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KAYSER-ROTH, JOSLYN, AND THE PROBLEM OF PARENT CORPORATION LIABILITY UNDER CERCLA

by

JAMES A. KING*

INTRODUCTION

This article discusses the liability, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹, of parent corporations for response costs caused by their subsidiaries. Although the principle of limited shareholder liability has historically protected parent corporations from third-party claims against their subsidiaries,² with increasing frequency parents are finding themselves personally liable for cleanup costs resulting from contamination their subsidiaries have caused.³ The courts have abrogated the rule of limited liability by holding parent, and even affiliated, corporations liable directly under the terms of CERCLA itself,⁴ and indirectly through "piercing the corporate veil" pursuant to federal common law.⁵

In abrogating the doctrine of limited shareholder liability in the parent corporation context, the courts have created a powerful instrument for recovering the substantial costs associated with the cleanup of sites contaminated with hazardous substances.⁶ Yet there are a number of inherent problems with the courts' rejection of this rule. For instance, limited liability of shareholders is traditionally governed by state law. And the states by and large have been quite reluctant to "pierce the veils" of corporations to reach shareholders. Nonetheless, the majority of federal courts addressing whether parent corporations may be

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¹ 42 U.S.C. §§ 9601-9675 (1988).

² For a discussion of the principle, see R. CLARK, *CORPORATE LAW* 6-10 (1986).

³ See Aronovsky & Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, U.S.F.L. REV. 421 (1990); Comment, *Piercing the Corporate Veil Under CERCLA: To Control or Not to Control - Which is the Answer?*, 59 U. CIN. L. REV. 975 (1991).

⁴ See *infra* text accompanying notes 64-151.

⁵ *Id.*

⁶ See Aronovsky & Fuller, *supra* note 3, at 423-25.

liable under CERCLA have held that the statute authorizes shareholder liability, despite the fact that this type of claim, under the facts and circumstances with which these courts have been presented, could not be sustained under state law. Moreover, it is unclear what the imposition of derivative responsibility upon parent corporations may portend for the future of corporate activity. The statute's authorization of retroactive, strict, and joint and several liability has sent shockwaves throughout several markets in the United States,⁷ most noticeably in the banking⁸ and in the insurance markets.⁹ Further judicial restrictions on the protection parent corporations enjoy under the rule of limited liability may force similar shockwaves to ripple throughout various corporate structures and transactions, thereby curtailing a considerable amount of beneficial commercial activity.

This article examines these issues by focusing on the responsibility of parent corporations as "owners" and as "operators" under section 107 of CERCLA.¹⁰ The scope of the analysis is limited to corporations that participate in the management of other corporations. Moreover, for the sake of simplicity, the reach of the analysis is limited to the situation in which a corporation owns one hundred percent of the stock of the subsidiary.

Part I provides a general overview of the principle of limited shareholder liability as it applies to parent corporations and of its economic underpinnings. Part II reviews judicial applications of CERCLA to parent corporations. My discussion focuses on two recent decisions - *United States v. Kayser-Roth Corp.*¹¹ and *Joslyn Mfg. Co. v. T.L. James & Co.*¹² - which represent the polar judicial views on shareholder liability and contain probably the best discussions in the case law thus far on this important issue. The district and appellate courts in *Kayser-Roth* found a parent corporation liable directly and indirectly under CERCLA. The courts in *Joslyn*, however, took the opposite position and declined to hold that CERCLA imposes direct liability on shareholders. Instead, they concluded that liability can only be imputed indirectly through piercing the corporate veil, and then only if the shareholder used the corporate form to avoid CERCLA liability.

⁷ See *id.* at 430, 450-51.

⁸ See Goldberg, *How Well Could Your Bank Bounce Back from a Crisis?*, AMERICAN BANKER, Dec. 3, 1990, at 4; Clark, *How to Survive in the Environmental Jungle*, INSTITUTIONAL INVESTOR, Dec. 1990, at 89.

⁹ See Abraham, *Environmental Liability and The Limits of Insurance*, 88 COL. L. REV. 942 (1988); see also Abraham, *Making Sense of the Insurance Liability Crisis*, 48 OHIO ST.L.J. 399, 407-08 (1987).

¹⁰ 42 U.S.C. § 9607 (1988).

¹¹ *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 957 (1991).

¹² *Joslyn Mfg. Co. v. T. L. James & Co.*, 696 F. Supp. 222 (W.D.La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991).

Finally, Part III criticizes the *Kayser-Roth* decision, as well as other decisions finding parent corporations directly liable under CERCLA, on both legal and policy levels. I conclude that parent corporation liability cannot be sustained under CERCLA unless the parent has exploited the corporate form to such an extent that piercing the corporate veil is warranted.

CERCLA AND LIMITED LIABILITY

A Brief Overview of CERCLA

Public anxiety over the dangers of hazardous waste disposal sites reached a fever pitch in the late 1970s.¹³ Images of the "Love Canal" and other contaminated sites prompted a call for federal action to attack the problem. In 1980, during the final days of Jimmy Carter's presidency, Congress responded by enacting CERCLA,¹⁴ a statute designed to enable both federal and state environmental agencies to begin immediately cleaning up contaminated sites. In 1986, Congress amended CERCLA, in part by passing the Superfund Amendments and Reauthorization Act (SARA).¹⁵

Together CERCLA and SARA (hereinafter collectively referred to as CERCLA) provide a comprehensive statutory mechanism for countering the problems associated with hazardous substances.¹⁶ The Act has retroactive effect and applies to the cleanup of all hazardous substances disposal sites, regardless of the date of their origin.¹⁷ Under the statute, the United States Environmental Protection Agency (EPA) may either respond directly and clean up the site,¹⁸ or order the parties responsible for the contamination to clean it up.¹⁹ If the EPA chooses the former course, it uses the so-called "Superfund"²⁰ to finance the action.²¹ Section 107 of CERCLA allows the EPA, state agencies, and private parties, to recover the costs of responding to a release or a threatened release of hazardous substances, so long as those costs are consistent with the National

¹³ See F. ANDERSON, D. MANDELKER, & A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 602-03 (2d ed. 1990).

¹⁴ *Id.*

¹⁵ See generally Atkeson, Goldberg, Ellrod, & Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 *E.L.R.* 10362 (1987).

¹⁶ For a general overview of the statute, see F. ANDERSON, D. MANDELKER, & A. TARLOCK, *supra* note 13, at 614-19.

¹⁷ See McSarrow, Jones, & Murdock, *A Decade of Superfund Litigation*, 21 *E.L.R.* 10367, 10368 (July 1991).

¹⁸ See 42 U.S.C. § 9604 (1988); see also McSarrow, Jones, & Murdock, *supra* note 17, at 10379-82.

¹⁹ See 42 U.S.C. § 9606 (1988); see also McSarrow, Jones, & Murdock, *supra* note 17, at 10382-84.

²⁰ Use of the fund is governed by 42 U.S.C. § 9611 (1988).

Contingency Plan, by imposing strict, joint and several liability upon potentially responsible parties (PRPs).²² PRPs include current owners and operators of the disposal site, past owners and operators, waste generators, and transporters of the waste.²³

Although CERCLA's critics have argued that the statute has been, in large part, ineffectual in promoting the clean up of this country's many hazardous waste disposal sites,²⁴ CERCLA's draconian liability provisions have affected the way businesses that handle hazardous substances conduct their affairs.²⁵ But firms that handle these wastes are not the only ones affected by the specter of CERCLA liability. Individual and corporate shareholders of these firms have also been affected by getting caught in the vast liability web Congress and the courts have woven with CERCLA.²⁶

The Principle of Limited Shareholder Liability and Its Economic Foundations

Generally, stockholders are not personally liable for debts of corporations in which they hold an equity interest. The axiom has its origins in the English common law and has been carried over to the United States as part of state corporation law.²⁷ Limited shareholder liability arose as a means to encourage private investment by individuals in capitalist ventures, and to facilitate the private exchange of those investments.²⁸ To illustrate, if an individual share-

²² *Id.* at § 9607.

²³ *Id.*

²⁴ See, e.g., Weisskopf, *Administrative Costs Drain Superfund*, Wash. Post, June 19, 1991, at 1, col. 1. The bulk of the criticism is found in commentaries written before the enactment of SARA. See, e.g., *Developments In The Law - Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1484, 1484-1504 (1986); Note, *The Political Economy of Superfund Implementation*, 59 S. CAL. L. REV. 875 (1986).

²⁵ See Angelo & Bergeson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. REV. 101 (1985); Tunderman, *Business Planning for Hazardous Waste Management Requirements, Risks, and Strategies*, 1983 B.Y.U.L. REV. 679; Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What are the Consequences?*, 38 MERCER L. REV. 677 (1987); Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 TEX. L. REV. 1237 (1990). Cf. Comment, *Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes*, 96 YALE L.J. 403 (1986) (arguing for insurance-based incentives to control the various risks associated with hazardous wastes).

²⁶ See, e.g., *State of New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991); *United States v. Nicolet*, 712 F. Supp. 1193 (E.D. Pa. 1989); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986).

²⁷ See W. CARY & M. EISENBERG, *CORPORATIONS: CASES AND MATERIALS* 1-14 (5th ed. 1980).

²⁸ Halpern, Trebilcock, & Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 126-131 (1980). Several other arguments explaining the rule's existence are presented in Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985). According to Judge Easterbrook and Professor Fischel, the rule also: (i) reduces costs of monitoring management and shareholders; (ii) allows market prices to impound additional information about the value

holder -- Mr. Smith -- invests in X Corporation, and X Corporation later becomes insolvent, Mr. Smith's loss is limited to the amount of his investment. Were he faced with losing his entire fortune as a result of a relatively risky, but small, investment, he would instead (assuming he is risk neutral) invest in cash equivalents or some other riskless or less risky investment.²⁹

Furthermore, suppose Mr. Smith has substantial personal wealth in relation to all of the other shareholders of X Corporation. In a world of unlimited personal liability, if X Corporation is unable to pay its debts, the firm's creditors will probably try to obtain a judgment against Smith before attempting to reach the assets of other investors.³⁰ As a consequence, Mr. Smith will value his shares in X Corporation much lower than other stockholders.³¹ This would result in stock prices fluctuating from investor to investor based on personal wealth and the likelihood of creditors' reaching the investor's personal assets.³² In such a world, it would be virtually impossible to structure liquid securities markets.³³

Limited shareholder liability solves these problems by encouraging private investment by individuals without the risk of losing one's personal fortune, while facilitating the exchange of those investments by tying the price of individual shares to systematic and unsystematic risks, not those associated with the peculiarities of the investor.³⁴ The principle, however, does create some inefficiencies, for it allows investors to reap all the gains of their investment, while bearing only some of the losses, leaving the brunt of any such losses upon third-party creditors of the firm in which the investor has invested.³⁵ But the efficiencies that are created from the principle, for the reasons discussed above, clearly outweigh any inefficiencies that it may create.

This balance comes into question when other corporations, rather than individuals, are shareholders.³⁶ Corporations comprise a substantial segment of the investment community. And they too enjoy limited liability for their

of firms; (iii) allows more efficient diversification; and (iv) facilitates optimal investment decisions. *Id.* at 94-97.

²⁹ See Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 502 (1976).

³⁰ Easterbrook & Fischel, *supra* note 28, at 92; Halpern, Treilcock, & Turnbull, *supra* note 28, at 130-31.

³¹ Easterbrook & Fischel, *supra* note 28, at 92.

³² *Id.*

³³ *Id.*

³⁴ See Halpern, Treilcock, & Turnbull, *supra* note 28, at 130-31.

³⁵ *Id.* at 148. Even this risk of creditors, however, has been taken into account in the form of higher interest rates. Posner, *supra* note 29, at 503.

³⁶ See Note, *Liability of Parent Corporations For Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 989-90 (1986).
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investments. Yet, from an economic perspective, limited liability has less significance when applied to corporations.³⁷ Whereas individual investors are likely to mitigate the potential for losses in equity investments by diversifying,³⁸ corporations tend to invest in individual projects that have positive net present values.³⁹ Since the risk of environmental liability will normally be factored into the calculation of net present value, corporate investment in projects with positive net present values should be socially desirable.⁴⁰ Nonetheless, it has been argued that limited liability of corporate shareholders does not attract needed capital to socially desirable though risky projects, but instead encourages inefficient investment.⁴¹ Some commentators have asserted that rather than promote efficient investing, limited liability of corporations serves to subsidize, and even encourage, capital outlays in projects where the total expected costs exceed the total expected returns.⁴²

Indeed, the case for disregarding limited liability is even stronger when there are involuntary creditors - typically, persons who have incurred an injury in tort.⁴³ In the context of hazardous waste disposal, involuntary creditors include governmental agencies, private parties harmed directly as a result of the disposal, and those indirectly harmed - either commercially, recreationally, or aesthetically - through damage to affected natural resources.⁴⁴ Involuntary creditors, as opposed to voluntary creditors, of corporations do not have the advantage of being able to negotiate the cost of the particular risk.⁴⁵ Moreover, involuntary creditors are not in the same position as corporate investors to abate the risks of hazardous waste disposal.⁴⁶

Notwithstanding these beneficial attributes, allowing creditors to reach the assets of corporate investors possesses several intrinsic problems. By definition, it will discourage corporate investment in risky projects whose net present values are positive, in part because the information costs associated with the investment will be so high that it will make calculation of the present values impossible and, therefore, investment prohibitive, and because the risks that the corporation will

³⁷ *Id.*

³⁸ *Id.* at 990.

³⁹ *Id.* at 989.

⁴⁰ See Easterbrook & Fischel, *supra* note 28, at 97.

⁴¹ Note, *supra* note 36, at 990.

⁴² *Id.*

⁴³ Easterbrook & Fischel, *supra* note 28, at 107; Halpern, Trebilcock, & Turnbull, *supra* note 28, at 145; Posner, *supra* note 29, at 519-20; Note, *supra* note 36, at 991.

⁴⁴ Note, *supra* note 36, at 991-92. See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988).

⁴⁵ Easterbrook & Fischel, *supra* note 28, at 107; Posner, *supra* note 29, at 520.

⁴⁶ Note, *supra* note 36, at 995-96.

lose its assets - possibly to the point of insolvency - will force it to forego investment opportunities.⁴⁷ This is especially true if liability is imposed, as under CERCLA, retroactively and strictly.⁴⁸ If a corporation is unable to calculate adequately the risks of investing in a firm that may handle hazardous substances, then investment in these firms by corporations will cease.⁴⁹

Concomitantly, the risk averse nature of corporate management will compound this problem. As Professor John Coffee has pointed out, "[M]anagers are inherently overinvested in the firm they serve."⁵⁰ This is so because managers' greatest assets are their jobs,⁵¹ because compensation plans often contain stock options and other perquisites,⁵² and because managers, unlike shareholders, may be found personally liable the corporation faces the possibility of becoming or in fact becomes insolvent.⁵³ Since managers cannot diversify their assets, they will seek to diversify the corporation's portfolio.⁵⁴ This they should not do because, in theory, shareholders can diversify themselves and will not pay a premium to have corporations in which they invest do it for them.⁵⁵

Even more troublesome for purposes of the issues discussed in this article are the specific investment decisions managers will make for their corporations when building this diversified portfolio. Corporate finance theory maintains that managers should ignore unsystematic (i.e., firm-specific) risks and focus exclusively on diversifiable systematic risks when making the corporations investment decisions.⁵⁶ The risk aversion of managers, however, will force them to concentrate on the total - unsystematic and systematic - risks of the investment.⁵⁷ Consequently, if managers indeed do look at an investment's total risks and if the particular investment in some way handles hazardous substances, because the unsystematic risk of CERCLA liability is incalculable, a manager will decide not to sink funds into the particular investment opportunity.

⁴⁷ See Aronovsky & Fuller, *supra* note 3, at 436.

⁴⁸ Evidence of this possibility is found in the insurance industry, where the nature of pollution risks has forced many insurance providers to opt out of pollution insurance market. See generally Abraham, *supra* note 9.

⁴⁹ *Id.*

⁵⁰ Coffee, *Shareholders Versus Managers: The Strain In The Corporate Web*, 85 MICH. L. REV. 1, 17 (1986); see Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 227, 318-332 (1990); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 412 (3d ed. 1986).

⁵¹ Coffee, *supra* note 50, at 17-18; Hu, *supra* note 50, at 319-20.

⁵² Coffee, *supra* note 50, at 18; Hu, *supra* note 50, at 320, 325, 327-29.

⁵³ Coffee, *supra* note 50, at 18-19.

⁵⁴ *Id.* at 20; Hu, *supra* note 50, at 322-23.

⁵⁵ Hu, *supra* note 50, at 324; Note, *supra* note 36, at 990-91.

⁵⁶ See Hu, *supra* note 50, at 287-95, 320-22.

⁵⁷ See *id.* at 320-22.

Furthermore, the analyses arguing for abrogating limited liability in situations when corporations invest do not distinguish between the publicly held corporation and the close or small corporation.⁵⁸ Persons who hold stock in small or close corporations are often in the same position as individual investors.⁵⁹ If they are subject to unlimited liability, the effects could be disastrous.⁶⁰ As a result, reaching the assets of these types of corporations has the same inefficient result on investment as unlimited liability of individual investors: diminished investment in worthwhile projects.⁶¹

With respect to the actual remediation of contaminated sites, the prospect of liability does not create the incentives that are necessary to effect an expeditious cleanup. Presumably, at least with respect to investment decisions that were made prior to CERCLA's existence, the corporation conducted a risk assessment of those risks associated with the subsidiary's hazardous waste practices. In order to protect its investment, the parent probably decided to play some type of role in these practices, to include actually providing for the cleanup of the disposal site. However, the enactment of CERCLA and the courts' application of the statute to ignore the rule of limited liability have resulted in the parent now being held liable as a matter of law for making this decision. Instead of proceeding with the cleanup of this site, the parent will combat liability because any claim under CERCLA against it for the subsidiary's actions places the parent's assets at risk; the claim, therefore, raises the stakes for the parent to an unacceptable level.⁶² The result is protracted litigation and little action as far as the environment is concerned.

Thus, the economic arguments counseling in favor of parent corporation liability under CERCLA are not as certain as one would originally believe. The statute does cast a large net to impose liability; but, as one court has made clear, the act also has limits.⁶³ In order to understand more fully the import of unlimited parent corporation liability, it is essential to keep in mind the economic underpinnings of limited liability, what economic effects abrogation of the rule will have on various corporate structures and transactions, and whether dissolution of the rule will further CERCLA's purposes.

⁵⁸ Posner, *supra* note 29, at 512-13.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² *See* R. POSNER, *supra* note 50, at 522-28.

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⁶³ *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988).

JUDICIAL TREATMENT OF PARENT CORPORATION LIABILITY

Courts have adjudged shareholders liable for releases or threatened releases of hazardous substances as "owners" and "operators" under two separate provisions of section 107 of CERCLA. Section 107 (a)(1) makes current owners and operators of a hazardous waste facility liable.⁶⁴ Past owners and operators of facilities are liable under section 107 (a)(2).⁶⁵ Both subsections refer to "owners and operators"⁶⁶ in the conjunctive, while section 101 - the definitional section of CERCLA - refers to the two disjunctively as "owners or operators." The courts that have addressed this distinction have held that either an "owner" or "operator" may be liable for response costs, notwithstanding any inference that can be drawn from the use of the word "and" in section 101.⁶⁷ This seems to suggest that to be liable under section 107, an entity must be both an "owner" and an "operator."⁶⁸ The statute defines "owners or operators" in a circular fashion as "persons" who own or operate a facility where hazardous substances are produced, stored or disposed.⁶⁹ The statute defines "person" very broadly to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."⁷⁰ Of particular relevance to the issue of shareholder liability is the exception provided under the definition of "owner or operator" specifying that the term does not include "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."⁷¹

The courts that have found corporate stockholders liable as "owners" and "operators" have done so using two methods. First, courts have held that CERCLA itself provides for direct shareholder liability if the parent corporation participates in some way in the management of the subsidiary that caused the contamination.⁷² Second, courts have also held that corporate shareholders may be liable indirectly under the statute for cleanup costs caused by their subsidiaries

⁶⁴ 42 U.S.C. § 9607 (a)(1) (1988).

⁶⁵ *Id.* at § 9607 (a)(2).

⁶⁶ *Id.* at § 9601 (20); McSarrow, Jones, & Murdock, *supra* note 17, at 10390-91.

⁶⁷ *See* McSarrow, Jones, & Murdock, *supra* note 17, at 10390-91.

⁶⁸ *See id.*

⁶⁹ 42 U.S.C. § 9601 (20) (1988); *see also* Edward Hines Lumber Co. V. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988); Oswald & Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U.L. REV. 259, 269-70 (1992).

⁷⁰ 42 U.S.C. § 9601 (21) (1988).

⁷¹ *Id.* at § 9601 (20) (A).

⁷² *See* *infra* text accompanying notes 74-91.

through piercing the corporate veil.⁷³ Because significant control of the corporation by the shareholder is an element of "veil piercing," whenever a court relies upon the second method, it usually has either implicitly or explicitly also relied on elements of direct liability.

This part of the article examines these issues in more detail by discussing two cases arising out of different federal circuits. In each of these cases, the courts were faced with a claim under CERCLA against a parent corporation for response costs. And in each, the courts had to address whether parent corporations may be liable directly and indirectly under the Act. Yet on both issues the courts reached opposite results. These decisions are paradigms, exemplifying a fundamental division in the courts over the interpretation of CERCLA as it relates to parent corporation liability, as well as a similar split regarding the circumstances under which judicial development of federal common law in furtherance of CERCLA is permissible.

United States v. Kayser-Roth Corp.

In *United States v. Kayser-Roth Corp.*,⁷⁴ the First Circuit Court of Appeals affirmed a district court decision holding a parent corporation liable for response costs caused by the activities of one of its former, but dissolved, subsidiaries. The United States sued the Kayser-Roth Corporation under section 107 of CERCLA for removal and enforcement costs that by the EPA and the Department of Justice had incurred in responding to contamination of a small Rhode Island town's drinking water.⁷⁵ The contamination was caused by Stamina Mills, Inc., a textile manufacturing firm.⁷⁶ From 1966 to 1977, the year Stamina Mills dissolved, Kayser-Roth owned all of Stamina's outstanding stock.⁷⁷ In 1969, Stamina began using a dry-cleaning system to scour newly-woven fabric produced at the mill.⁷⁸ The system used the chemical trichlorethylene (TCE) as a cleaning agent.⁷⁹ A combination of an isolated accidental spill on the mill's property and of Stamina's deposit of used TCE bottoms in one of its landfills caused the contamination of a number of wells supplying the nearby town with drinking

⁷³ See *infra* text accompanying notes 92-113, 140-151.

⁷⁴ 724 F. Supp. 15. For other discussions of the *Kayser-Roth* decisions, some upon which this discussion draws, see Aronovsky & Fuller, *supra* note 3, at 443-460; Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)*, 52 Ohio St. L.J. 133, 161-62 (1991); Oswald & Schipani, *supra* note 69, at 313-15; Comment, *supra* note 3, at 987-94. See also Comment, *Dissolving the Corporate Veil: Corporate Officer Liability for Response Costs under the Comprehensive Environmental Response Compensation and Liability Act*, 17 U. Tol. L. Rev. 923 (1986)

⁷⁵ 724 F. Supp. at 16.

⁷⁶ *Id.* at 17.

⁷⁷ *Id.* at 18.

⁷⁸ *Id.*

water.⁸⁰ The problem was not discovered until 1979, two years after the mill dissolved, and was ultimately remedied by EPA.⁸¹

The United States sued Kayser-Roth as the parent corporation of Stamina Mills, claiming that Kayser-Roth was the "owner" and the "operator" of the mill at the time the contamination occurred.⁸² According to the district court, throughout the life of Kayser-Roth's parent-subsidiary relationship with Stamina, Kayser-Roth exercised a significant degree of control over the mill's operations.⁸³ Specifically, the district court discovered that the two companies shared common officers; that Kayser-Roth's approval was necessary for any purchase or movement of capital assets, for acquisition or disposal of real property, and for borrowing money; and that Kayser-Roth controlled Stamina's fiscal affairs.⁸⁴ The only aspects of Stamina Mills' business Kayser-Roth did not control, according to the court, were those associated with the subsidiary's day-to-day routine activities.⁸⁵

One aspect of control that the district court found especially relevant was Kayser-Roth's authority over Stamina's environmental activities, including those associated with the TCE dry-cleaning system.⁸⁶ For example, Kayser-Roth approved of the mill's use of the system after directing a cost-benefit study on its feasibility.⁸⁷ The district court also found that Kayser-Roth issued a directive to Stamina Mills, requiring that it notify Kayser-Roth's legal department of any correspondence with courts and governmental agencies regarding environmental matters.⁸⁸ More specifically, in 1974, Stamina sought Kayser-Roth's approval of a settlement agreement arising out of a lawsuit by the United States against Stamina for violations of the Clean Water Act.⁸⁹

The district court applied these findings to section 107 of CERCLA, and determined that Kayser-Roth was an "owner" and an "operator" of Stamina, and was therefore liable for CERCLA response costs. The district court found liability in a manner far different from the majority of courts which have held parent corporations liable. These courts have simply determined that the

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 15-16.

⁸³ *Id.* at 18-19.

⁸⁴ *Id.*

⁸⁵ *See id.* at 19.

⁸⁶ *See id.* at 22-23.

⁸⁷ *Id.* at 22.

⁸⁸ *Id.* at 23.

particular shareholder was an "owner and operator" of the facility where the contamination occurred, making no distinction between the two statutory conditions.⁹⁰ The district court in *Kayser-Roth*, however, applied section 107 literally, noting that an "owner" is not the same as an "operator."⁹¹ Implicit in the decision is the view that a defendant must first be identified either as an "owner" or an "operator" to be held liable.

1. *Kayser-Roth* and Direct Liability of Parent Corporation

The first issue the district court considered was Kayser-Roth's liability as an "operator." In analyzing this issue, the district court discussed two theories that other courts have advanced in holding shareholders liable pursuant to section 107. Under both theories, in order to find that a federal statute makes shareholders directly liable for certain actions, the statute must evince congressional intent to disregard the rule of limited liability.⁹² Courts employing the first theory find that a defendant is, conjunctively, an "owner and operator" within the meaning of the Act.⁹³ In doing so, the courts adhere to the confusing intermingling of the conceptions of "ownership" and "operation," as the two are used in defining an "owner and operator" under the statute.⁹⁴

For example, the courts that employ the first theory find it significant that the definition of "owner and operator" excludes "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."⁹⁵ Reasoning by implication, the courts conclude that a share of stock may constitute "indicia of ownership" to protect a security interest in a facility and, therefore, one who *owns* (i.e., "owner") such stock may be liable as an "owner and operator" as long as that entity exercises *operational control* (i.e., "operator") to some extent over the facility. Turning to the specific activities of a particular defendant, courts applying the first theory examine the level of control the shareholder exercised over the polluting corporation. If the shareholder in any way exercised control over the contaminating activities of the corporation, the court will find the

⁹⁰ See, e.g., *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 671-72 (D. Idaho 1986); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 848-49 (W.D. Mo. 1984), *modified*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

⁹¹ 724 F. Supp. at 23.

⁹² See *id.* at 19-20.

⁹³ See *id.* at 20-21. See also *City of New York v. Exxon Corp.*, 112 Bankr. 540, 547-48 (S.D.N.Y. 1990) *aff'd in part*, 932 F.2d 1020 (2d Cir. 1991) (discussing the two theories of direct liability under CERCLA of parent corporations).

⁹⁴ See 42 U.S.C. § 9601 (20) (1988).

⁹⁵ See 724 F. Supp. at 20, and the cases cited therein.

shareholder liable under section 107.⁹⁶

The second theory ignores this jumble of "ownership" and "operation" and focuses simply on whether the parent corporation exercised any control over the subsidiary generally and, if so, whether the parent actually controlled or had the capacity to control the management and operations of the activities causing the pollution.⁹⁷ It appears, therefore, that the courts using the this theory look at the "operational" aspects of the parent's relationship with its subsidiary. "Ownership" is either assumed or irrelevant to the courts' ultimate decision.

The district court in *Kayser-Roth* identified a number of factors that other courts have employed in finding a shareholder liable under this theory: whether the shareholders could have discovered in a timely manner the release or threatened release; whether the shareholder "had the power to direct the mechanisms causing the release;" and, finally, whether the person had the authority to prevent or alleviate damages caused by the release.⁹⁸

In *Kayser-Roth*, the district court applied the second theory to the parent's activities.⁹⁹ Before applying the specific factors identified above, however, the district court examined the control Kayser-Roth exerted generally over the business of Stamina Mills and determined that its control was "pervasive."¹⁰⁰ The district court then turned to the specific issue of Kayser-Roth's control over Stamina Mills' environmental affairs and found that Kayser-Roth had the power to control releases of TCE, the power to direct the use of TCE, and the power to prevent and abate damages.¹⁰¹ The court also noted Kayser-Roth's approval of the scouring system, and its directive to Stamina that Stamina notify Kayser-Roth's lawyers of any governmental contact concerning environmental matters.¹⁰² Examining all of these factors together, the court determined that Kayser-Roth was the de facto operator of Stamina Mills' textile operation, as well as of Stamina's scouring system.¹⁰³ Accordingly, the district court deemed Kayser-Roth strictly liable as an "operator" pursuant to section 107 for all

⁹⁶ *City of New York v. Exxon Corp.*, 112 Bankr. 540, 547-48 (S.D.N.Y. 1990). See also Oswald & Schipani, *supra* note 69, at 269-70.

⁹⁷ See, 724 F. Supp. at 21; *Colorado v. Idarado Mining Co.*, 18 E.L.R. 20578 (D. Colo. 1987). See also *City of New York v. Exxon Corp.*, 112 Bankr. 540, 547-48 (S.D.N.Y. 1990); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 416-20 (W.D. Mo. 1985).

⁹⁸ 724 F. Supp. at 21.

⁹⁹ *Id.* at 22-23.

¹⁰⁰ *Id.* at 22.

¹⁰¹ *Id.* at 22-23.

¹⁰² *Id.*

¹⁰³ *Id.* at 23. Published by IdeaExchange@Uakron, 1992

response costs the United States incurred.¹⁰⁴

2. *Kayser-Roth* and Indirect Shareholder Liability: Piercing the Corporate Veil

The next issue the district court in *Kayser-Roth* addressed was the parent corporation's liability under section 107 as an "owner."¹⁰⁵ All shareholders are "owners" in a very general sense. But CERCLA does not impose liability on shareholders specifically. Following the lead taken by several other courts,¹⁰⁶ the *Kayser-Roth* district court determined that stockholders may be liable derivatively as owners through the doctrine of piercing the corporate veil.¹⁰⁷

CERCLA does not explicitly contemplate the imputation of shareholder liability, nor is there a general federal statute authorizing corporate veil piercing. Nonetheless, the district court in *Kayser-Roth* held that courts may employ federal common law under CERCLA to pierce the corporate veil, if necessary to further the interests of "public convenience, fairness, and equity."¹⁰⁸ The court determined that in order to establish such liability under CERCLA, one must conclude that the statute places no particular importance on the corporate form, and that piercing the veil would further CERCLA's remedial purpose.¹⁰⁹ Once this finding is made, the courts must apply certain factors to determine whether the parent's veil should be pierced.¹¹⁰ The specific factors, which federal courts have developed under federal common law, parallel those commonly applied under state law: inadequate capitalization of the corporation given its purposes; substantial shareholder control over the corporation; intermingling of the shareholder's property and accounts with the corporation's; failure on the part of the corporation to adhere to corporate formalities; failure by the corporation to maintain adequate records; and the existence of corporate officers or directors possessing little or no responsibility over the corporation's affairs.¹¹¹

The district court in *Kayser-Roth* found that CERCLA's sweeping language, coupled with its purpose of cleaning up hazardous substance disposal sites in an expeditious manner, demonstrated congressional intent that the Act "places no

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1200-02 (E.D. Pa. 1989); *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 31 (D. Mass. 1987).

¹⁰⁷ 724 F. Supp. 15, 23.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 23-24.

special importance upon the corporate structure."¹¹² The district court then examined again Kayser-Roth's control over Stamina Mills, considering essentially the same factors it had surveyed in holding Kayser-Roth liable as an operator. The district court declared that the corporation's veil should be pierced, not only because public convenience, fairness, and equity dictated such a result, but also because Kayser-Roth exercised substantial control over Stamina Mills as "in fact and deed, an owner."¹¹³

Joslyn Corp. v. T.L. James & Co.

Compared to the majority of judicial decisions addressing this issue, the district court's decision in *Kayser-Roth* contains a detailed examination of the reasons for holding a parent corporation liable under CERCLA for contamination caused by a subsidiary. Indeed, on appeal the First Circuit described the opinion as "excellent."¹¹⁴ Nonetheless, like most of the courts that have found parent corporations liable under CERCLA, the district court in *Kayser-Roth* relied too heavily on the draconian effect of CERCLA generally, rather than on the Act's express statutory scheme, and did not consider what consequences unlimited liability may have on corporate activity. These problems are further illuminated by contrasting the district court decision in *Kayser-Roth* with the district and appellate court opinions in *Joslyn Corp. v. T.L. James & Co.*¹¹⁵ The *Joslyn* courts took contrary positions on the issues the district court addressed in *Kayser-Roth*, and their decisions clearly demonstrate the inherent problems with *Kayser-Roth* and with the entire notion of parent corporation liability under CERCLA.

In *Joslyn*, the U.S. Court of Appeals for the Fifth Circuit affirmed a district court decision declining to find a corporate shareholder liable under CERCLA. The case involved a wood treating firm located in Louisiana, known as the Lincoln Creosoting Company, Inc.¹¹⁶ The company was founded in 1935 by three men: Messrs. Tooke, Hayes, and James.¹¹⁷ Mr. James provided the initial capital for Lincoln in return for sixty percent of the voting stock, and all two hundred shares of Lincoln's non-voting preferred stock; Mr. Tooke and Mr. Hayes purchased the remaining forty percent of the two hundred shares of voting stock.¹¹⁸ Upon the purchase of the stock, the three shareholders endorsed all

¹¹² *Id.* at 24.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 910 F.2d at 27.

¹¹⁶ *Joslyn Mfg. Co.*, 696 F. Supp. at 222.

¹¹⁷ *Id.* at 227.

shares to T. L. James & Co.¹¹⁹ As a result, T. L. James & Co. controlled one hundred percent of Lincoln's outstanding stock. Yet, despite the substantial financial control the shareholders had over Lincoln, the corporation was, for all intents and purposes, run as an independent entity.¹²⁰ In fact, several individuals completely unaffiliated with T. L. James & Company were the principal managers of Lincoln.¹²¹

Lincoln was organized to conduct creosoting operations and all of its business took place at a single plant.¹²² During the fifteen years of Lincoln's formal existence, the company's chemical recovery system allowed wood treating chemicals to drip into a sump pit.¹²³ Although Lincoln attempted to recover the chemicals, some were discharged into an open ditch and later flowed into a slough.¹²⁴ In 1950, Lincoln sold its plant to Joslyn Manufacturing Company, which owned and operated the facility until 1969, when Koppers Company, Inc. purchased the operation.¹²⁵ After the acquisition in 1969 and until the case was ultimately filed, at least seven other entities owned the plant property in whole or in part.¹²⁶

Upon discovery of the contamination caused by the creosoting chemicals, the Louisiana Department of Environmental Quality ordered Joslyn and several additional persons to clean up the contaminated areas.¹²⁷ Joslyn, in turn, sued T. L. James & Co., as well as others, claiming that the company was an "owner" and an "operator" of the plant at the time of the creosoting chemicals' discharge,¹²⁸ and was therefore liable to Joslyn under section 107 of CERCLA for response costs.¹²⁹ More particularly, Joslyn argued that T.L. James & Co. was directly liable as an "owner and operator" under section 107 (making no distinction between the status of the two).¹³⁰ Unlike the courts in *Kayser-Roth*, however, both the district and the appellate courts rejected the argument that a parent corporation can be directly liable.

¹¹⁹ *Id.* at 228.

¹²⁰ *Id.*

¹²¹ *See id.* at 228-29.

¹²² *Id.*

¹²³ 893 F.2d at 81.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 82.

¹²⁷ *Id.*

¹²⁸ 696 F. Supp. at 224.

¹²⁹ *Id.*

The district court held that parent corporations cannot be "owners and operators" for purposes of CERCLA.¹³¹ The court concluded that in enacting CERCLA, Congress did not authorize courts to ignore the corporate form in order to find liability.¹³² Consequently, parent corporations, which enjoy limited liability under state law, are protected from direct CERCLA liability. The district court based its conclusion on several prior federal court opinions¹³³ holding that Congress must make it clear in a particular statute when it intends to create an exception to the state law principle of limited liability. Absent such an explicit statement of congressional intent, courts are not to abrogate the principle of limited liability. In *Joslyn*, the district court found nothing in CERCLA affecting the limited liability of shareholders;¹³⁴ it was not about to create such a rule.¹³⁵

On appeal, the Fifth Circuit affirmed.¹³⁶ It also found nothing in the language of CERCLA evincing an intent on the part of Congress to alter so fundamental a rule of corporation law as limited liability.¹³⁷ Even evidence of such intent in the legislative history of the statute, said the court, was not enough.¹³⁸ If Congress had wanted to make shareholders liable, it should have done so expressly.¹³⁹

Joslyn also argued that liability should be imputed upon the James Company through piercing the corporate veil.¹⁴⁰ *Joslyn* brought to the district court's attention several indicia of James's control over Lincoln, asserting that Lincoln had no identity of its own.¹⁴¹ Analyzing this argument, the district court hypothesized that a parent corporation may be held liable for contamination caused by its subsidiary, through piercing the corporate veil under federal common law.¹⁴² In making this conclusion, the court stated that the threshold issue is whether state or federal law provides the controlling rule of decision.¹⁴³ The district court found that in this instance, federal common law governed

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* 225-26.

¹³⁴ *Id.* at 226.

¹³⁵ *See id.*

¹³⁶ 893 F.2d at 82-83.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 696 F. Supp. at 230.

¹⁴¹ *Id.* at 230-31.

¹⁴² *Id.* at 226-27.

¹⁴³ *Id.* at 226.

because it was necessary to fill in the interstices of a federal statute.¹⁴⁴

Ultimately, however, the district court concluded that it made no real difference which body of law was controlling, because the federal common law standards for piercing the corporate veil include those under state law:¹⁴⁵ shared stock ownership, directors or officers, business departments; consolidated financial statements and tax returns; substantial capital input by the parent; incorporation of the subsidiary by the parent; inadequate capitalization of the subsidiary; salaries and expenses of the subsidiary paid by the parent; the parent is the only source of the subsidiary's business; use of the subsidiary's property by the parent as its own; inseparable operations of the two companies; and inobservance by the subsidiary of corporate formalities.¹⁴⁶ Applying these criteria to the facts surrounding the relationship between Lincoln and T.L. James & Co., the district court determined that Lincoln's veil should not be pierced.¹⁴⁷ The Fifth Circuit agreed with the district court's finding,¹⁴⁸ but added a caveat¹⁴⁹ to which the lower court had only alluded.¹⁵⁰ The circuit court held that under CERCLA, [v]eil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetuate a fraud or avoid personal liability."¹⁵¹

AN ANALYSIS OF DIRECT AND INDIRECT LIABILITY WITH *JOSLYN* AS A GUIDE

In my opinion, the *Joslyn* decisions are correct as a matter of law. Direct parent corporation liability pursuant to section 107 cannot be sustained. The only way courts may find parent corporations accountable under the Act is by piercing the corporate veil, and only then when the parent shareholder used the subsidiary's corporate form for fraudulent or protective purposes. Viewed in light of *Joslyn*, those court opinions holding parent corporations liable directly and indirectly are flawed in at least two respects. Foremost, as a purely legal matter, the courts have construed CERCLA too liberally in finding direct liability, and have not properly articulated the situations in which indirect liability should be triggered. Additionally, these courts have failed to consider the policy implications, especially the economic effects, associated with corporate shareholder liability.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 227.

¹⁴⁷ *Id.* at 231.

¹⁴⁸ 893 F.2d at 83.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* <http://ideaexchange.uakron.edu/akronlawreview/vol25/iss1/3>

The First Level of Criticism: The Law

1. Direct Liability

Courts holding parent corporations liable under section 107 of CERCLA have done so by relying almost exclusively on the statute's remedial nature. Through the accepted canon of statutory construction that remedial legislation should be interpreted liberally,¹⁵² the courts have turned to the generic federal interests embodied in CERCLA's text and history, that is, to provide a federal solution to a nationwide problem by promoting the expeditious cleanup of hazardous sites and by ensuring that those responsible for contamination bear the costs of the cleanup, in order to find that the statute covers parent corporations for contamination caused by their subsidiaries.¹⁵³

Indeed, judicial reliance on the remedial design of CERCLA and the federal interest associated with that design in order to hold parent corporations liable is necessary for at least two reasons: First, CERCLA itself does not specifically make parent corporations liable. Rather, the Act contains only very general language defining those persons who may be liable. Second, evidence in the Act's legislative history indicating that Congress intended to sweep parent corporations into section 107's net is scant. Because CERCLA's language and history, standing alone, do not provide specific direction, the courts turn to more general evidence for help. For example, in *United States v. Northeastern Pharmaceutical & Chem. Co.*,¹⁵⁴ which is one of the seminal cases concerning parent corporation liability and one upon which the district court in *Kaysar-Roth* relied extensively,¹⁵⁵ the lower court looked at the general definition of "owner and operator" and construed its language to include parent corporations based on the statute's general purposes.¹⁵⁶ Several other courts have reached similar conclusions.¹⁵⁷

But there are incongruous qualities associated with the broad federal interests CERCLA personifies, and how those interests relate to direct liability of parent corporations. When it enacted CERCLA, Congress intended to provide an effective federal response to the problems associated with sites contaminated with

¹⁵² See W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 656-57 (1988).

¹⁵³ *United States v. Kayser Roth Corp.*, 724 F. Supp. 15, 23 (D.R.I. 1989), *aff'd*, 910 F.2d (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

¹⁵⁴ 579 F. Supp. at 823

¹⁵⁵ 724 F. Supp. at 20, 22, 23.

¹⁵⁶ 579 F. Supp. at 848.

¹⁵⁷ See *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 672 (D. Idaho 1986).

hazardous substances. To the extent that a parent corporation can limit its exposure through the corporate form and thereby avoid the clean up of contaminated sites, the statute's efficacy is undermined. Further, if liability depends upon the state in which the parent corporation is incorporated, then it may also be argued that CERCLA's goal of providing a nationwide rule governing liability is undermined.

Recognizing these pragmatic concerns, courts have imposed liability directly on parent corporations if they can establish that those corporations have in some way personally engaged in the subsidiary's activities. This holding is necessary, say these courts, to assure that any loopholes in the statute which would enable parent corporations to avoid liability are closed, and to ensure that CERCLA damages are borne by parties who have sufficient resources to address the underlying hazardous substances problem. By interpreting CERCLA broadly to cover parents, these courts hold that they are furthering CERCLA's remedial objective.

By contrast, derogation of a fundamental principle of corporation law, such as limited shareholder liability, without explicit congressional authorization is problematic on both legal and pragmatic grounds. When courts turn to the remedial design of CERCLA and the federal interests related to that design to do away with the principle, their action flies in the face of the maxim that statutes in derogation of the common law must be strictly construed. According to this rule, Congress must be explicit if it intends to derogate an accepted common law principle.¹⁵⁸ If Congress is not explicit, then it is presumed that the common law rule remains.¹⁵⁹ Although it is arguable whether limited liability originated in the common law,¹⁶⁰ it is accepted that the tenet is so fundamental to our notion of the corporation that regardless of its centuries-old roots, it cannot be disregarded statutorily without an explicit intent on the part of the legislature to do so. If it is true that in the field of corporate law, Congress enacts laws "against the background of existing state laws,"¹⁶¹ then it follows that Congress should be explicit if it intends to ignore the doctrine of limited liability for a specific statute such as CERCLA.

In addition, from a practical perspective, if a parent corporation participates

¹⁵⁸ 3 C. SANDS, SUTHERLAND ON STATUTES AND STATUTORY CONSTITUTION § 61.01, at 77-78 (N. Singer 4th ed. 1984).

¹⁵⁹ *Joslyn Manufacturing Company*, 893 F.2d at 82-83; SUTHERLAND, *supra* note 158, at § 61.01, at 77-78.

¹⁶⁰ It has been argued, however, that the doctrine is statutory in origin; referring to it as a common law rule, therefore, is incorrect. Heidt, *supra* note 74, at 159-60. Assuming without argument that Professor Heidt is correct, I believe that her point is so technical, given the doctrine's elementary role in our concept of what a corporation is, that I do not think it necessarily calls the canon that the court used in *Joslyn* into question.

¹⁶¹ *Burks v. Lasker*, 441 U.S. 471, 478 (1979).

in the management of its subsidiary but does not intend to avoid CERCLA liability through the subsidiary's corporate form, there is no immediately apparent reason to do away with the rule of limited liability and thereby infringe upon an area of significant state interests.¹⁶² This is especially true in cases like *Kayser-Roth* and *Joslyn*, in which there is no evidence that the parent's influence over the subsidiary's acts was unreasonable or directly contributed to the problems stemming from the subsidiary corporation's hazardous waste practices.

Despite the incongruity associated with the federal interests embodied in CERCLA, the decisions holding parent corporations liable under section 107 have addressed only one side of the story: they have centered on the general language of CERCLA and the generic federal interests associated with the statute as guidance rather than the Act's explicit text to formulate a blanket rule that the statute imposes liability directly on parent corporations if the parents in some way participated in their subsidiaries' contamination-causing activities. By doing so, the decisions have failed to explain in a principled way why an elementary rule of state corporation law should be generally discarded under a federal statutory scheme even if there was no illicit intent on the part of a parent.¹⁶³ This limited focus has resulted in opinions with little statutory analysis, the outcomes of which appear to be predetermined.¹⁶⁴

As explained in *Kayser-Roth*, the courts have used two legal theories to impose liability on parent corporations under section 107.¹⁶⁵ The first theory centers on the language of the Act and whether stockholders are included as PRPs under section 107. Courts adopting this theory initially conclude that the terms "owner or operator" and "person" are sufficiently broad to include shareholders and parent corporation. As indicated above, these courts buttress their conclusions based on what they envision Congress intended CERCLA to accomplish. Next, they determine that the exception for persons not participating in the management of a facility in the definition of "owner or operator" implies that an owning stockholder who manages the subsidiary corporation is liable under CERCLA as an owner or operator."

Each of these conclusions under the first theory is vulnerable to interpretive attack. The words "shareholder" or "parent corporation" do not appear in the

¹⁶² See Aronovsky & Fuller, *supra* note 3, at 461-64 (proposing a more stringent standard than that set forth by the courts).

¹⁶³ See Comment, *supra* note 3, at 995-1000, where the author reaches the same conclusion in the context of indirect liability. But see Oswald & Schipani, *supra* note 69, at 301-15, where the authors conclude that "[a]nalysis of the case law simply does not support a conclusion that the courts are eroding traditional corporate liability rules regarding parent corporations in the CERCLA context." *Id.* at 315.

¹⁶⁴ See *id.* at 996 (discussing indirect liability).

¹⁶⁵ See *supra* text accompanying notes 93-104.

statutory definitions of "owner and operator" and of "person." It appears entirely inappropriate to conclude from these terms without something more that Congress intended to waive the rule of limited liability that would ordinarily apply. In response, these courts would probably say that the "something more" is the remedial design of CERCLA and Congress' intent that the statute be read liberally. Fifty separate rules of limited liability could undermine CERCLA's remedial objectives, rendering consistency of application of the statute impossible.¹⁶⁶ This conclusion, however, is overbroad. There are nuances attributable to particular state versions of the rule,¹⁶⁷ but there are general principles of limited liability that can be extrapolated and applied fairly consistently regardless of the local rule.¹⁶⁸

If one looks at the doctrine of limited liability more generally, it becomes evident that by holding parent corporations liable directly under CERCLA the courts are doing more than furthering the statute's remedial purposes: they are altering at the most fundamental level a traditional feature of corporation law. Shareholders, including parent corporations, are presumed to not be personally liable for claims against the corporations in which they have invested. Concurrently, by ignoring the limited liability of the parent, the courts ignore the separate existence of the subsidiary.¹⁶⁹ Each of these concepts is basic to the entire notion of the corporate entity. Although Congress is free at any time to modify the historical rules of corporation law, if it does, it should do so expressly.¹⁷⁰ Absent such an expression, however, the existing rules should remain; courts should not be free to modify fundamental concepts by relying on generic federal interests associated with a particular statute. Allowing the courts to dissolve the rule of limited liability without specific congressional direction serves to undermine the law's predictability, "rendering consistency of application hostage to the supposed significance of the policy urging the [rule's] abandonment."¹⁷¹

The courts' reliance on the exception set forth in the definition of "owners and operators" relating to persons participating in the management of a facility is similarly misplaced. The exception applies to any person, who does not participate in a vessel or facility's management, who holds indicia of ownership to protect his *security interest* in the vessel or facility. Stock is, of course, indicia of ownership; and it is a security. But is stock indicia of ownership to protect a security interest in property? An affirmative answer seems to stretch the words

¹⁶⁶ See Heidt, *supra* note 74, at 185-88.

¹⁶⁷ *Id.* at 185-86.

¹⁶⁸ See, e.g., Oswald & Schipani, *supra* note 69, at 294-97.

¹⁶⁹ Aronovsky & Fuller, *supra* note 3, at 435-36.

¹⁷⁰ *Joslyn Mfg. Co.*, 893 F.2d at 82-83.

¹⁷¹ Aronovsky & Fuller, *supra* note 3, at 436.

to their breaking point. Stock is more of an ownership interest than a security interest. Consequently, a more reasonable interpretation of this provision is that it was intended to protect secured creditors holding liens on vessels transporting hazardous materials or facilities where hazardous substances are generated. This construction of the exception comports with several court decisions that have applied it in analyzing the liability of secured creditors under CERCLA.¹⁷²

The second theory of direct parent liability, the one used by the district court in *Kayser-Roth*, focuses upon the acts of the particular parent corporation and the relationship of those acts to the ordinary meaning of "operator."¹⁷³ The determination whether the parent corporation qualifies as an "operator" hinges upon the pervasiveness of the parent corporation's control over the management and operation of the polluting subsidiary, and whether that control extended to the actions causing the pollution. If both aspects of control are present, then the parent is deemed an "operator" for purposes of section 107.

Like the first theory, this theory suffers from its failure to address adequately parent corporation liability based on the express language of the statute. There is nothing in the legislation that authorizes courts to flout the principle of limited liability or suggests that Congress intended this result. If CERCLA does not authorize abrogation of the rule, then it should remain. Any other conclusion results in an unprincipled judicial encroachment upon a basic feature of corporation law.

2. Indirect Liability

Although courts may not rely upon the generic federal interests embodied in CERCLA and its history to find that the Act itself makes parent corporations liable, reliance on those interests is appropriate when applied to indirect liability of parents. Indirect liability in this context means, of course, court-created federal common law to fill the interstices of CERCLA. The Supreme Court has held that federal courts may engage in federal common law making in two instances: first, when the federal statute expressly authorizes courts to develop federal common law, or when the statute does so implicitly by expressly adopting state law as the rule of decision; or, second, when the federal interests the statute embodies, either in its language, history, or both, would be usurped in particular instances unless

¹⁷² See generally Note, *Cleaning Up the Debris After Fleet Factors: Lender Liability and CERCLA's Security Interest Exemption*, 104 HARV. L. REV. 1249 (1991).

¹⁷³ See *supra* text accompanying notes 97-98.

the courts engaged in the creation of federal common law.¹⁷⁴

Applying these principles to the creation of a federal veil piercing doctrine under CERCLA, one discovers that the first ground for developing federal common law does not apply because CERCLA is silent on the issue. The second situation, however, is applicable. As noted above, the federal interests personified in the Act are clear: to provide a national solution to a nationwide problem by ensuring that hazardous waste disposal sites are cleaned up, and that the costs of the cleanups are borne by those responsible for the contamination.¹⁷⁵ If the corporate form is being used to contravene these federal interests, then courts should not allow the loophole to remain. Further, the uncertainty that would arise if courts adopted state corporation law to fill the gaps left in CERCLA militates in favor of a generalized federal common law doctrine of piercing the corporate veil.¹⁷⁶ In such a situation, courts may engage in interstitial federal common law making.

If courts are authorized to develop federal common law of veil piercing under CERCLA, then issues arise concerning the proper elements of this common law principle and the circumstances under which it should be employed.¹⁷⁷ As a general rule, a corporation's veil will be pierced either when the subsidiary is a mere instrument -- the "alter ego" -- of the parent, or when there is evidence that the subsidiary was formed out of an illegal or improper motive. In the specific context of CERCLA, the elements of the doctrine of piercing the corporate veil should be an amalgam of both of the theories: domination by the parent over the subsidiary's environmental activities, with the parent's intent to further some improper purpose related to those activities. This two-pronged approach ensures that CERCLA's remedial objectives are satisfied by its focus on the parent's involvement in and motivations with respect to the subsidiary's environmental affairs. Yet it also ensures that the parent's veil is not pierced casually, based on CERCLA's generic design, but in discrete circumstances in which the parent's design was to engage in the subsidiary's hazardous waste practices for its own personal benefit, knowing full well that there were negative consequences associated with those practices.

Using this two-pronged approach, courts should first determine whether the

¹⁷⁴ See *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, *HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 935-50 (1988); see also Note, *Piercing The Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

¹⁷⁵ *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 23 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied* 111 S. Ct. 957 (1991).

¹⁷⁶ Note, *supra* note 170, at 861-64.

¹⁷⁷ See Aronovsky & Fuller, *supra* note 3, at 461-62. See also Oswald & Schipani, *supra* note 69, at 301-15.
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parent exercised substantial domination over the subsidiary's environmental affairs. Although the focus is on the environment, an examination of the parent's domination in this area will probably reveal more. That is, if the parent was able to and did exert substantial domination over the actions resulting in contamination, then it is likely that the parent's dominance pervaded over all of the subsidiary's activities. Conversely, it is doubtful that the parent could exercise such control over only one segment of its subsidiary's operations without having similar control over all the subsidiary's affairs. Nonetheless, the focus remains on the environment for the courts' development of a federal common law of veil piercing is in furtherance of an environmental statute only, not in order to create a rule of general applicability. The factors a court should look to in determining whether there is total domination of the subsidiary are those typically used in veil piercing cases, such as those the courts enumerated in *Joslyn*.¹⁷⁸

Then, under the second prong, courts should determine whether, with substantial participation by the parent, there has been a direct violation of CERCLA by the subsidiary, or in situations arising before the enactment of CERCLA, an intended imposition of external costs onto third parties in the form of pollution caused by the parent through its subsidiary.¹⁷⁹ As the court of appeals alluded to in *Joslyn*, judicial employment of the veil piercing doctrine under CERCLA should be limited in most instances to situations in which the parent has attempted to perpetuate a fraud or avoid personal liability.¹⁸⁰ Other than in *Joslyn*, however, such a showing has not been necessary thus far in the courts' CERCLA veil piercing holdings.¹⁸¹ Rather, the courts have pierced the veils of corporations under CERCLA in order to further "public convenience, fairness, and equity" without a requisite showing of some illicit or otherwise wrongful intent either to avoid statutory liability or to thrust external costs onto third parties on the part of the parent company.¹⁸² Use of this "public convenience" standard provides no guidance in determining the circumstances under which the separate existence of the subsidiary should be ignored in the CERCLA context. If "public convenience" is the only normative consideration courts are

¹⁷⁸ 696 F. Supp. at 227.

¹⁷⁹ Professors Oswald and Schipani maintain that the court of appeals in *Joslyn* was too restrictive in setting forth situations when it is appropriate to pierce the corporate veil. Oswald & Schipani, *supra* note 69, at 307. Of course, if piercing the corporate veil in the absence of CERCLA is otherwise appropriate, such as when there has been no fraud but there is such a continuity of interest that the subsidiary is the "alter ego" of the parent, then I would agree that *Joslyn's* holding is too narrow. Nonetheless, I maintain that the courts have strained to pierce the veils of parents in the CERCLA context simply because of the sweeping nature generally of the statute. I do not agree that parents' veils have been pieced under CERCLA in situations in which it was indeed otherwise appropriate.

¹⁸⁰ 893 F.2d at 83; *accord*, Comment, *supra* note 3, at 996-98. For a contrary position, see Oswald & Schipani, *supra* note 69, at 301-15.

¹⁸¹ See Comment, *supra* note 3, at 994-1000. *But see* Oswald & Schipani, *supra* note 69, at 301-05.

¹⁸² Comment, *supra* note 3, at 994-1000.

to employ, then parents would be liable in nearly every instance.

Further, without examining whether there was an improper motive by the parent, or at least some culpable conduct that would otherwise justify imposing liability under traditional veil piercing doctrine, courts are piercing parents' veils pursuant to a federal common law that is much different from that which courts have developed under other federal statutes. Before piercing corporate veils in furtherance of a particular federal statute, courts have typically found culpable conduct or improper motive by the parent to avoid the statute's restrictions. Under CERCLA, however, the courts have developed a less stringent rule.¹⁸³ They have looked to the broad federal purposes of CERCLA and based on those purposes they conclude that the statute places no particular importance on the corporate form. With those conclusions in hand, the courts have found parents liable if the parents exercised any control over the subsidiary's environmental activities. No improper intent or culpable conduct is apparently necessary because of the strict liability provisions of CERCLA. The result is a novel, sweeping approach to veil piercing under federal common law.

Another aspect of the courts' utilization of CERCLA's broad purposes to pierce parents' veils concerns its effect on the states' historic governance over corporations. That is, by using lesser standards to pierce veils in furtherance of CERCLA. The courts are creating a new strain of general federal veil piercing authority.¹⁸⁴ However, since states are generally reluctant to allow corporate veils to be pierced, the federal courts' employment of lesser standards in the furtherance of the remedial purposes of CERCLA creates an apparent tension between state and federal interests. This tension is mitigated if courts refrain from undue reliance on the "public convenience" standard and instead, pursuant to the two-pronged approach set forth above, focus on whether there was any intent on the part of the parent to avoid personal liability or to benefit from its polluting activities at the expense of third-parties. If culpable conduct or some improper intent on the part of the parent is required in order for the subsidiary corporation's veil to be pierced pursuant to CERCLA, then the federal common law of veil piercing liability begins to look more like that appearing under state law. Thus, by requiring such a showing (in addition to a presentation of other evidence demonstrating why the subsidiary's veil should be pierced), the two-pronged test for veil piercing ensures that state regulation of corporations is not unduly usurped. Furthermore, the federal interests associated with CERCLA are quite acute when the corporate form was or is used to avoid the statute, or, before the enactment of CERCLA, when the parent corporation intentionally imposed external costs onto third parties that it did not intend to internalize. Piercing the

¹⁸³ *Id.*

¹⁸⁴ *Id.*
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corporate veil in scenarios like this furthers the federal statutory interests at stake, while at the same time narrowing the federal intrusion on state corporation law.

The Second Level of Criticism: Policy

There are a number of pragmatic difficulties inherent in both direct and indirect parent corporation liability under CERCLA. Specifically, allowing the rule of limited liability to dissolve carries with it, as I mentioned earlier in the article, certain economic inefficiencies. The possibility of liability presents corporate stockholders with disincentives that did not exist prior the judiciary's abrogation of the rule. These disincentives in turn do not promote the expeditious cleanups that Congress designed CERCLA to accomplish. This part of the article attempts to further illuminate some of the economic consequences that direct and indirect liability of parents, as the two have been employed by the majority of the courts, have introduced.

Foremost, unlimited liability pursuant to CERCLA will discourage future investment in firms and ventures that in some way handle hazardous substances. Corporations, through management, invest in those firms and ventures with positive net present values.¹⁸⁵ Because managers are, as a rule, risk averse,¹⁸⁶ in order for them to decide to invest assets of the corporation into another firm, they must be able to forecast the risks (typically through the discount rate) associated with the particular investment. If those risks are incalculable or if they are so high that they approach infinity, then the corporation will not invest unless it can procure insurance to guard against the identified risks. But, as noted earlier, insurance is generally unavailable to cover pollution liability. As a consequence, corporate investment in firms that handle hazardous substance will not occur.

A useful analogy is found in the insurance market itself. Insurers specialize in calculating risks. If the risks cannot be calculated, insurers will not provide coverage for those risks. Pollution liability under CERCLA is just such a risk;¹⁸⁷ the information costs are prohibitive because of the retroactive, strict, and joint and several nature of CERCLA liability.¹⁸⁸ These variables make any risk calculation impossible.¹⁸⁹ As a result, insurers, by and large, no longer provide insurance for hazardous waste activities.¹⁹⁰ If the specter of CERCLA

¹⁸⁵ See *supra* text accompanying notes 36-42.

¹⁸⁶ See *supra* text accompanying notes 50-57.

¹⁸⁷ Abraham, *supra* note 8, at 955-56.

¹⁸⁸ See *id.* at 956-60.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 944.

liability does the same to investments as it has to the availability of insurance, then the availability of needed capital in many markets will be severely curtailed.

But what of the corporation that has already invested in a subsidiary, either before CERCLA's enactment or after its enactment but before the recent tide of judicial extensions of it to parents? There are a number of inefficient consequences if CERCLA liability is thrust into these preexisting relationships. To simplify matters, the following analysis concentrates on parent investments in subsidiaries that were made before CERCLA was on the books.¹⁹¹ To be more specific, suppose a corporation, before 1980, invested capital in a subsidiary corporation. The parent determined that the subsidiary possessed a positive net present value. If the corporation was correct, then the investment was socially desirable. As part of the corporation's risk assessment, it may have recognized the problems, particularly in tort,¹⁹² associated with the subsidiary's hazardous waste practices. In order to mitigate those risks, it is reasonable to conclude that the parent will play a part in the subsidiary's decision-making concerning these substances. Indeed, the parent must do so in order to obtain the return it expected on its investment.¹⁹³

The injection of CERCLA liability, however, upsets the corporation's original calculation of the subsidiary's net present value. With respect to a parent corporation's decision to invest, CERCLA liability exacts an added cost (which was unknown or unknowable), *ex post*, into the parent's risk assessment of the subsidiary. This, in essence, serves to reprove what at the time was a socially desirable investment. To further compound the parent corporation's predicament, its involvement in the subsidiary's environmental affairs is highly relevant, if not dispositive, in being found both directly and indirectly liable under the statute.¹⁹⁴ Thus, if, as part of its original present value calculation, the parent decided to mitigate the risks associated with the subsidiary's pollution-causing activities by playing a greater role in decisions affecting those activities and

¹⁹¹ Whether parent corporations could have forecast the imposition of liability in late 1980, soon after CERCLA's enactment, but before the judicial applications of the statute to parents is a difficult question. As the reader can obviously gather, I maintains that they could not have because the Act, by its terms, does not contemplate parents, simply by being parents, as PRPs. Thus, the critical time after which corporations realistically began factoring potential CERCLA liability into their investment calculations was probably somewhere around the 1984-86 time period: when the courts began extending CERCLA liability to parents. For purposes of this analysis, therefore, the situations when a parent invested before 1980 and before 1984-86 are essentially the same. However, as evidenced by the several courts that have found parents to be PRPs under section 107, there are many who would disagree with this conclusion.

¹⁹² One exception to the investment situations discussed in the previous note is that when a corporation made its investment calculation after 1980, but before 1984-86, it also plugged possible CERCLA liability of the subsidiary, to the extent it was calculable, into the equation.

¹⁹³ Professors Oswald and Schipani would argue, however, that this involvement will probably result in veil piercing under the alter ego theory. See Oswald & Schipani, *supra* note 69, at 301-15.

¹⁹⁴ See *supra* text accompanying notes 99-113.

thereby protecting its investment, that involvement will in all likelihood now trigger direct or indirect CERCLA liability.

Therefore, if a subsidiary has caused a release or a threatened release of hazardous substances in contravention of section 107, the parent must face personal liability. Indeed, the imposition of CERCLA liability may force the parent to pay twice for the subsidiary's actions:¹⁹⁵ once for the diminished value in the subsidiary's stock and again for response costs under section 107.¹⁹⁶ And, as already noted, the parent cannot protect itself against these costs through insurance; insurance providers have opted out of the pollution liability market.¹⁹⁷ In order to guard against this twofold effect, the parent corporation must choose among several courses of action, all of which are undesirable from a societal standpoint.

As an example, although the parent may be able to take some actions to abate the contamination, it cannot because its further participation in the subsidiary's environmental problems will exacerbate any defense the parent may have against liability. Instead, the parent will seek to prevent liability, or mitigate its impact, through restructuring its relationship with the subsidiary or through combating, rather than settling, any section 107 claims against it. In this regard, the parent may sell all of its shares in the subsidiary. But since its actions to mitigate the risks caused by the subsidiary's environmental activities are probably enough to trigger liability in and of themselves, divestment offers no sanctuary.

A more likely course for the parent is to hold onto the stock, but aggressively resist liability. Since the costs of CERCLA remediation costs are enormous, coupled with the fact that these costs cannot be passed onto insurers but, instead, must be absorbed by the parent, CERCLA liability raises stakes for the parent to an unacceptable level.¹⁹⁸ Simply stated, the parent's assets, and possibly its viability, are now at risk. The parent will resist settling any such claim and, instead, will run the gauntlet of protracted litigation.¹⁹⁹ This will further delay expeditious cleanup.

Another inefficient effect of parent liability concerns the fact that the judiciary's application of unlimited CERCLA liability does not distinguish between the large and small parent corporation. Direct liability under section 107 affects sole proprietorships, partnerships, close corporations, and large corpora-

¹⁹⁵ Aronovsky & Fuller, *supra* note 3, at 437.

¹⁹⁶ *Id.*

¹⁹⁷ Abraham, *supra* note 8, at 944.

¹⁹⁸ See R. POSNER, *supra* note 50, at 522-528.

¹⁹⁹ See *id.*
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tions alike. But what if a small or close corporation invests in another firm that causes the incurrence of CERCLA response costs? Should that corporation, if it played a personal role in the action resulting in the pollution, be likewise liable? Under the *Kayser-Roth* analysis the answer is yes: the corporation is liable directly as an "operator," and possibly indirectly as an "owner." This analysis, however, ignores the realities of the situation in favor of the structure of the corporation. As Judge Richard Posner has argued, disregarding the corporate entity to reach the assets of a close or a small corporation has the same inefficient effect on investment that unlimited liability of individual investor exhibits.²⁰⁰ Investors in these corporations typically do not have the same opportunities to diversify as individuals who invest in publicly held corporations.²⁰¹ To illustrate, if investors satisfy their claims against a particular corporation through the assets of a close corporation that owns stock in the corporation, the effect will be almost the same as if the close corporation was an individual. Allowing its assets to be reached chills investment in potentially worthwhile ventures.

Hence, courts analyzing whether to impose liability on parent corporations must keep these considerations in mind before coming to any conclusions. So far, the courts holding a parent liable have paid little attention to the size and structure of the parent, although it is unclear whether in fact any small or close corporations have in fact been held liable under these decisions. Any future holdings should determine these characteristics of the parent before imposing CERCLA liability.

In addition to the inefficiencies created when parents are in fact held liable, the mere prospect of CERCLA liability for parents, even when the subsidiary has not engaged in improper hazardous waste disposal techniques, may cast further inefficiencies onto existing parent-subsidiary relationships. For instance, the specter of liability may force the parent to liquidate its investments in subsidiaries that handle hazardous substances so that the parent can avoid altogether any chance of its becoming personally liable. This may even occur if the subsidiary has properly stored or disposed of the materials (but this will depend upon the level of risk the parent is willing to bear). It is probably not in society's interest for the divestment to occur because the investment would remain absent the potential for CERCLA liability. Another possibility is that the parent will attempt to distance itself from the subsidiary in order to demonstrate that it plays little or no role in the subsidiary's environmental affairs. By pursuing this course, an effective vehicle for private monitoring of the subsidiary, through protection of the parent's investment, simply disappears. This harms the parent and results in a further impediment to the expeditious cleanup of disposal sites.

²⁰⁰ Posner, *supra* note 29, at 512-13.

Alternatively, the parent may decide to merge the subsidiary into it. If the parent responds in this manner, it will do so because the agency costs are too high to keep the two firms apart. In general, a parent will monitor a subsidiary's activities only to the extent necessary to protect its investment. At that point, the agency costs of monitoring the subsidiary are optimal. Liability of the parent, whether it be direct or indirect, will not be triggered unless the parent participates substantially in the actions that resulted in pollution. But, as already pointed out, the parent may have only undertaken that participation to protect its investment, not to exploit the subsidiary. If a parent must now monitor those activities to such an extent to also protect its own assets, then there will be overregulation by the corporation. This in turn creates an incentive for the parent and subsidiary to merge; a relationship that is probably not otherwise cost-effective for if it was, it would have been pursued absent the specter of liability.

In summary, the abrogation of limited liability of parent corporations in the CERCLA context carries with it economic impacts that are not necessarily beneficial from a societal standpoint. Although it is unclear whether the effects resulting from the incentives CERCLA liability creates are greater than the negative consequences of those effects, I suggests that the negative effects constitute a significant counter-weight. Nonetheless, I have not conducted a detailed study to determine whether the negative effects outlined are indeed occurring and if they are, to what extent. Further inquiry is necessary to grasp more fully the impact which CERCLA liability hatched on parent corporations.

CONCLUSION

This article has attempted to show that direct liability of parent corporations under CERCLA cannot be sustained. The statute simply does not authorize the imposition of direct liability against parents. The courts' holdings that it does rely too much on the federal interests associated with CERCLA rather than on the statute's explicit terms. Furthermore, from a policy - specifically economic - perspective, the imposition of direct liability contains certain inefficiencies. It is important for both courts and commentators to keep these inefficient effects in mind when analyzing the issue of direct parent corporation liability. In addition, further positive analysis is necessary to determine precisely what economic consequences the abrogation of the rule of limited liability under CERCLA has had on corporate activity.

Nonetheless, this article has also attempted to argue that indirect liability of parents under CERCLA through piercing the corporate veil is a legitimate alternative. Courts are authorized to develop federal common law if the federal interests embodied in a statute are undermined in particular instances. Applying this rule, courts may close the gaps Congress left in CERCLA through development of a federal common law doctrine of piercing the corporate veil if it is

necessary to ensure that parent corporations cannot avoid CERCLA liability through use of the corporate form.