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Introduction

Laws hastily enacted to protect our environment have proven quite difficult to integrate with other more established bodies of law. This tension is readily evidenced under circumstances when environmental and corporate laws interact. Presently, certain environmental laws are threatening the very existence of what is possibly the most fundamental corporate law doctrine — limited liability. This note focuses on the circumstances and competing policy interests which have brought about this critical juncture in the evolution of our law.

Part I of this note introduces CERCLA and its interaction with the corporate doctrine of limited liability. More specifically, this section defines the circumstances which have brought into question the CERCLA liability of parent corporations for their subsidiaries. Part II discusses various theories of CERCLA liability and focuses on the specific statutory language which has made questionable the liability of corporate parents. Part III discusses the concepts of “piercing the corporate veil,” the “alter ego” doctrine and the relationship these concepts have to the issue of parent liability in the CERCLA context. Parts IV and V analyze two conflicting approaches recently taken by courts addressing the parent liability issue. Finally, part VI proposes that the solution to this issue is a uniform alter ego doctrine which more equitably balances the competing policy interests.

I. Interaction of Environmental and Corporate Laws

A. CERCLA

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ in response to an increasing national concern for our environment. CERCLA’s basic purpose is to provide emergency cleanup procedures upon discovery of any hazardous substances being released into the environment.² To fulfill this purpose,

Congress included guidelines for determining the liability of "persons" responsible for contaminating the environment.\(^3\)

CERCLA imposes liability on "persons" who "own or operate" a "facility" at which there is a "release of hazardous substances." However, determining liability for a release of hazardous substances is often difficult. While CERCLA provides some broad guidelines, extensive litigation may be necessary to clearly establish each responsible party. In such cases, protracted litigation often results in continued pollution of the environment.

To eliminate this problem, Congress created a "Superfund" in conjunction with CERCLA. The Environmental Protection Agency (EPA) and similar state agencies may draw from Superfund to conduct immediate cleanup operations and seek reimbursement from responsible parties later. Obviously, liability must still be determined in order to prevent eventual depletion of the Superfund.\(^8\)

**B. The Role of Corporations in the Environment**

The persons responsible for most large releases of hazardous waste are not individuals, but corporations. Many corporations utilize manufacturing processes that generate toxic byproducts. Any corporation which generates, transports, or disposes of toxic waste may be held directly liable as a responsible "person" under CERCLA.\(^11\)

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4. Section 9601 of CERCLA provides rather lengthy definitions of "persons," "facility," "release" and "hazardous substances." Id. § 9601. The meaning of each of these terms has been litigated extensively. However, any controversy associated with these terms is beyond the scope of this note. This note is concerned primarily with the meaning of the language "owner or operator," which is discussed at length later in the text.

5. Id. § 9607.

6. The Superfund was formally referred to as the Hazardous Substance Superfund. Id. § 9607. It was established by an amendment to CERCLA known as the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10, 29, 33 & 42 U.S.C.).


10. Disposal of such byproducts often requires sophisticated equipment and elaborate safety procedures. As a result, other corporations now actually provide the services of transporting and disposing of hazardous byproducts. The manifestation of these new industries is reflected by the liability provisions under § 9607(a)(1)-(4) of CERCLA. 42 U.S.C. § 9607(a) (Supp. IV 1986).

11. CERCLA states. In pertinent part:

   (21) "person" means 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 (emphasis added).

I. The Corporate Form of Ownership

The fact that corporations are responsible for the majority of hazardous waste problems is no surprise. Today, the corporation is the chief form of business organization in the United States. Corporate ownership is popular because shareholders have no liability beyond their investments unless a plaintiff can “pierce the corporate veil.” Notwithstanding its recognition as a basic tenet of corporate law, the concept of limited liability is being threatened under the circumstances discussed in this note.

II. The Parent/Subsidiary Relationship

In recent years, corporate ownership has become more complex. Corporations often purchase or create one or more subsidiary corporations, each of which conducts a different type of business. In this situation, a parent corporation, rather than an individual, is the subsidiary’s controlling shareholder. If a subsidiary is not financially stable, the parent may dissolve the subsidiary, sell it to another corporation, or absorb its assets. As with personal corporate ownership, the parent is normally not liable beyond its investment in the subsidiary.

C. A Parent’s Liability Under CERCLA for its Responsible Subsidiary

A corporation can be liable as a “responsible person” under CERCLA. Unfortunately, in creating CERCLA, Congress failed to specifically confront

13. See H. Henn & J. Alexander, Laws of Corporations and Other Business Enterprise § 73, at 130 (3d ed. 1983) [hereinafter Henn & Alexander]. However, there are a number of other reasons for the popularity of the corporate form of ownership. See, e.g., Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L.J. 193 (1929). See notes 45-47 and accompanying text, in which the concept of “piercing the corporate veil” is discussed in greater depth.
14. See Henn & Alexander, supra note 13, at 130. For a general discussion of limited liability in the parent/subsidiary context, see Douglas & Shanks, supra note 13.
15. A subsidiary corporation is “one in which another corporation (i.e., parent) owns at least a majority of the shares, and thus has control.” Black’s Law Dictionary 1280 (5th ed. 1979). The term subsidiary is used to denote a company “more than 50 percent of whose voting stock is owned by another.” Id.
16. A parent corporation is one which has working control through stock ownership of its subsidiary corporations. Id. at 1004.
17. The dissolution of a corporation is the termination of its existence as a body politic. Dissolution may occur “by act of the legislature . . . ; by surrender or forfeiture of its charter; by expiration of its charter by a lapse of time, by proceedings for winding it up under the law; by loss of all its members or the reduction below the statutory limit; by bankruptcy.” Id. at 425.
18. This note refers to the dissolution process only to exemplify a general pattern of circumstances under which the issue of parent liability often arises. For a more thorough discussion of corporate dissolution in this context, see Anderson, supra note 8.
the issue of parent corporations' liability for their responsible subsidiaries. Consider this scenario:

\[ P \] (parent corporation) owns \( S \) (subsidiary corporation). \( S \) owns and operates a plant at which there is a release of hazardous substances. After the release, \( S \) is dissolved. \( C \) (party which cleaned up the hazardous substances — often the federal and/or state government) sues \( S \) under CERCLA for the costs incurred in conducting cleanup operations. However, \( S \), the responsible party, no longer exists.

These circumstances raise the question addressed by this note: Can the parent be held directly liable as an "owner or operator" under CERCLA for the release caused by its dissolved or judgment-proof subsidiary? Recent court decisions have given both affirmative and negative answers to this question.

I. CERCLA Liability

A. Scope of Liability Under CERCLA

1. Strict Liability

Most jurisdictions have held that CERCLA is a strict liability statute. Courts have reached this conclusion despite Congress' failure to include an express provision for strict liability. In imposing strict liability, courts have relied primarily on title 42, section 9601(32) which states that liability under CERCLA "shall be construed to be the standard of liability" found in section 311 of the Federal Water Pollution Control Act (FWPCA). The standard of liability under the Clean Water Act has consistently been construed as strict liability. Thus, if a party is deemed to be a responsible person, strict liability is imposed.

2. Joint and Several Liability

Courts have also, under certain circumstances, held that CERCLA imposes joint and several liability. Again, courts have reached this conclusion even though Congress specifically deleted the language supporting such liability.


Title 42 U.S.C. § 9601(32) provides: "'Liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33," 42 U.S.C. § 9601(32) (Supp. IV 1986).


25. Id.

from CERCLA just prior to its enactment. Courts imposing joint and several liability rely on certain legislative history which suggests that the scope of liability under CERCLA should be determined under common law principles. Thus, because CERCLA actions often involve complex factual circumstances associated with multiple-generator waste sites, joint and several liability has been deemed appropriate.

3. Successor Liability

Courts’ imposition of strict or joint and several liability in CERCLA actions has been extended to impose liability on successors to hazardous waste site ownership. When one corporation purchases or receives the assets of another, the purchasing corporation is normally not liable for the debts and liabilities of the corporation being purchased. However, under CERCLA, the purchasing corporation is the present “owner” of a hazardous waste site. Therefore, applying principles of strict liability, the successor corporation may be liable under CERCLA, even though it did not contribute to the release of hazardous substances by the corporation being purchased. Furthermore, when a subsidiary is dissolved and the assets merged into its parent, the parent may be considered “a mere continuation” of the subsidiary. Under such circumstances, the parent may be held fully liable for a hazardous release caused by its subsidiary.

The trend toward the imposition of successor liability clearly shows courts’ extreme concern for CERCLA’s broad remedial purpose. Accordingly, many courts have liberally construed certain liability provisions under CERCLA. However, other courts have been much more conservative in their interpretation of such provisions. The following section discusses the specific

29. This term refers to sites where the waste which has collected or accumulated can be attributed to numerous “persons” as defined by CERCLA. Id. Because it is often difficult to determine the specific amount and toxicity of the waste contributed by each generator, joint and several liability has been applied.
32. Stringfellow, 661 F. Supp. at 1063.
33. Id.
34. The “mere continuation” doctrine is a test by which courts determine successor liability. The factors emphasized in this doctrine are “a common identity between officers, directors, and stock between the selling and purchasing corporations . . . .” Vertac Chemical Corp., 671 F. Supp. at 614-15 (quoting Tucker v. Paxon Machine Co., 645 F.2d 620, 625-26 (8th Cir. 1981)). This concept should be distinguished from a de facto merger which occurs when two corporations are merged but fail to comply with statutory regulations governing merger. Id. at 615. Both of these concepts are similar in nature to the alter ego doctrine which is discussed at length later in the text. See notes 52-55 and accompanying text.
36. See infra notes 111-23 and accompanying text.
37. See infra notes 97-110 and accompanying text.
liability provisions which have created controversy on the parent liability issue.

B. The Meaning of “Owner/Operator”

CERCLA imposes liability on four classes of persons. The class relevant to the issue of parent liability is defined as “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . .”

Section 9601(20)(A) defines “owner or operator” as “any person owning or operating such facility . . . .” The term “person” includes corporations. Consequently, the critical questions are whether a parent corporation is an “owner or operator” for purposes of CERCLA liability, and if so, under what circumstances. As presented by most courts addressing this

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

39. Id. § 9607(a)(1)(2) (emphasis added). Subsections (3) and (4) require the presence of certain facts which are generally beyond the scope of this note. These circumstances are briefly addressed in this note, at text accompanying supra notes 9-19. For purposes of this analysis, it is the meaning of “owner or operator” under subsections (1) and (2) which must be carefully scrutinized.
40. Subsection (i) refers specifically to “owners and operators of vessels” and is therefore of no concern in this paper.
   (20)(A) “owner or operator” means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title of control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id. § 9601(20)(A).
41. See supra note 11 and accompanying text.
42. The distinction between “owner” and “operator” is somewhat confusing in the parent/ subsidiary context. There is little doubt that a corporation may be held directly liable as the present owner of a hazardous waste site, or as a past owner of the site at a time when there was a release of hazardous substances. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985). However, courts have apparently not decided whether a parent corporation may be held directly liable for its subsidiary where it simply owns the subsidiary...
issue, the ultimate question is whether the parent can be held directly liable as an "operator" under CERCLA, or whether the corporate veil between the parent and the subsidiary must first be pierced.43

II. Piercing the Corporate Veil Via the Alter Ego Doctrine

A. Piercing the Corporate Veil

When a plaintiff pierces the corporate veil, the court "disregard[s] the usual immunity of corporate officers or entities from liability for corporate activities."44 Where the corporate veil is pierced in the parent/subsidiary context, courts ignore the corporate separateness between the two entities.45 Thus, the parent, as the primary shareholder, may be liable for damages beyond the amount it has invested in the subsidiary.46

The corporate veil issue is critical in CERCLA actions because frequently the enormous cost of cleaning up the released hazardous substances exceeds the entire value of the responsible subsidiary.47 Furthermore, when the

and does not operate it. In this situation, the parent does not actually own the site at which the release has occurred. Instead, the parent merely owns the subsidiary which, in turn, owns the site.

It stands to reason that courts would not attach liability to the parent under such circumstances. This presumption follows from the fact that courts supporting direct operator liability are concerned primarily with the parent corporation's control over its subsidiary. Further, direct owner liability in the parent/subsidiary context would mean that a corporation may be held directly liable for a subsidiary's actions although its ownership of the subsidiary is merely indirect. Clearly, such a rule takes no account of the corporate fiction.

Several courts have implied that the parent's mere awareness of, and ability to prevent, its subsidiary's CERCLA-violative behavior is sufficient to create liability. See e.g., United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984). Additionally, at least two commentators argue that the imposition of direct liability on parent corporations is warranted by the mere fact of ownership. Allen, Refining The Scope Of CERCLA's Corporate Veil Piercing Remedy, 6 STAN. ENV'TL L.J. 43 (1986-87). See also Note, Liability, supra note 21. These views are discussed at greater length at infra text accompanying notes 129-36.

Nevertheless, most courts appear to be focusing on the nature and substance of the parent's ownership rather than the mere fact of pure ownership. See, e.g., United States v. McGraw-Edison Co., 718 F. Supp. 154 (D.N.Y. 1989) (court considered liability of one corporation which was a 49 percent shareholder in another corporation). Therefore, the central concern of this note is direct operator liability.

43. See infra notes 74-75 and accompanying text.

44. BLACK'S LAW DICTIONARY 1033 (5th ed. 1979). See also Kapp v. Naturelle, Inc., 611 F.2d 703, 709 (8th Cir. 1979); Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981); DeWitt Truck Brokers v. W. Ray Fleming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976).

45. Chrome Plate, Inc. v. District Director of Internal Revenue, 614 F.2d 990, 996 (5th Cir. 1980); Rose Hall Ltd. v. Chase Manhattan Overseas Banking, 576 F. Supp. 107, 130 (D. Del. 1983).

46. See, e.g., Chrome Plate Inc., 614 F.2d at 996.

47. For a discussion regarding the extreme cost of environmental cleanup, see Proper Hazardous Waste Disposal is Cheaper, EPA Administrator Says, 9 Env't Rep. (BNA) 2082, 2082 (Mar. 4, 1979).
responsible subsidiary is dissolved prior to being sued, the assets of the subsidiary are frequently sold to another corporation or simply merged into the parent corporation. In either case, the party who cleaned up the waste may experience extreme difficulty in recovering all of the expenses it has incurred.

In such a situation, the party bringing suit may naturally look to the subsidiary’s parent for reimbursement. Under the customary presumption of limited liability, the party seeking recovery would be required to pierce the veil between the parent and the subsidiary to recover anything beyond the total capital of the subsidiary. However, the presumption of limited liability has traditionally been extremely difficult to overcome.

B. The Alter Ego Doctrine

While the doctrine of limited liability remains a well-established rule in the law of corporations, courts recognize several equitable exceptions to the rule. One such exception is known as the “alter ego” doctrine, or the “instrumentality rule.”

Where a parent corporation “totally dominates and controls its subsidiary,” the subsidiary may be considered merely the alter ego or instrument of its parent. In this situation, courts will allow the corporate veil to be pierced. However, courts have experienced several problems in applying the alter ego doctrine in CERCLA actions.

1. Alter Ego Doctrine as a Function of State Corporation Law

The alter ego doctrine is a vague concept which has been subject to a variety of interpretations. The confusion surrounding this concept can be attributed to several sources. Local interests have demanded that corporate law be developed primarily by state legislatures. Accordingly, standards for the alter ego doctrine often vary in relation to differing state corporate

49. See supra note 19 and accompanying text.
51. Id.
52. Equitable exceptions are generally found under circumstances where there has been an abuse of the corporate form. See, e.g., Van Dorn Co. v. Future Chemical and Oil Corp., 753 F.2d 565 (7th Cir. 1985) (when corporate form is abused equity warrants piercing the corporate veil). For example, two recognized exceptions are where the corporate form is used fraudulently or to carry out illegal purposes. See, e.g., United States v. Jon-T Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985).
53. Alter ego means “second self.” Under this doctrine, the court disregards the corporate entity and holds the individual shareholder (in this context, a parent corporation) responsible for acts knowingly and intentionally done in the name of the corporation (in this context, the parent’s subsidiary). The alter ego doctrine is also known as the “instrumentality rule.” See BLACK’S LAW DICTIONARY 71, 720 (5th ed. 1979).
54. Jon-T Chems., 768 F.2d at 691 (citing Nelson v. International Paint Co., Inc., 734 F.2d 1084, 1091-93 (5th Cir. 1984)). See generally Note, Corporate Veil, supra note 50.
55. Jon-T Chems., 768 F.2d at 691. See generally Note, Corporate Veil, supra note 50.
56. Note, Corporate Veil, supra note 50, at 857.
laws. Application of the doctrine is further complicated because cases in which the doctrine is appropriate are generally very fact-specific. Therefore, states have adopted inconsistent tests by which to determine whether the corporate veil should be pierced.

Rather than developing a workable standard, courts have instead articulated a "laundry list" of factors which aid in determining whether a subsidiary is, in fact, the alter ego of its parent. Most courts agree that an alter ego finding "rests on the totality of the circumstances." The presence of each factor is not required. Instead, courts look for any combination which sufficiently evidences parental domination of the subsidiary.

While some states consider only factors showing extreme control, others have applied a two-pronged test. Under this test, the first prong requires an examination of factors traditionally viewed as indicia of parental control over the subsidiary. The second prong requires that "if the acts are treated as those of the [subsidiary] corporation alone, an inequitable result will follow." Still other courts require a showing of fraud to establish abuse of the corporate form. Regardless of which test is used, an alter ego

57. However, there is frequently a great deal of confusion as to whether the state standard should be applied. Id. This problem is discussed at greater length at infra note 69 and accompanying text.


59. See generally Note, Corporate Veil, supra note 50.

60. These factors include:
   (1) the parent and the subsidiary have common stock ownership;
   (2) the parent and the subsidiary have common directors or officers;
   (3) the parent and the subsidiary have common business departments;
   (4) the parent and the subsidiary file consolidated financial statements and tax returns;
   (5) the parent finances the subsidiary;
   (6) the parent caused the incorporation of the subsidiary;
   (7) the subsidiary operates with grossly inadequate capital;
   (8) the parent pays the salaries and other expenses of the subsidiary;
   (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 formalities, such as keeping separate books and records and holding shareholder and board meetings.

Jon-T Chems., 768 F.2d at 691-92.

61. Id. at 694 n.8.

62. Id.


64. Note, Corporate Veil, supra note 50, at 854-55 (citing Automotoriz Del Golfo de Cal. S.A. v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957)).

65. Id. at 854.

66. Id.

finding depends heavily upon the facts of the particular case. Accordingly, there has been little uniformity in the application of the alter ego doctrine.

2. No Uniform Standard Under Federal Common Law

Problems associated with the alter ego doctrine are exacerbated in the context of federal question litigation (the setting of most CERCLA actions). Federal courts often hold that state law does not directly control federal question litigation. Courts have, in certain limited areas, found it necessary to espouse what has been termed as federal common law. Federal common law is typically created where courts desire uniformity in the application of a federal statute, but state law serves to frustrate the statute's broad intent. Cases involving CERCLA certainly appear to be one of those limited areas.

However, in search of uniformity, federal courts have encountered what has been referred to as a legal quagmire. Indeed, the federal common law concerning the alter ego doctrine is often less clear than if a particular state standard were controlling. Thus, while courts may look to federal common law to ensure uniformity in the application of certain CERCLA provisions, uniformity has yet to be established with respect to the alter ego doctrine.

3. Conflicting Policy Interests

Courts addressing the issue of a parent corporation's liability are clearly faced with conflicting policy interests. On one hand, the concepts of limited liability and the corporate veil are deeply rooted in our history. These entrepreneurial concepts which support risk taking have been instrumental in the development of our society. On the other hand, CERCLA's function is no less significant. Its broad purpose is to prevent further destruction of

68. See, e.g., FMC Fin. Corp. v. Murphree, 632 F.2d 413, 421-22 (5th Cir. 1980) (applying Illinois law).

69. Illinois v. Milwaukee 406 U.S. 91 (1972); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). For this reason, this note is not specifically concerned with Oklahoma law. However, there is some disagreement as to whether state or federal common law should control. This disagreement arises where, as here, a case involves a federal statute which has no express provisions regarding the federal statute's preemption of particular state statutes. For example, where a state has a statute specifically stating an alter ego standard and the federal statute is silent, there is disagreement as to whether that state's law should be applied. In such cases, the courts often look to legislative history behind the statute. Many courts have held that federal programs such as CERCLA mandate uniform application and thus must be governed by federal common law. United States v. Chem-Dyne Corp. 572 F. Supp. 802, 809 (S.D. Ohio 1983).

70. Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (citing United States v. Standard Oil Co., 332 U.S. 301, 308 (1947)) (Court held that development of federal common law is necessary where a federal rule of decision is needed to preserve unique federal interests, or where Congress has granted courts power to formulate substantive law).

71. See, e.g., Chem-Dyne Corp., 572 F. Supp. at 809.


73. See generally Douglas & Shanks, supra note 13.
our environment by effectuating cleanup operations and imposing liability on responsible parties.\(^74\)

Courts attempting to mesh the competing interests of these bodies of law are faced with a serious dilemma. Seemingly, one body of law must be eliminated in order to accommodate the other. Not surprisingly, courts have expressed different approaches as to the proper resolution of these problems.

### III. Recent Decisions: Derivative v. Direct Liability

Courts have recognized two basic approaches in resolving the issue of a parent corporation’s liability for its CERCLA-liable subsidiary. One approach adheres to traditional corporate doctrines, thereby requiring a plaintiff to pierce the corporate veil in order to hold the parent liable beyond its investment in the subsidiary.\(^75\) The other approach simply ignores the corporate veil-piercing requirement entirely.\(^76\) These two approaches and their underlying theories of support are discussed in the following three sections.

#### A. Protection of Traditional Corporate Doctrines

The issue of parental liability for a dissolved subsidiary was specifically addressed in *Joslyn Manufacturing. Co. v. T.L. James & Co.*\(^77\) In *Joslyn*, the Louisiana Department of Environmental Quality issued orders to certain parties, including Joslyn, requiring investigation and cleanup of a former creosoting plant in Bossier City, Louisiana. Joslyn brought a CERCLA action against T.L. James & Co., Inc. (James), a former parent of the Lincoln Creosoting Plant (Lincoln).


In *Kayser-Roth*, the lower court recognized this approach to contain two sub-approaches. Under one line of authority, courts hold liable as an “operator” any stockholder which manages the responsible corporation. These courts place significance on CERCLA’s definition of owner or operator which bars from liability “a person, who without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.” United States v. Kayser-Roth Corp., 724 F. Supp. 15, 20 (D.R.I. 1989) (citing *Shore Realty*, 759 F.2d at 1052 and *Northeastern Pharm. & Chem. Co.*, 579 F. Supp. at 848). Viewing this language, these courts reason that any person who holds indicia of ownership and does participate in management, is liable. *Id.*

The other line of decisions holds that a “stockholder, parent corporation, or any person associated with a facility,” regardless of whether he has ownership interest, may be held liable if such person controls the management of the responsible corporation. *Id.*

\(^77\) Joslyn Mfg., 893 F.2d at 80.
Joslyn claimed that because James owned and operated the subsidiary creosoting plant, it should be held directly liable for cleanup operations under CERCLA.78 Joslyn argued that it did not have to pierce the corporate veil to directly sue James.79 The Fifth Circuit rejected Joslyn's argument, holding that, under such circumstances, Joslyn could not recover unless it presented evidence that would warrant piercing the corporate veil between James and its subsidiary creosoting plant, Lincoln.80 

The Fifth Circuit further held that the circumstances did not warrant piercing the corporate veil.81 The court based this holding on several factors. First, Lincoln maintained its own books and records and held frequent shareholder and directors meetings.82 Second, Lincoln's daily operations were completely separate from those of James.83 Third, Lincoln and James filed separate tax returns.84 Finally, Lincoln paid its own bills and arranged for its own employee benefits.85 

B. Erosion of Traditional Corporate Doctrines

More recently, the First Circuit reached the opposite conclusion addressing the same issue in United States v. Kayser-Roth Corp.86 In Kayser-Roth, the United States brought action under CERCLA to recover cleanup costs resulting from a spill of hazardous substances. The release of these substances was found to have been caused primarily by Stamina Mills, Inc., a now-defunct corporation. Kayser-Roth Corporation (Kayser-Roth) was the parent corporation and sole shareholder of Stamina Mills, Inc.

Ignoring the traditional presumption of limited liability, the court held that Kayser-Roth was directly liable as an “operator” under CERCLA.87 The court relied most heavily on the fact that Kayser-Roth had exercised nearly total control over Stamina Mills.88 The court provided a number of factors showing such control.89

First, Kayser-Roth exerted total monetary control over Stamina Mills.90 Second, it placed restrictions on Stamina Mills' budget.91 Third, it issued a directive that subsidiary-governmental contact, including environmental matters, be channeled directly through Kayser-Roth.92 Fourth, any leasing, buying or selling by Stamina Mills required prior approval by Kayser-Roth.93

78. Id. at 82.
79. Id.
80. Id. at 83.
81. Id.
82. Id.
83. Id. at 83.
84. Id.
85. Id.
87. Id. at 28.
88. Id.
89. Id. at 27.
90. Id.
91. Id.
92. Id.
93. Id.
Fifth, any capital transfers or expenditures by Stamina Mills exceeding $5,000 required prior approval by Kayser-Roth. Finally, almost all director and officer positions at Stamina Mills were held by Kayser-Roth personnel. The court concluded that because Kayser-Roth had total control over Stamina Mills’ operations, it was, in fact, operating this subsidiary.

C. Theories Supporting the Differing Approaches

1. Derivative Liability Approach

Joslyn represents one approach in deciding cases involving corporate parent liability under CERCLA. That line of decisions adheres to the traditional corporate law doctrine of limited liability. Consequently, under this view, plaintiffs may seek reimbursement only from the violating corporation itself, not from its parent company or shareholders. Only where the facts show control sufficient to warrant piercing the corporate veil will these courts recognize an exception to the presumption of limited liability. Where the corporate veil can be pierced, courts impose derivative liability on the parent for the actions of its subsidiary. In reaching this conclusion, courts have generally provided two substantial arguments.

First, the concept of limited liability is well established in the law of corporations. This concept, which was developed to promote risk taking, has played a significant role in the expansion of industry and the growth of trade and commerce. While CERCLA’s goals are important, they certainly do not mandate completely doing away with an entire body of law which is so firmly rooted in our history.

Second, under fundamental principles of statutory construction, CERCLA’s language clearly does not justify such a total departure from well-established concepts of corporate law. CERCLA’s definition of owners

94. Id.
95. Id.
96. Id.
98. Id.
99. The term “derivative” is somewhat confusing. Under an alter ego finding, a court is essentially declaring that a parent corporation has so dominated its subsidiary so that the two seem to be one in the same. One may logically conclude that under such a finding, courts are simply holding a parent corporation directly liable. Indeed, alter ego is defined as “second self.” BLACK’S LAW DICTIONARY 71 (5th ed. 1979). However, courts instead view the parent’s liability in terms of an agency theory. See, e.g., In re Acushnet River, 675 F. Supp. 22, 32 (D. Mass. 1987). In other words, in cases of extreme parental control, the subsidiary is considered an agent of the parent. Id. Thus, it appears that the name “alter ego” is misleading in itself. This misleading terminology may be largely responsible for the conflicting approaches taken by the courts.
100. See Acushnet River, 675 F. Supp. at 32-34.
101. In fact, it has been further argued that a direct liability approach would “discourage investors, and reduce the number of solvent corporations” from which parties seeking recovery may obtain reimbursement. Id. at 32.
104. Joslyn Mfg., 893 F.2d at 82.
or operators does not include parent companies of wholly-owned CERCLA-
liable subsidiaries. Further, there is little evidence of legislative intent to
do away with the concept of limited liability in CERCLA actions. Therefore,
in the absence of express statutory language to the contrary, traditional
corporate doctrines should control the analysis of parental liability.

Courts utilizing the above rationale have upheld the corporate veil-piercing
requirement. However, the few courts which have addressed the issue have
carefully scrutinized factors such as those mentioned in the *Joslyn*
decision to determine whether the subsidiary is merely the alter ego of its
parent. In fact, at least one court faced with this precise issue allowed the
corporate veil to be pierced under the alter ego doctrine. Such a liberal
application of the alter ego doctrine is interesting as few courts have
addressed this issue.

2. Direct Liability Approach

Jurisdictions which have taken the *Kayser-Roth* approach claim that the
corporate veil need not be pierced. Under this line of decisions, courts
hold that parent corporations can be directly liable as “operators” under
CERCLA. Those courts also provide several significant reasons for their
conclusion.

First, requiring the traditionally strict standard of corporate veil-piercing
would allow parent corporations to escape liability by purposely undercap-
italizing or dissolving subsidiaries potentially liable under CERCLA. If
such parents continually escape liability, the Superfund, which is largely
comprised of taxpayers’ money, will require constant replenishment.

Second, CERCLA’s construction as a strict, joint and several liability
statute supports holding parent corporations directly liable. To determine
liability by focusing solely on the corporate form would frequently allow
those corporations which knew of, had capacity to prevent, and benefitted
from a release of hazardous substances to escape liability. Certainly,
Congress’ intent in enacting CERCLA was to impose liability on parties
who benefit from the pollution.

105. Id.
106. Id.
107. Id.
108. See *supra* note 75.
110. This may suggest a less rigorous standard for piercing the corporate veil in the CERCLA
context. This leniency indicates that courts on both sides of the issue are truly reaching the
same conclusions, despite language to the contrary.
111. See *supra* note 76.
112. See *supra* note 76 and accompanying text.
114. This idea has been explicitly addressed by at least one commentator. Allen, *supra* note
42, at 49.
49 (W.D. Mo. 1984).
Finally, an analysis of the legislative history behind CERCLA supports the imposition of direct liability on parent corporations.\textsuperscript{117} There is no language in the legislative history which would prevent holding parent corporations directly liable as operators.\textsuperscript{118} Because CERCLA is remedial in nature, its language should be construed liberally to prevent frustration of its legislative purpose.\textsuperscript{119} In other words, the mere corporateness of an entity should not be allowed to defeat CERCLA's purported goal.\textsuperscript{120} Therefore, the broad remedial intent behind CERCLA compels a departure from traditional corporate doctrines under these circumstances.\textsuperscript{121}

These arguments are indicative of the rationale behind the direct liability approach. Applying such rationale, courts supporting this approach firmly argue that a parent corporation may be directly liable as an operator. However, the \textit{Kayser-Roth} court recognized that for a parent to be liable as an operator of its subsidiary “requires more than merely complete ownership” and the general authority and control associated with such ownership.\textsuperscript{122} Interestingly, the \textit{Kayser-Roth} court also noted, “It is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary.”\textsuperscript{123} Most courts supporting the direct liability approach have, therefore, focused on factors which show extreme or total parental control over the subsidiary.

\textbf{IV. Analysis}

Unquestionably, courts disagree as to whether the corporate veil need be pierced to extend full liability to a parent corporation. This disagreement, however, is largely a function of the courts' differing interpretations of the alter ego doctrine. Clearly, courts on both sides of the issue have placed ultimate importance on the parent’s control over its subsidiary. In fact, most courts have consistently examined the same general factors in reaching a conclusion on the issue of parental control over the subsidiary.

In spite of the consistency in the factors examined, one critical factor has been applied exclusively by the direct liability line of decisions. Several courts implementing the direct liability approach have supported the imposition of liability where the parent corporation simply knew of, and had the capacity to prevent, a release caused by its subsidiary.\textsuperscript{124} This “awareness” factor will clearly be satisfied where parental control or domination is present. Nonetheless, under certain circumstances, that factor could be

\begin{itemize}
\item \textsuperscript{117} United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990).
\item \textsuperscript{118} Id.
\item \textsuperscript{119} See \textit{Shore Realty Corp.}, 759 F.2d at 1045.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} \textit{Kayser-Roth}, 910 F.2d at 27-28.
\item \textsuperscript{122} Id. at 27.
\item \textsuperscript{123} Id.
\end{itemize}
satisfied even where such control or domination cannot be established. In such a case, a parent corporation could be held liable even though it did not exercise direct control over its subsidiary. Therefore, that concept might allow liability to be imposed on a parent where none would exist under traditional notions of the alter ego doctrine.

Notwithstanding this exception, courts have apparently been concerned with the same general factors. While courts addressing this issue have applied different reasoning to reach different conclusions, these cases can largely be reconciled by a thorough analysis of differing factual circumstances. Yet in order to ameliorate further confusion, it is imperative to develop a uniform process by which courts may analyze and decide cases of this nature.

Commentators have suggested that parent corporations should be held "categorically liable" for their responsible subsidiaries. 125 While the nature of this rule undoubtedly lends itself to uniformity, it may also serve to penalize corporations for nothing more than having ownership of a responsible subsidiary. To recognize such a rule would be to entirely abandon the concept of limited liability.

Indeed, this theory proposes to entirely destroy the legal fiction of the corporate entity. Such a theory would clearly punish corporations which have relied on well-established rules of corporate law. Thus, while this approach may help effectuate the goals of CERCLA, it completely abandons traditional corporate doctrines.

Another author has proposed that individual officers of a corporation should be held liable on the basis of a theory of personal participation in tortious conduct. 126 A corporate officer is examined independently of the issue of corporateness. 127 While such a proposal has merit, it may lose applicability in the parent/subsidiary context.

Applying this theory by analogy to the parent/subsidiary setting, a parent corporation, which knew of and had the capacity to prevent a release by its subsidiary, may escape liability if it was not sufficiently "participating" in its subsidiary's tortious conduct. Several courts adhering to the direct liability approach placed great emphasis on this "awareness" factor. 128 Thus, under such circumstances, the theory may unnecessarily frustrate the goals of CERCLA.

Clearly, the ideal solution would be a rule which balances these competing policy interests, relaxing one body of law in order to accommodate the other.

125. See Allen, supra note 42; see also Note, Liability, supra note 21.
127. Id. at 971.
V. Proposed Solution: A Uniform Alter Ego Doctrine
Under the Federal Common Law

A proposed solution to the parent liability issue is the development of a uniform alter ego doctrine.129 Under this test, the court should focus solely on the issue of parental control over the subsidiary. For purposes of uniformity, the court should limit its initial focus to the following five factors:

(1) parental domination over the day-to-day operations and activities of the subsidiary;
(2) parental exertion of financial control over the subsidiary;
(3) parental disregard of basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings;
(4) gross undercapitalization of subsidiary operations;
(5) parental awareness of, benefit from, and ability to prevent the release of hazardous substances caused by its subsidiary.130

These factors should be given primary importance. If, however, these five factors are not conclusive on the issue of control, the court can look to other factors traditionally viewed as indicia of parental control.131 The ultimate question should be whether, in view of these factors, the subsidiary corporation is merely an instrument of its parent. If that question is answered in the affirmative, the parent should be held liable for any portion of a judgment which is incapable of being satisfied by its subsidiary.

The proposed test does not differ drastically from what some courts have already done by implication. Summarily, this test is an attempt to combine the factors considered important by courts on both sides of the issue. There are, however, several reasons why this test may present a more effective process by which to resolve the parent liability issue.

First, factors one through four have been used in a majority of the traditional alter ego tests. These factors are widely accepted as indicia of extreme parental control over a subsidiary. Additionally, because a court may look to other factors where those listed are not sufficient, the court maintains its discretion to reach a decision based upon the facts as a whole. Such discretion corresponds directly with legislative history recognizing CERCLA issues as warranting a case-by-case analysis.132 Therefore, a test fo-

129. A proposal similar to this one has been made by another author in a general corporate context. See generally Note, Corporate Veil, supra note 50. However, that proposal differs somewhat in that it contains two prongs. Additionally, the fifth factor of the solution proposed in this note adds an entirely different dimension to the concept of the alter ego doctrine.
130. This portion of the alter ego test is tailored to the precise circumstances presented by CERCLA violations. However, this factor could be generalized to apply to the violation of any federal statute which raises the alter ego issue.
131. See supra note 60.
cusing on these factors should appeal to courts which adhere to traditional corporate doctrines. At the same time, many of these same factors have been the ultimate concern of courts taking the opposite (direct liability) approach.

Second, the inclusion of the fifth factor adds a new dimension to traditional alter ego tests. This factor serves to prevent parent corporations from escaping liability under the traditional factors by simply developing other methods by which to control their subsidiaries. In addition, it encourages a parent that is aware of a hazardous release by a subsidiary to respond before the problem becomes more expensive. This factor also places the responsibility on the corporation which is benefitting from the hazardous release.

Nevertheless, consideration of this factor would not serve to punish a parent which is benefitting from the subsidiary, but for lack of control is unaware of the hazardous release. In short, this factor liberalizes the test so as to place greater significance on the substance of the parent/subsidiary relationship rather than on the form under which such relationship may be disguised. Therefore, this factor serves to promote a more equitable outcome.

A third benefit of this proposal is that it contains no requirement for fraudulent intent by the parent corporation. Because of the difficulty in proving fraud, this element has been somewhat of a barrier to piercing the corporate veil. However, fraud is not required for an alter ego finding in tort cases. Thus, because CERCLA liability is essentially grounded in tort, the element of fraud is, likewise, not required for an alter ego finding in CERCLA cases.

Further, the factors of this test make proof of purposeful undercapitalization or dissolution of the subsidiary to escape CERCLA liability unnecessary. Moreover, while parental awareness is a factor to be considered, such awareness is not mandated by the test. This test therefore harmonizes with the interpretation of CERCLA as a strict liability statute.

Fourth, the proposed test strikes a balance between competing policy interests. The factors of the test recognize the corporate form as a legitimate method by which an investing corporation may limit its liability. The test requires a finding of parental control sufficient to warrant piercing the corporate veil under the alter ego doctrine. It is also constructed to make only moderate deviations from existing law. Consequently, this test would certainly appeal to courts desiring to protect traditional corporate doctrines.

133. Courts considering the alter ego issue have expressed concern over this premise of substance over form. See, e.g., DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 685 (4th Cir. 1976) (where court held that in alter ego cases, courts should focus on reality, not form).

134. Some courts deem fraud an element essential to piercing the corporate veil in contract cases. See, e.g., United States v. Jon-T Chems., Inc., 768 F.2d 686, 692 (5th Cir. 1985). Other cases have held that fraud need not be shown at all. See, e.g., DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976).

135. See Comment, supra note 126, at 971.

136. Jon-T Chems., 768 F.2d at 692; see also Comment, supra note 126, at 971.
At the same time, the fifth factor and the absence of an intent requirement allow the broad remedial goals of CERCLA to overcome the corporate fiction where equity so demands. Accordingly, the test should also be readily accepted by courts adhering to the direct liability approach. Finally, this test strives for clarity and uniformity, both of which will enable a more effective resolution of the parental liability issue in future cases.

**Conclusion**

As expected, the enactment of CERCLA has dramatically affected many areas of the law. However, while CERCLA is a welcome addition, it does not warrant abandonment of other laws which have proven successful over time. Rather, courts should interpret CERCLA in harmony with other established laws. Such an interpretation can only be achieved by balancing the policy goals which underlie both CERCLA and existing laws. Moreover, courts must strive for uniformity in this balancing process.

CERCLA’s goals are certainly important. Its enactment was obviously a response to our nation’s desire to immediately curtail further destruction of the environment. However, the corporate doctrine of limited liability is equally important. Indeed, “it is on this assumption that large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.” Clearly, courts cannot ignore either of the important policies which underlie these laws. Therefore, the solution to this conflict is a uniform alter ego doctrine which strikes a balance between the competing policy interests.

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137. *Jon-T Chems.*, 768 F.2d at 690 (quoting Anderson v. Abbot, 321 U.S. 349, 362 (1944)).