The Demise of Limited Liability of Parent and Successor Corporations Under Superfund

Scott C. Whitney

John S. Donnellon

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hplj

Part of the Property Law and Real Estate Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hplj/vol4/iss1/3

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Property Law Journal by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
THE DEMISE OF LIMITED LIABILITY OF PARENT AND SUCCESSOR CORPORATIONS UNDER SUPERFUND

Scott C. Whitney*  
John S. Donnellon**

INTRODUCTION

In recent years, courts have grappled with the problem of the extent to which the enactment of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")\(^1\) and the Superfund Amendment and Reauthorization Act of 1986 ("SARA")\(^2\) has modified prior law pertaining to limited liability of corporations. This analysis will examine the impact of these legisla-

---

* Professor of Law, George Mason University School of Law; Adjunct Professor of Marine and Environmental Law, Virginia Institute of Marine Science. J.D. Harvard, 1953.
** Lt. Colonel U.S. Army; B.S. Notre Dame University; M.B.A. University of Indiana; J.D. George Mason University School of Law, 1991.

tive acts ("Superfund"), on two aspects of corporate liability: the liability of a parent corporation for the conduct of a wholly-owned or controlled subsidiary and the liability of a successor corporation for the conduct of a predecessor.

A clarification of Superfund's impact on liability limitations provided by established principles of corporation law is important for two reasons. First, the estimated cost of cleaning up known hazardous waste sites has escalated steadily to half a trillion dollars and will probably continue to escalate as more sites are identified and remediation costs increase. Second, Superfund remediation is a pri-

3. All references to Superfund, previously cited as 42 U.S.C. §§ 101-175, have been changed to reflect current Superfund citations at 42 U.S.C. §§ 9601-9675.

4. Apart from liability of parent and successor corporations, numerous courts have imposed Superfund liability on officers, directors, employees and shareholders as "persons," which § 9601(21) defines to include "individuals" who are found either to be "owners or operators" of a Superfund facility under § 9607(a)(1) and (2) or a "person" within the meaning of § 9607(a)(3) or (4). In these cases, liability is based upon Superfund's definition of responsible parties and is not based upon "piercing the corporate veil." See Comment, Liability of Corporate Officers Under CERCLA: An Ounce of Prevention May Be The Cure, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10377, 10378 (Sept. 1990); see also New York v. Shore Realty, 759 F.2d 1032, 1052 (2d Cir. 1985) (holding an individual who was both the principal shareholder and corporate officer liable); Vermont v. Staco, Inc., 684 F. Supp. 822, 831-32 (D. Vt. 1988) (liability imposed on manager who directed operations and controlling shareholders who participated in the general management and control); United States v. Northernaire Plating Co., 670 F. Supp. 742, 747 (W.D. Mich. 1987), aff'd, United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, R.W. Meyer, Inc. v. U.S., 494 U.S. 1057 (1990) (president admitted he was responsible for disposal of hazardous wastes); United States v. Carolina Transformer Co., 20 Envtl. L. Rep. 20953 (E.D.N.C. 1989) (holding liable former corporate officers who were found responsible for day-to-day operations when the contamination occurred); United States v. Medley, 17 Envtl. L. Rep. 20297 (D.S.C. 1989) (corporate officer who actively participated in management at the time hazardous wastes were disposed); United States v. Carolawn Co., 14 Envtl. L. Rep. 20699 (D.S.C. 1984) (liability for two corporate officers found to be responsible for day-to-day operations). This article will be confined to the liability of parent and successor corporations.

5. Compare the estimate in 126 CONG. REC. 26,360 (1980) of $44 billion with the estimate contained in the Office of Technology Assessment, Assessing Contractor Use in Superfund, 1 (1989), which, through assessment expenses, increases the EPA's estimate of $300 billion to $500 billion excluding "projections for cleanup of Department of Energy Facilities." Section 9605(a) of Superfund directs the President through the Administrator of the EPA to supplement the National Contingency Plan originally structured pursuant to Section 311 of Title 33 [Federal Water Pollution Control Act] to "include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants." Utilizing a "Hazard Ranking System," 40 C.F.R. § 300 (1990), embodying the criteria set forth in § 9605(a)(8)(A), the Administrator is directed by § 9605(a)(8)(B) to produce a National Priority List of "the known releases or threatened releases throughout the United States" and to revise and update the list annually. This activity "shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President [as delegated to the Administrator], taking into account to the extent possible, the population
ority national public health problem requiring prompt response.6

at risk, the hazard potential of the hazardous substance at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, the contamination or potential contamination of the ambient air . . . and other appropriate factors.”

6. In addition to its general remedial provisions, Superfund also created the Agency for Toxic Substances and Disease Registry (ATSDR), which reports directly to the Surgeon General of the United States. The Administrator of the ATSDR is directed

with the cooperation of the Administrator of the Environmental Protection Agency, the Commissioner of the Food and Drug Administration, the Directors of the National Institute of Medicine, National Institute of Environmental Health Sciences, National Institute of Occupational Safety and Health; Centers for Disease Control, the Administrator of the Occupational Safety and Health Administration, the Administrator of the Social Security Administration, the Secretary of Transportation and appropriate State and local health officials, to effectuate and implement the health related authorities of this chapter.


In addition to five categories of duties listed in § 9604(i)(1)-(5), the ATSDR is directed by Congress as follows:

(2)(A) Within 6 months after . . October 17, 1986, the Administrator for the Agency for Toxic Substances and Disease Registry (ATSDR) and the Administrator of the Environmental Protection Agency (EPA) shall prepare a list, in order of priority, of at least 100 hazardous substances which are most commonly found at facilities on the National Priorities List and which, in their sole discretion, they determine are posing the most significant potential threat to human health due to their known or suspected toxicity to humans and the potential for human exposure to such substances at facilities on the National Priorities List or at facilities to which a response to a release or a threatened release under this section is under consideration.

(2)(B) Within 24 months after . . October 17, 1986, the Administrator of ATSDR and the Administrator of EPA shall revise the list prepared under subparagraph (A). Such revision shall include, in order of priority, the addition of 100 or more such hazardous substances. In each of the 3 consecutive 12-month periods that follow, the Administrator of ATSDR and the Administrator of EPA shall revise, in the same manner as provided in the 2 preceding sentences, such list to include not fewer than 25 additional hazardous substances per revision. The Administrator of ATSDR and the Administrator of EPA shall not less often than once every year thereafter revise such list to include additional hazardous substances in accordance with the criteria in subparagraph (A).

(3) Based on all available information, including information maintained under paragraph (1)(B) and data developed and collected on the health effects of hazardous substances under this paragraph, the Administrator of ATSDR shall prepare toxicological profiles of each of the substances listed pursuant to paragraph (2). The toxicological profiles shall be prepared in accordance with guidelines developed by the Administrator of ATSDR and the Administrator of EPA . . .

In addition, the ATSDR is directed to:

For each hazardous substance listed pursuant to paragraph (2), the Administrator of ATSDR (in consultation with the Administrator of EPA and other agencies and programs of the Public Health Service) shall assess whether adequate information on the health effects of such substance is available. For any such substance for which adequate information is not available (or under development),
The purpose of this article is to determine the extent to which the Superfund system, which was fashioned by Congress to allocate liability between potentially responsible parties for the cost of the massive cleanup of hazardous sites, overrides the liability limitations provided by the law of corporations.

Part I of this analysis summarizes the history and the policy underlying the doctrine of limited liability for corporations as it is developed in the United States, and discusses the circumstances that

the Administrator of ATSDR, in cooperation with the Director of the National Toxicology Program, shall designate the initiation of a program of research designed to assure the health effects (and techniques for development of methods to determine such health effects) of such substance. Where feasible, such program shall seek to develop methods to determine the health effects of such substance in combination with other substances with which it is commonly found. Before assuring the initiation of such program, the Administrator of ATSDR shall consider recommendations of the Interagency Testing Committee established under section 4(e) on the Toxic Substances Control Act [15 U.S.C.A. Section 2603(e)] of the types of research that should be done. . . . Section 101(i)(5)(A)

Utilizing this and other information, the ATSDR is directed:

The purpose of health assessments under this subsection shall be to assist in determining whether actions under paragraph (11) of this subsection should be taken to reduce human exposure to hazardous substances from a facility and whether additional information on human exposure and associated health risks is needed and should be acquired by conducting epidemiological studies under paragraph (7), establishing a registry under paragraph (8), establishing a health surveillance program under paragraph (9), or through other means. In using the results of health assessments for determining additional actions to be taken under this section, the Administrator of ATSDR may consider additional information on the risks to the potentially affected population from all sources of such hazardous substances including known point or nonpoint sources other than those from the facility in question. Section 101(i)(6)(G).

Under this scheme, the ATSDR evaluates, inter alia, the foregoing data and:

If a health assessment or other study carried out under this subsection contains a finding that the exposure concerned presents a significant risk to human health, the President shall take such steps as may be necessary to reduce such exposure and eliminate or substantially mitigate the significant risk to human health. Such steps may include the use of any authority under this Act, including, but not limited to—

(A) provision of alternative water supplies, and

(B) permanent or temporary relocation of individuals. In any case in which information is insufficient, in the judgment of the Administrator of ATSDR or the President to determine a significant human exposure level with respect to a hazardous substance, the President may take such steps as may be necessary to reduce the exposure of any person to such hazardous substances to such level as the President deems necessary to protect human health. Section 9604(i)(11).

In addition to the ATSDR special regulatory system to protect public health, Superfund created a regulatory and liability system to protect natural resources administered by the Administrator of EPA and Federal and State Public Trustees of Natural Resources.

vitiate limitations on corporate liability and result in courts “piercing the corporate veil.”

Part II of the article discusses the extraordinarily comprehensive liability system established by Congress in Superfund. The most distinctive feature of Superfund liability is that it imposes strict liability retroactively for conduct that was not unlawful at the time it occurred. This liability system overrides existing systems of liability limitation such as sovereign immunity for the federal government and eleventh amendment immunity for the states. Likewise, municipal and local entities of government are not immune from the liability system imposed by Superfund.

Moreover, exceptions, exemptions and defenses from liability under Superfund are extremely narrow because the “innocent landowner” defense has been significantly restricted by Environmental Protection Agency (hereinafter “EPA”) regulations. Similarly, the

7. Overriding liability limitations on corporate entities is also referred to as the “alter ego” or “instrumentality” doctrine or “disregarding the corporate entity.” 18 C.J.S. Corporations § 12 (1990).


9. 42 U.S.C. § 9607(b) (1991) establishes the only defenses available under Superfund: There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

   (1) an act of God;
   (2) an act of war;
   (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions, or
   (4) any combination of the foregoing paragraphs.

The “innocent landowner defense” consists of § 9607(b)(3) which mentions the term “contractual relationship”.

79x591] THE DEMISE OF LIMITED LIABILITY
79x578] Part II of the article discusses the extraordinarily comprehensive liability system established by Congress in Superfund. The most distinctive feature of Superfund liability is that it imposes strict liability retroactively for conduct that was not unlawful at the time it occurred. This liability system overrides existing systems of liability limitation such as sovereign immunity for the federal government and eleventh amendment immunity for the states. Likewise, municipal and local entities of government are not immune from the liability system imposed by Superfund.

Moreover, exceptions, exemptions and defenses from liability under Superfund are extremely narrow because the “innocent landowner” defense has been significantly restricted by Environmental Protection Agency (hereinafter “EPA”) regulations. Similarly, the
scope of the "security interest" exception to the liability-affixing definition of "owner" was significantly narrowed by recent judicial decisions and is presently being reexamined by both Congress and the EPA.\textsuperscript{10}

Part III-A analyzes the recent, ostensibly conflicting decisions of federal courts of appeal, which the Supreme Court declined to review,\textsuperscript{11} and which address the extent to which parent corporations

---

The term 'contractual relationship' for the purpose of section 9607(b)(3) . . . includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threat of release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.


Even in cases in which the landowner meets this convoluted set of requirements, the EPA has taken the position that the only alternative to defending against liability in court, thereby incurring significant transaction costs, is to enter into a settlement with the EPA pursuant to the provisions of EPA's Guidance on Landowner Liability under § 9607(a)(1) of CERCLA, De minimis Settlements under § 9622(g)(1)(B) of CERCLA, and Settlements With Prospective Purchasers of Contaminated Property. (OSWER Directive No. 9835.9, June 6, 1989).

Thus, even if a party is able to qualify as an "innocent landowner," the party must either litigate to vindicate innocence or acquiesce in a "de minimis settlement" which implies, contrary to fact, a degree of liability, albeit "de minimis" in extent.

10. The "security interest" exemption is set forth in the last sentence of § 9601(20)(A) of Superfund which defines the term "owner or operator" as one of the categories of "covered persons" liable under § 9607(a) of Superfund. The last sentence provides: "[s]uch 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." The scope of the "security interest" exception under § 9601(20)(A) of Superfund became unsettled after the decision in United States v. Fleet Factors Corp., 901 F.2d 1550, reh'g denied en banc, 911 F.2d 742 (11th Cir. 1990), cert. denied, 111 S. Ct. 752. To clarify the extent to which a party having obtained "indicia of ownership primarily to protect his security interest" may participate in the management of a Superfund facility without becoming liable as an "owner or operator" under § 9607(a), there are at least three bills pending before the 102nd Congress: H.R. 1450, H.R. 1643, and S. 651. The Superfund, Ocean and Water Protection Subcommittee of the Senate Committee on Environment and Public Works held initial hearings in April, 1991. Moreover, the EPA has drafted regulations to clarify the statutory provision. The draft is presently under review by the Office of Management and Budget pursuant to Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

will be held liable for the acts of wholly-owned or controlled subsidiaries under the expansive liability regime created by Superfund. Part III-B considers other decisions by federal courts of appeal under Superfund, which the Supreme Court has also declined to review, concerning the liability of successor corporations for the acts of predecessors.

The analysis in this article supports certain conclusions concerning the extent of Superfund authority. First, the logic and structure of Superfund compels the view that it overrides state law allowing limited liability to parents and successors if they qualify as potentially responsible parties under Superfund's liability provisions. The alternative to this conclusion would be to interpret Superfund as specifically singling out parent and successor corporations from a retroactive comprehensive liability system that has overridden sovereign immunity and the eleventh amendment and allows only the most narrow defenses and exemptions for other categories of "persons" as defined by Superfund.

Second, even if the logic and structure of Superfund is not interpreted as expressly overriding the state law providing for limited liability for parent and successor corporations, Superfund clearly articulates a federal purpose and policy to be achieved which may not, under controlling Supreme Court precedent, be frustrated or thwarted by state law. Instead, it is clear that federal common law of Superfund would supersede discordant state law.

Thus, this analysis suggests that the pervasive system of retroactive liability for remediation of hazardous Superfund sites imposed by Congress and the narrow exceptions and limited defenses allowed by the Act, compel the conclusion that Congress intended to override the doctrine of limited corporate liability, a doctrine that is antithetical to the systematic scheme of liability mandated by Superfund. Moreover, as a matter of policy there is no discernible reason why persons doing business using the corporate form should receive preferential non-liability when other liability limiting concepts for federal, state and local governments have been overridden.

Finally, this analysis concludes that given the confusion and analytical disarray in the judicial decisions construing Superfund, and given the Supreme Court's apparent disinclination to clarify the law, legislative action may well be the most expeditious way to clarify the law and carry out the evident intent of Congress.
I. THE DOCTRINE OF LIMITED LIABILITY FOR CORPORATIONS AND CIRCUMSTANCES WHICH LEAD COURTS TO "PIERCe THE CORPORATE VEIL"

A. Origin and History of the Doctrine of Limited Liability for Corporations

The doctrine of limited liability in both the United States and England did not originate contemporaneously with the development of the corporation or its counterpart, the English joint stock company. In both countries, a considerable period elapsed between the acceptance of the concept that a corporation was a legal "person," separate from the managers and investors participating in the enterprise, and the adoption of the principle of limited corporate liability. Historically, limited liability was a subsequent refinement devised to protect the personal fortunes of investors by confining their liability to the assets actually invested in the emerging industrial enterprises. Limited liability for corporations was not established in England until 1855.

In the early years of the United States there was a pronounced mistrust of corporations, and Jeffersonian policy "did not want to facilitate the aggregation of large amounts of capital in private enterprises." Accordingly, during the early nineteenth century corporate charters could only be granted by explicit acts of the state legislatures and numerous restrictions were routinely imposed. The Supreme Court's decision in Dartmouth College v. Woodward "signalled the gradual ascendancy of a new view that corporations should be seen as essentially private arrangements among investors.

12. P. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS, chs. 1, 2, & 4 (1987). The original purpose of the corporate form was to provide continuity of existence to avoid disruption when human members of the enterprise died or left the enterprise. As William Blackstone expressed it: "[a]ll the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." W. BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND 456 (Legal Classics Ed. 1983).


16. For example, the scope of the firms activities, its duration, and the amounts of capital it was entitled to raise were specifically limited. Id. at 113-14.

rather than as state-created concessions." Two further developments led to the end of the restrictive approach to chartering corporations in the United States. First, during the Jacksonian era of economic reform, an effort to provide equal access to corporate charters led to liberalized statutory requirements for incorporation. Second, despite the implications of Paul v. Virginia, states began to compete with each other to attract commercial activity because, once a few states had enacted statutes providing for limited liability, the concept spread rapidly for fear that capital investment would be attracted to states with statutes offering more protective limited liability. This trend continued with few exceptions, until limited liability had become a part of the corporate form of doing business throughout the United States for most of the twentieth century. The theoretical basis for the concept of limited liability is that a corporation

19. Id.
20. 75 U.S. (8 Wall.) 168 (1868). This case was one of the early Supreme Court decisions to articulate the idea that the corporate entity would act to limit liability. Justice Field, writing for a unanimous court, stated:

Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that charter, and not the rights which belong to its members as citizens of a State. (75 U.S. at 180) . . . Now a grant of corporate existence is a grant of special privileges to [a corporation], enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specifically provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporate entity entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

75 U.S. at 181.

is an entity separate and apart from its shareholders, officers, and persons controlling it.\textsuperscript{22}

This concept of limited liability also extends to parent corporations that own subsidiary corporations:

A corporation is a legal entity separate and apart from its stockholders. \textit{United States v. Davidson}, 5 Cir., 1943, 139 F.2d 908, and the corporate fiction should not be disregarded because of identity of corporate names, stockholders and officers and the fact of ownership of capital stock in one corporation by another. \textit{Maule Industries, Inc. v. Gerstel}, 5 Cir., 1956. 232 F.2d 294. Since New Orleans and Northeastern Railroad Company owns and actively operates its own business, the mere fact that Southern Railroad Company owns all of the stock does not render the holding company responsible for the actions of its subsidiary. \textit{Atlantic Coastline Railroad Co. v. Shields}, 5 Cir., 1955, 220 F.2d 242. The circumstances here do not warrant a disregard of the separate entity of the two corporations.\textsuperscript{23}

Another variation of the liability limitation pertaining to the corporate form is the concept of successor liability. This liability theory applies when one corporation sells its assets to another and then liquidates the corporation after distributing the proceeds of the sale of assets to the shareholders. Subsequently, it may be determined that such assets include a site that qualifies as a Superfund site, thereby triggering liability for remediation costs. The pre-Superfund rule governing this type of transaction is that apart from four narrow exceptions, the successor does not acquire the liabilities of the predecessor.\textsuperscript{24

\begin{footnotesize}
\begin{enumerate}
\item H. Henn & J. Alexander, \textit{Law of Corporations} at 345; see also \textit{Terry v. Yancey}, 344 F.2d 789 (4th Cir. 1965).
\item Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 308-09 (3d Cir.), \textit{cert. denied}, 474 U.S. 980 (1985); \textit{Dayton v. Peck, Stow & Wilcox Co.}, 739 F.2d 690, 692 (1st Cir. 1984); \textit{Tucker v. Paxson Mack Co.}, 645 F.2d 620, 622 (8th Cir. 1981); \textit{Trevis v. Harris Corp.}, 565 F.2d 443, 446 (7th Cir. 1977). The exceptions are: (1) if the successor expressly or impliedly agreed to assume the predecessor's liabilities; (2) if the transaction is a fraudulent attempt to escape liability; (3) if the transaction amounts to a \textit{de facto} merger or consolidation; or (4) if the successor is a "mere continuation" of the predecessor. \textit{Id.}; see also 15 W. Fletcher, \textit{Cyclopedia of the Law of Private Corporations} § 7122, at 231 (rev. perm. ed. 1983).
\end{enumerate}
\end{footnotesize}
B. Circumstances that Override Limited Corporate Liability: "Piercing the Corporate Veil" and Related Doctrine

The United States Supreme Court has held that although limited liability is the rule, not the exception, a corporation's separate legal identity may be disregarded if that corporation is used for fraudulent purposes, when the corporation is undercapitalized, or when it would "defeat a legislative policy, whether that was the aim or only the result of the arrangement."\(^{25}\) Expressed in metaphorical language, there are circumstances in which courts will adopt the "alter ego doctrine" which holds that courts will "pierce the corporate veil" and hold a parent corporation liable for the acts of a subsidiary under certain circumstances.\(^{26}\)

When a dispute arises in federal litigation as to whether the


\(^{26}\) The best statement of the circumstances to invoke the "alter ego doctrine" is set forth in Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160-61 (7th Cir. 1963):

In order to establish that a subsidiary is the mere instrumentality of its parent, three elements must be proved: control by the parent to such a degree that the subsidiary has become a mere instrumentality; fraud or wrong by the parent through its subsidiary; e.g., torts, violation of a statute or stripping subsidiary of its assets; and unjust loss or injury to the claimant, such as insolvency of the subsidiary. (citations omitted).

In determining whether the requisite degree of control is maintained by the parent corporation, many factors are relevant. It is the presence of these factors in the proper combination which is controlling. Factors generally considered by courts are as follows:

(a) The parent corporation owns all or most of the capital stock of the subsidiary.
(b) The parent and subsidiary corporations have common directors or officers.
(c) The parent corporation finances the subsidiary.
(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
(e) The subsidiary has grossly inadequate capital.
(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
(i) The parent corporation uses the property of the subsidiary as its own.
(j) The director or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.
(k) The formal legal requirements of the subsidiary are not observed.
limited liability of corporations is to be overruled and the corporate
veil pierced, there are two basic categories of cases. If the jurisdic-
tion of the court is based on diversity of citizenship, the court will
look to state substantive law to determine whether to override lim-
ited liability.

In cases involving federal statutes, in which jurisdiction is based
on federal question rather than diversity of citizenship, two situa-
tions are possible. If the federal statute, by its terms, applies, the
federal jurisdiction is explicit and preemptive. This precept is based
upon well-settled Supremacy Clause doctrine. The second possibility
is that whenever a federal statute unequivocally establishes a system
of liability that effectively "pierces the veil" established by state law,
such federal legislation trumps the state law providing corporations
with limited liability. The Supreme Court has directly addressed this
second situation:

The policy underlying a federal statute may not be defeated by
. . . an assertion of state power. [citation omitted] . . . [N]o state
may endow its corporate creatures with the power to place them-
selves above the Congress of the United States and defeat the fed-
eral policy . . . which Congress has announced.27

Thus, even in cases where no unequivocal federal statutory pro-
visions explicitly override the "veil" of limited liability, there is
nonetheless a settled principle that "[i]f application of state law
would arguably interfere with an identifiable federal policy or inter-
est, but not amount to a conflict which would preclude application of
state law, [courts] must proceed to an examination of the relative
strengths of the state's interest in having its rules applied."28 The
Supreme Court has also explained the rationale for this doctrine:
"[a]part from considerations of [nationwide] uniformity, we must
also determine whether application of state law would frustrate spe-
cific objectives of federal programs. If so, we must fashion special
rules solicitous of these federal interests."29

The cases that have addressed such situations in which rival
federal-state interests have been involved have tended to adopt a di-
47
chotomous analysis by which the law of the state of incorporation

28. Georgia Power Co. v. Sanders, 617 F.2d 1112, 1118 (5th Cir.), cert. denied, 450
29. United States v. Kimball Foods, Inc., 440 U.S. 715, 728 (1979); see also United
prevails in disputes concerning the internal affairs of the corporation, but federal law prevails in disputes involving external matters, especially if uniform national policy and standards are clearly important. The "internal-external" dichotomy has been adopted by courts due to the increasing size and importance of national corporations:

Public and private rights created by federal law should not be allowed to be thwarted by each state's protective concern for local corporate enterprise; the need to further federal policies in alter ego disputes must rebut the general presumption under federal common law that state law should be adopted as the federal rule of decision.

This calculus has been adopted in a variety of federal-state situations including federal labor law, employment discrimination, income tax law, bankruptcy, patent law, medicare regulation, social security, truth in lending law, and admiralty.

Thus, even if Superfund did not contain unequivocal language overriding limited corporate liability, the judicial policy or practice of applying federal law over state law would seem to apply a fortiori in cases involving Superfund in which protection of the nation's public health and the environment is involved. As shown hereafter, in-

30. See Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law, and ... except where federal law expressly requires [otherwise], state law will govern the internal affairs of the corporation.") (emphasis added).
38. See Brunenkant v. Celebrezze, 310 F.2d 355, 358-59 (7th Cir. 1962).
41. For a detailed discussion of the allocation of authority between the federal government and state law under Superfund, see infra notes 91-97 and accompanying text. Superfund
vocation of the state law doctrine of limited corporate liability is particularly inappropriate in a regulatory system that has fashioned a virtually unprecedented system of comprehensive, retroactive and strict liability.

II. SUPERFUND IMPOSES A COMPREHENSIVE SYSTEM OF LIABILITY FOR THE COST OF REMEDIAL ACTION MANDATED BY LAW

Congress has enacted an all-encompassing system of liability which contains few defenses and extremely narrow exemptions or exceptions. Moreover, Superfund imposes liability retroactively for actions that were lawful when taken. Courts have repeatedly rejected claims that such retroactive application of Superfund violates the due process provisions of the Constitution on the grounds that retroactive application of Superfund carries out a legitimate legislative purpose in a rational manner and that cost recovery imposed on liable parties does not constitute a taking in violation of the fifth amendment of the Constitution. Other courts have disposed of the constitutional issue by holding that Superfund is not retroactive in the constitutional sense because it is applied prospectively.

A. Federal Liability Under Superfund

Superfund provides that each department, agency, and instrumentality of the United States, including the executive, legislative and judicial branches, shall be subject to, and comply with Superfund in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including specifically compliance with the liability provisions of section 9607. Moreover, all guidelines, rules, regulations and criteria which are applicable to preliminary assessments carried out under Superfund for facilities at which hazardous substances are located, that are appli-

specifically allows states to deviate from federal law provided the deviation is more stringent. See 42 U.S.C. § 9614(a) (1991). ("Nothing in this chapter shall be construed or interpreted as preemting any state from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.") (emphasis added).


cable to evaluations of such facilities under the National Contingency Plan, that are applicable to inclusion on the National Priorities List, or that are applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent that such guidelines, rules, regulations and criteria are applicable to other facilities. 

Section 9620(a)(1) and (2), thus, constitute a clear and comprehensive waiver of sovereign immunity. This waiver is further emphasized by the provision that no department, agency, or instrumentality of the United States may adopt or utilize any guidelines, rules, regulations and criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the EPA to govern other regulated entities.

The only material exceptions that apply to the federal government are the time period requirements, the provisions pertaining to bonding, insurance, or financial responsibility, and provisions pertaining to national security. The federal government is subject to the notice and disclosure provisions of Superfund and is also subject to detailed procedural requirements including those pertaining to a special Federal Agency Hazardous Waste Compliance Docket.

---

45. Id. § 9605.
46. Id.
47. Id. § 9620(a)(2).
48. Id.
49. Id. § 9620(a)(3).
50. Id.
51. Id. § 9620(j).
52. 42 U.S.C. § 9620(b) (1991) provides that:
   Each department, agency, and instrumentality of the United States shall add to the inventory of Federal agency hazardous waste facilities required to be submitted under Section 3016 of the Solid Waste Disposal Act [42 U.S.C.A. § 6937] (in addition to the information required under Section 3016(a)(3) of such Act) [42 U.S.C.A. § 6937(a)(3)] information on contamination from each facility owned or operated by the department, agency, or instrumentality if such contamination affects contiguous or adjacent property owned by the department, agency, or instrumentality or by any other person, including a description of the monitoring data obtained.
53. 42 U.S.C. § 9620(c) (1991) provides that:
The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the “docket”) which shall contain each of the following:
   (1) All information submitted under section 3016 of the Solid Waste Disposal Act [42 U.S.C.A. § 6937] and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this chapter with respect to the facility.
Within eighteen months after October 17, 1986, the EPA "shall take steps to assure that a preliminary assessment is conducted for each facility on the docket." Moreover, a detailed mandatory system of "required actions" is imposed on the federal government including conducting a "remedial investigation and feasibility study" ("RI/FS") for each facility included on the National Priorities List, commencement of remedial action based on the RI/FS, and completion of the remedial action pursuant to the terms of the interagency agreement between the EPA and the responsible federal agency. Each department, agency, or instrumentality of the federal government responsible for compliance with Superfund must file an annual report to Congress disclosing its progress in complying with Superfund.

(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act [42 U.S.C.A. § 6925 or 6930].

(3) Information submitted by the department, agency, or instrumentality under section 9603 of this title.

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the docket during the immediate preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection.

54. 42 U.S.C. § 9620(d)(1991) provides further:

Following such preliminary assessment, the Administrator shall, where appropriate:

(1) evaluate such facilities in accordance with the criteria established in accordance with section 9605 of this title under the National Contingency Plan for determining priorities among releases; and

(2) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria.

Such criteria shall be applied in the same manner as the criteria are applied to facilities which are owned or operated by other persons. Evaluation and listing under this subsection shall be completed not later than 30 months after October 17, 1986.

55. Id. § 9620(e)(1).

56. Id. § 9620(e)(2).

57. Id. § 9620(e)(3).

58. Id. § 9620(e)(4).

59. 42 U.S.C. § 9620(e)(5)(1991) provides:

Such report must include as a minimum:

(A) A report on the progress in reaching interagency agreements under this section.

(B) The specific cost estimates and budgetary proposals involved in each interagency agreement.
In addition, the federal government is governed by specific provisions concerning settlements with other potentially responsible parties, their relations with state and local counterparts, and the transfer of property by federal agencies.

(C) A brief summary of the public comments regarding each proposed inter-agency agreement.

(D) A description of the instances in which no agreement was reached.

(E) A report on progress in conducting investigations and studies under paragraph (1).

(F) A report on progress in conducting remedial actions.

(G) A report on progress in conducting remedial action at facilities which are not listed on the National Priorities List.

With respect to instances in which no agreement was reached within the required time period, the department, agency, or instrumentality filing the report under this paragraph shall include in such report an explanation of the reasons why no agreement was reached. The annual report required by this paragraph shall also contain a detailed description on a State-by-State basis of the status of each facility subject to this section, including a description of the hazard presented by each facility, plans and schedules for initiating and completing response action, enforcement status (where appropriate), and an explanation of any postponements or failure to complete response action. Such reports shall also be submitted to the affected States.

60. Id. § 9620(e)(6).

61. Id. § 9620(f).

62. 42 U.S.C. § 9620(h)(1991) provides:

(1) Notice.

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to be released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

(2) Form of notice; regulations

Notice under this subsection shall be provided in such form and manner as may be provided in regulations promulgated by the Administrator. As promptly as practicable after October 17, 1986, but not later than 18 months after October 17, 1986, and after consultation with the Administrator of the General Services Administration, the Administrator shall promulgate regulations regarding the notice required to be provided under this subsection.

(3) Contents of certain deeds

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain —

(A) to the extent such information is available on the basis of a complete search of agency files —
B. State Liability

The eleventh amendment to the United States Constitution creates partial sovereign immunity for states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."\(^{63}\)

The Supreme Court interpreted this amendment to preclude suits for monetary damages in federal courts even when jurisdiction is based on the presence of a federal question.\(^{64}\) Congress may, however, override this immunity when it acts pursuant to power granted by section five of the fourteenth amendment provided it makes its intent to override "unmistakably clear."\(^{65}\)

The Supreme Court has extended this doctrine to include suits under Superfund for monetary damages brought by a citizen of another state against one of the States.\(^{66}\) The Court based its decision on the doctrine that Congress has the power to abrogate eleventh amendment immunity when exercising its plenary authority to regulate interstate commerce. The Court specifically held that:

The remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup. See, e.g., 42 U.S.C. § 9613(f)(1) (1986 ed., Supp. IV). Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different

(i) a notice of the type and quantity of such hazardous substances,
(ii) notice of the time at which such storage, release, or disposal took place, and
(iii) a description of the remedial action taken, of any, and
(B) a covenant warranting that —
(i) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and
(ii) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.

The requirements of subparagraph (B) shall not apply in any case in which the person or entity to whom the property is transferred is a potentially responsible party with respect to such real property.

63. U.S. Const. amend. XI.
64. Hans v. Louisiana, 134 U.S. 1 (1890).
projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties. . . . If States, which comprise a significant class of owners and operators of hazardous-waste sites, . . . need not pay for the costs of cleanup, the overall effect on voluntary cleanups will be substantial. This case thus shows why the space carved out for federal legislation under the commerce power must include the power to hold States financially accountable not only to the Federal Government, but to private citizens as well. 67

The majority of the courts also held that Superfund made Congressional intent to override state sovereign immunity “unmistakably clear” and based that decision, inter alia, on two general terms in the statute that describe those who may be liable under Superfund for the cost of remedial action: “persons” and “owners or operators” in section 9607(a). 68

“Person,” as defined in section 9601(21), specifically includes “states” and “owner or operators” as defined in section

67. Id. at 2285.
68. 42 U.S.C. § 9607(a) (1991) provides:
   Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
   (1) the owner or 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 such hazardous substances were disposed of,
   (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
   (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . . .
69. 42 U.S.C. § 9601(21) (1991) defines the term “person” to mean “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. 42 U.S.C. § 9601 (1991) (20) defines “owner or operator”:
   (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 or 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 . . . .
9601(20)(A) by reference to activities that a "person" may undertake.

The Supreme Court further noted that although the first phrase of section 9601(20)(D) excluded "states" from the category of "owners or operators" if they "acquired ownership or control [of a facility] involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquired title by virtue of its function as sovereign,"71 that nevertheless states were not completely exonerated:

The exclusion provided under this paragraph shall not apply to any state or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such state or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.72

C. Municipal and Local Government Liability

It is equally clear that the provisions of Superfund apply to municipalities and entities of local government. As noted above, the liability provisions of section 9607 designated as "covered persons" the "owner and operator" of a facility and "any persons" covered by subsections 9607(b)(2), (3) and (4).73 Section 9601(21), which defines "person" for purposes of section 9607, specifically designates "municipality" and a "political subdivision of a state" as covered entities.

The exclusion provided by section 9601(20)(D), as discussed above with respect to the liability of states, applies with equal force to "local governments," a term that has been interpreted as encompassing municipalities.74 Accordingly, the exclusion from liability, provided by the first sentence of section 9601(20)(D) (with respect to the ownership or control of facilities acquired involuntarily through bankruptcy, tax delinquency, abandonment, or other cir-

72. Id. at 8.
73. See 42 U.S.C. § 9607 (1991); supra note 68.
cumstances), does not apply to any state or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under § 9607 of this title. 76

Thus, with respect to governmental entities — federal, state, and local — the provisions of Superfund apply with full force and effect.

D. Corporate Liability Under Superfund

The definition of “person” under Superfund is the linchpin of the scope of the liability system fashioned by Congress. In 1989, the Supreme Court held that “[t]he remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous waste contamination may be forced to contribute to the costs of cleanup.”77 As noted previously, the term “person” is defined comprehensively 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.”77 The term “person” is systematically employed throughout Superfund in connection with the term “owner or operator.”78 For example, the notification requirements respecting released substances impose nondiscretionary duties upon “any person in charge of a vessel or an offshore or an onshore facility,”79 as well as “any person who owns or operates or who, at the time of disposal, owned or operated . . . a facility.”80 The provisions dealing with “Response Authorities” also link “persons” with owners or operators.81 The provisions governing “Abatement Actions” also explicitly apply to “persons” as defined in section 9601(21).82

78. See supra note 68 and accompanying text.
79. 42 U.S.C. § 9603(a); see also § 9603(b) 1991.
80. Id. § 9603(c).
81. See 42 U.S.C. § 9604(a) 1991 “When the President determines that such [response] action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action . . . .” (emphasis added).
82. 42 U.S.C. § 9606(a) and (b).
Significantly, the liability provisions use the terms "owner," "operator," and "person" interchangeably as "covered persons." Although used interchangeably, each statutory term imports a unique meaning, which must be read together to articulate the full scope of the comprehensive liability system Congress fashioned in Superfund. Whichever type of "person" is involved in a given case—be it the federal government, a state, a municipality, a private corporation, or an individual—Superfund provides that such person is liable under section 9607 if the person is an "owner or operator" under section 9607(a)(1) or (2) a "person" within subsections (3) or (4).

This pattern of language continues in the civil penalties and awards provision and is particularly prominent in the contribution provision, which authorizes "any person" to seek contribution from "any other person" who is liable or potentially liable under sections 9607(a) or 9606. This provision explicitly provides that such claims for contribution "shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law."

In addition, the provisions governing the settlement process are also clearly preemptive. Whenever any person who is a potentially responsible party has entered into settlement pursuant to section 9613, that person "shall not be liable for claims for contribution regarding matters addressed in the settlement." Moreover, such settling party may bring suit for contribution against persons not party to the settlement. The United States or any state may likewise bring suit "against any person who has not so resolved its liability [by a section 9613 settlement]." Again, the statute makes explicitly clear that "[a]ny contribution action brought under this paragraph shall be governed by Federal law."

Like other major federal environmental statutes, Superfund
explicitly addresses the role of state law and authorizes enactment of state law establishing *additional* state liability or requirements with respect to releases of hazardous substances within a state: "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing *any additional liability or requirements* with respect to the release of hazardous substances within such State."\(^92\) This language clearly authorizes state law variations from the provisions of Superfund, but only if the state provision is more stringent than the federal requirement. There is literally nothing in Superfund that can be construed as allowing provisions of state law to exempt parents, successors, or responsible corporate officers, directors, and shareholders from the liability imposed by Superfund.

Given this pervasive pattern of federal statutory provisions and the evident intent of Congress to fashion a retroactive system of strict liability,\(^93\) which the Supreme Court has recognized applies to "everyone who is potentially responsible for hazardous waste contamination. . . ."\(^94\) it is clear that Superfund preempts and overrides the state law doctrine of limited corporate liability both as to


\(^93\) Unless the facts of the case indicate that liability is divisible, the standard of liability under Superfund is strict and "joint and several." United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); see *supra* note 4. This rule was established by federal common law:

While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm. *See Shore Realty*, 759 F.2d at 1042 n. 13; United States v. Chem-Dyne, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983). In each case, the court must consider traditional and evolving principles of federal common law, (footnote omitted) which Congress has left to the courts to supply interstitially.

Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260 n. 8 (1979). When such persons cause a single and indivisible harm, however, they are held jointly and severally liable for the entire harm. *Id.* (citing *Restatement (Second)* of *Torts* § 433A (1965)). We think these principles, as reflected in the *Restatement (Second)* of *Torts*, represent the correct and uniform federal rules applicable to CERCLA cases.

Section 433A of the Restatement provides:

(1) Damages for harm are to be apportioned among two or more causes

where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

*Restatement (Second) of Torts* § 433A (1965); *see also* *Monsanto*, 858 F.2d at 171-72.

\(^94\) *Pennsylvania*, 491 U.S. at 21.
parents and as to successors.

Even if the above provisions of Superfund stating that federal law controls were to be ignored, and even if the plain language of section 9614(a) was to be disregarded, the Supreme Court has made it clear that federal common law would still control. For instance, any "silence . . . in federal legislation is no reason for limiting the reach of federal law, . . . [because] the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." Absent such interstitial judicial interpretation of federal statutes, the application of the federal statute would impermissibly vary from one forum state to another and would "change whenever state courts issued new decisions on piercing the corporate veil." Absent such interstitial judicial interpretation of federal statutes, the application of the federal statute would impermissibly vary from one forum state to another and would "change whenever state courts issued new decisions on piercing the corporate veil." Absent such interstitial judicial interpretation of federal statutes, the application of the federal statute would impermissibly vary from one forum state to another and would "change whenever state courts issued new decisions on piercing the corporate veil."

As shown subsequently in Part III, whenever federal courts have invoked state law doctrine of limited corporate liability, it has produced one of two deleterious results. First, if the court enforces the state law doctrine, it thereby creates a judge-made exception to the pervasive, comprehensive, and retroactive system of liability fashioned by Congress in Superfund. To date, fortunately, only the Court of Appeals for the Fifth Circuit has reached such an aberrant result. Second, even those courts that do not circumvent the Superfund liability system in the manner of the Joslyn decision are nevertheless indulging in irrelevant and unnecessary analysis concerning whether "to pierce the corporate veil," since the state law doctrine of limited liability is totally inapplicable according to the principles discussed above.

III. JUDICIAL DECISIONS ADDRESSING SUPERFUND'S IMPACT ON THE STATE LAW DOCTRINE OF LIMITED CORPORATE LIABILITY

Two categories of cases have arisen which involve issues of the

---


interface between Superfund and the state law doctrine of limited corporate liability: the parent-subsidiary cases, and the successor liability cases.

A. Parent Liability For The Acts of a Wholly-Owned or Controlled Subsidiary

On February 19, 1991, the Supreme Court denied petitions for writs of certiorari to review ostensibly conflicting or at least inconsistent decisions concerning the issue of whether a parent corporation is liable under Superfund for response costs resulting from the release of hazardous substances at a subsidiary corporation's facility.\(^98\) Joslyn held that Superfund, by its terms, does not impose liability on a parent corporation for response costs resulting from the release of a hazardous substance by a subsidiary on the basis of the parent's ownership and control of the subsidiary.\(^99\) In reaching this decision, the court relied on an analysis of section 9601(20)(A) of Superfund which defines the term "owner or operator" as used in section 9607(a)(2) and which is one of the provisions governing liability under Superfund. The court held "[s]ignificantly, CERCLA does not define "owners" or "operators" as including the parent company of offending wholly-owned subsidiaries."\(^100\) The court based this conclusion upon a statutory analysis that compared the wording of section 9601(20)(A)(ii) with that of section 9601(20)(A)(iii), noting that the latter section employed the phrase "any person who owned, operated or otherwise controlled activities at such facility," whereas the former provision employed the phrase "any person owning or operating such facility." The court concluded that this difference in phrasing was dispositive with respect to liability, "[n]o such 'control' test appears in subsection (ii), the subsection at issue in this case, and we will imply none."\(^101\) The court further stated:

Joslyn urges this court to read CERCLA's definition of "owner or operator" liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute. In doing so, Joslyn urges us to follow the several courts, including the Second Circuit, which have extended CERCLA liability to parents. See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United

\(^99\) Joslyn Mfg., 893 F.2d at 82-83.
\(^100\) Id. at 82.
\(^101\) Id. at 83.
The analysis upon which this decision is based is flawed in several major substantive respects. First, the Fifth Circuit's analysis of Superfund ignores the logic and structure of the Act described previously in Part II, which shows unmistakable congressional intent to fashion an all-inclusive liability system applicable to all entities, including specifically the federal government, states, municipalities, local governments, corporations, individuals and others, imposing strict, and joint and several liability for persons responsible for releases of hazardous substances, and permitting only the most narrow defenses and exemptions. Moreover, the court did not attempt to justify its strangulated interpretation of "corporation" in section 9601(21) nor does any such justification exist. As the Third Circuit noted in a similar situation: "[i]t is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues, including corporate successor liability. The meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the statute." 103

The Third Circuit proceeded to read "corporation" to include "successor corporations" because "[t]he Act [Superfund] views response liability as a remedial, rather than a punitive measure whose primary aim is to correct the hazardous condition. . . . [T]he obligation to take necessary steps to protect the public should be imposed on a successor corporation." 104 This principle applies with equal force to the parent-subsidiary relationship.

Second, the Court's reliance on the difference in language between subsections 9601(20)(A)(ii) and (iii) is facially spurious.
Leaving out the well-recognized fact that, due to hasty drafting and time exigencies, there are infirmities of draftsmanship in Superfund that render close textual analysis of dubious value, the use of the phrase "or otherwise controlled activities at such facilities" in section 9601(20)(A)(iii) does not, on its face, pertain to the liability determinative term "owner." The absence of that phrase in section 9601(20)(A)(ii), even if intended by Congress to have substantive significance, cannot, for several reasons, have the substantive significance the court attributes to it. Most obviously, the phrase "owned, operated or otherwise controlled activities at each such facility" is phrased disjunctively and therefore lists three separate bases for liability. Thus, under this language the parent's "ownership" of the subsidiary by itself is sufficient to result in liability under Superfund.

There is no question that T.L. James in *Joslyn* owned the subsidiary because the court of appeals did not disturb that finding by the district court. There is also no question that such ownership of the subsidiary included ownership of all of its assets including the "Superfund" facility, the existence of which was also found by the district court and affirmed by the Fifth Circuit. Moreover, the court's analysis effectively ignored the undisputed fact that the parent not only owned or controlled 100% of the stock of the subsidiary, and hence effectively owned the facility in question, but also ignored the fact that the parent had interceded in the affairs of the subsidiary to replace an operating officer with a parent-designated substitute in order to achieve more profitable operations and when this did not occur, liquidated the subsidiary. This conduct effectively amounted to participating in the "operation" of the subsidiary within the meaning of Superfund. Thus, from the record, T.L. James appears to have been owner and operator of the subsidiary and consequently to have "otherwise controlled" the subsidiary, including terminating it when it was no longer profitable.

The third major flaw in the Fifth Circuit's decision is that having rejected liability for the parent under its constricted interpretation of Superfund, it totally ignored the federal common law of Superfund and proceeded to apply state law. It held that a parent corporation may be liable for the subsidiary's acts only if, under state law, the separate incorporation "is used as a sham, to perpetuate a fraud or avoid personal liability." Based on state law, the

105. *Joslyn Mfg.*, 893 F.2d at 81.
106. *Id.* at 81-82.
107. *Id.* at 83.
court concluded that "the facts here militate against piercing the corporate veil." Accordingly, the court affirmed the decision of the district court granting defendant's motion for summary judgment. Thus, both the district court and the court of appeals based their decisions upon the state law concept of limited corporate liability. This recourse to state law instead of federal common law violates the well-established doctrine discussed in Part II of this article. Where the federal purpose of a law would be contravened by recourse to state law, federal common law interpreting the federal statute trumps state law in order to effectuate the policy and purpose of the federal statute.

The United States participated in Joslyn as amicus curiae to the court of appeals to express its theory of parent corporation liability and urged the case be remanded for further findings of fact relevant to other established theories of corporate liability. Interestingly, the United States did not advocate the imposition of liability on parent corporations based on the control inherent in the ownership of subsidiaries liable under Superfund, but would rather base cost recovery suits against parent corporations on "established" state law theories of corporate liability. Specifically, the United States suggested that the court consider remand to the district court to reopen the record for evidence whether the parent was liable based on the activities of its officers or employees in controlling or operating the subsidiary's facility. The court of appeals did not address the government's theory directly, and furthermore, it did not discuss the United State's amicus presentation.

Given the position in the amicus brief of the United States, and the denial of certiorari by the Supreme Court in Joslyn, the likelihood that the law may be clarified by anything less than legisla-

108. Id.
109. Id. at 84.
111. Id.
112. Id. at 14-25.
114. The United States did not support petitioner's (Joslyn's) argument that parents were liable under Superfund for the violations of wholly-owned subsidiaries, but rather argued for remand to determine whether the facts would support liability under other established theories of corporate liability.
tive action seems remote. The Fifth Circuit clearly perceived the issue to be whether Superfund imposes liability on a parent corporation solely because the parent corporation owns a subsidiary that is itself liable under the statute. The Fifth Circuit is the only court of appeals as yet to confront this issue. As shown hereafter, other courts which have found parent corporations liable have based those decisions, inter alia, upon findings of fact that either justify "piercing the corporate veil" under governing state law, or by applying different state laws which impose liability on corporations (that is, for the commission of tortious conduct).

In Kayser-Roth, the Court of Appeals for the Fifth Circuit affirmed a district court decision that the parent of a wholly-owned subsidiary, found to have Superfund liability, was liable as an "operator" of the subsidiary. The court stated that "Congress, by including a liability category in addition to owner (operators') connected by the conjunction 'or,' implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership." Thus, "[g]iven this grammatical construction and the broad definition of 'person,' [section 9601(21)] corporate status, while relevant to determine ownership, cannot shield a person from operator liability. In addition, the legislative history provides no indication that Congress intended 'all persons' who are 'operators' to exclude parent corporations." The court concluded that "our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA."

The court distinguished Joslyn on the ground that it "is concerned primarily with owner rather than operator liability" and noted that Kayser-Roth was being held liable for its activities as an operator, not for the activities of its subsidiary. The court opined that "it is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary" and observed in dicta that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary."

115. Kayser-Roth, 910 F.2d 24, 26 (1st Cir. 1990).
116. Id.
117. Id.
118. Id. at 27.
119. Id.
Having articulated an “active involvement” test, the court adopted and applied a “total influence and control standard,” that is, a standard that appropriately applies to “owners.” Thus, the court inconsistently relied upon five factors found to exist by the court below as showing that the parent “exercised pervasive control” over the subsidiary.\(^{120}\)

As a practical matter these factors are not significantly different from those exercised by the parent in *Joslyn* in which the parent terminated an unsatisfactory executive of the subsidiary, substituted its own replacement to resume a profit-making operation, and when that effort was unsuccessful, liquidated the company.\(^{121}\) In both cases the parent “had the power to control the release or threat of release [of the hazardous substance], had the power to direct the mechanisms causing the release, and had the ultimate ability to prevent and abate damage.”\(^{122}\)

Although each parent possessed similar power to control their respective subsidiaries, each was treated differently. The *Joslyn* court determined that despite such power and despite de jure ownership, the parent was not an “owner” under Superfund; yet in *Kayser-Roth*, similar control and de jure ownership was held to be “more than sufficient to be liable as an operator under CERCLA.”\(^{123}\)

Thus, the decisions of the courts of appeal which have addressed the parent-subsidiary issue are seriously flawed, and if not ostensibly conflicting, are certainly confusing and possess little precedential value.\(^{124}\)

---

120. The five factors are:
1) its total monetary control including collection of accounts payable; 2) its restriction on Stamina Mills’ financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills’ leasing, buying or selling of real estate first be approved by Kayser-Roth; 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5,000; and finally, its placement of Kayser-Roth personnel in almost all Stamina Mills’ director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out.

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

121. *See supra* notes 105-06 and accompanying text.

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

123. *Id.*

124. Decisions by district courts contribute further analytical variations. For example, in Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988) the court held the parent corporation (Chase Instruments), the subsidiary that owned the land on which the “facility” was located (Keeper Corporation), the subsidiary that operated the “facility” (Staco, Inc.), and the of-
B. Liability of "Successor" Corporations for Acts of Predecessors Which Violate Superfund

Three circuit courts have directly ruled on the issue of successor liability, and all have held successor corporations liable for the actions of predecessors which trigger liability under Superfund.

In the earliest decision addressing this issue, Smith Land, had acquired real property containing a hazardous waste site from a predecessor who acquired the property from defendants, Celotex and Rapid-American Corporation, (hereinafter "defendant-successors"). The defendant-successors were the successors to the corporation which created the site, Phillip Corey Company (hereafter "Corey"). The defendant-successors refused to contribute to the cost of remediation incurred by plaintiff pursuant to a settlement agreement with the EPA. Plaintiff brought suit for contribution under, inter alia, section 9613(f) of Superfund, alleging defendant-successors were "covered persons" under section 9607(a). The district court granted defendant-successor’s motion for summary

---

...
judgment on the state law doctrine of caveat emptor. The Third Circuit reversed on the ground that contribution claims "shall be governed by federal law" and noted that the doctrine of "caveat emptor" is not included in the defenses enumerated in Superfund.\textsuperscript{126} In addition, the court held that "several considerations . . . lead us to conclude that this venerable doctrine is not in keeping with the policies underlying CERCLA\textsuperscript{127} and concluded that "the doctrine of caveat emptor is not a defense to liability for contribution but may only be considered in mitigation of amount due."\textsuperscript{128}

Although the court conceded that Superfund does not explicitly address the issue of successor liability, it recognized that "Congress expected the courts to develop a federal common law to supplement the statute" and concluded that

\begin{quote}
[t]he concerns that have led to a corporation's common law liability of a corporation for the torts of its predecessor are equally applicable to the assessments of responsibility for clean-up costs under CERCLA. . . . Just as there is liability for ordinary torts or contractual claims, the obligation to take necessary steps to protect the public should be imposed on a successor corporation.\textsuperscript{129}
\end{quote}

The court also stressed the importance of national uniformity because "otherwise, CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability."\textsuperscript{130}

On August 6, 1990, the Court of Appeals for the Ninth Circuit issued its amended decision affirming a district court's grant of summary judgment filed by third-party defendant L-Bar Products, Inc., the corporate successor of Industrial Mineral Products, Inc. (IMP) which had marketed a product called "slag," a by-product of Asarco's copper refining operation.\textsuperscript{131} The "slag," sold by IMP to plaintiff was used as ballast to stabilize the ground in log-sorting yards, but it also reacted with acidic wood waste precipitating heavy metals into the soil and ground water, thereby creating a Superfund

\begin{footnotes}
\item 126. \textit{Id.} at 89.
\item 127. \textit{Id.}
\item 128. \textit{Id.} at 90.
\item 129. \textit{Id.} at 91. The court further noted that the costs associated with clean-up must be absorbed. Congressional intent supports the conclusion that when choosing between whether taxpayers or a successor corporation should pay, the successor should bear the cost. \textit{Id.} at 92.
\item 131. \textit{Louisiana-Pacific Corp. v. L-Bar Products, Inc.}, 909 F.2d 1260 (9th Cir. 1990).
\end{footnotes}
THE DEMISE OF LIMITED LIABILITY

site. The court of appeals held that although Congress failed to explicitly address corporate successor liability under CERCLA, it nonetheless did intend to impose such liability. The Ninth Circuit also held that the Smith Land analysis "is equally applicable to successor liability in the context of an asset sale" as well as an acquisition or merger because of the need for national uniformity in the successor liability area and the possibility that CERCLA's purposes could otherwise be frustrated by state law. The court proceeded to adopt the "traditional rules of successor liability" as the applicable federal common law. Under these rules "asset purchasers are not liable as successors unless one of four exceptions applies." After analyzing the facts of record in connection with the four exceptions, the court concluded that third party plaintiff Asarco had failed to meet any of the four bases for successor liability.

The most recent court of appeals decision addressing successor liability under Superfund purports to "reach the same result as the Third Circuit in Smith Land (CERCLA makes a successor corporation liable where there has been a formal merger) and as the Ninth Circuit in Louisiana-Pacific (the statute would make a successor corporation liable where all the conditions of a de facto merger are present)." But the court proceeds to emphasize that it

132. Id. at 1262-63. The court stated:


Id. at 1263.

133. Id. at 1263.

134. Id.

135. Id. These exceptions are: "(1) The purchasing corporation expressly or impliedly agrees to assume the liability; (2) The transaction amounts to a 'de facto' consolidation or merger; (3) The purchasing corporation is merely a continuation of the selling corporation; or (4) The transaction was fraudulently entered into in order to escape liability." Id.

136. Id. at 1265. The record established that L-Bar did not continue IMP's "slag" business, but rather IMP had discontinued the "slag" business nine months before the acquisition of assets.


138. Id. at 1245.
reaches "this determination from our construction of section 9607(a) in its context within CERCLA, however, and find[s] that it is not necessary to fashion a federal common law rule." 139 Instead, according to the court, "when Congress wrote 'corporation' in CERCLA it intended to include a successor corporation." 140

The court's determination was based upon the distinction between courts developing federal common law, "a process of case-by-case judicial decisions in the common law tradition," 141 and courts which detect "only gaps in definitions or descriptions" and "fill these interstices of the statute by exercising its authority to interpret or construe the statute." 142 While the court acknowledged that "the line separating statutory interpretation and judicial lawmaking is not always clear and sharp," the distinction is fundamental because "[t]he authority to construe a statute lies at the very heart of judicial power and is not subject to rigorous scrutiny." 143

The court held that section 9607(a) "is not ambiguous" but rather "may be considered textually incomplete in the sense that it fails to spell out in so many words the universally accepted rule that a reference to liability of corporations includes successors—a rule that we conclude Congress intended to apply to the definition it used." 144 The court explained that "[i]t was not creating or fashioning federal common law when [it] adopt[ed] an interpretation of a statute that is in harmony with a universally accepted rule of law." 145

The only technical defect in this analysis is that section 9607(a) does not, as the court states, use the term "corporation," but rather employs the word "persons," a term that is used interchangeably with and fleshes out the scope of the terms "owner or operator." 146

139. *Id.*
140. *Id.*
141. *Id.* (quoting Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 95 (1981)).
142. *Id.*
143. *Id.* The court noted that in contrast "[b]efore a federal court may fashion a body of federal common law, it must find either (1) that Congress painted with a broad brush and left it to the courts to 'flesh-out' the statute by fashioning a body of substantive federal law, or (2) that a federal rule of decision is necessary to protect uniquely federal interests." (citations omitted).
144. *Id.* at 1246.
145. *Id.* The court further explained: "[W]e are merely saying that the drafters of CERCLA were not blind to the universal rule that 'corporation' includes a successor corporation resulting from a merger." *Id.*
146. See note 4 and accompanying text.
The term "person" used in this fashion in section 9607(a) is defined to include, *inter alia*, "corporations" by section 9601(21). However, the substance of the court's argument is correct albeit flawed by inaccurate articulation.

Thus, although all three circuits abjure use of state law pertaining to successor liability, the Third and Ninth Circuits rely on federal common law whereas the Sixth Circuit adopts a different rationale:

We are not creating or fashioning federal common law when we adopt an interpretation of a statute that is in harmony with a universally accepted rule of law. Rather, we are merely stating that the drafters of CERCLA were not blind to the universal rule that "corporation" includes a successor corporation resulting from a merger and that the drafters intended "corporation" to be given its usual meaning.  

**CONCLUSION**

There is no doubt that it would be anomalous to conclude that the pervasive system of liability fashioned by Superfund for the federal government, state governments, municipalities, local governments, individuals, associations, partnerships, consortiums, joint ventures, commercial entities, interstate bodies, and corporations should exclude, without so stating, liability for parent and successor corporations. Moreover, even if the logic and structure of Superfund were not clear, federal common law would control instead of the heterogeneous rules of the several states. However, given the aberrant decisions pertaining to parent corporations and the Supreme Court's denial of certiorari, it may be necessary to enact clarifying legislation to overcome the confusion that presently exists.

147. *Anspec Co.*, 922 F.2d at 1246.