Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive

David S. Bakst

Follow this and additional works at: https://lawdigitalcommons.bc.edu/iclr

Part of the Comparative and Foreign Law Commons, Environmental Law Commons, and the Torts Commons

Recommended Citation

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.
Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive

INTRODUCTION

One of the most basic doctrines of corporate law in the United States is that the corporation is a separate legal entity from its shareholders.¹ A corollary principle is that the shareholders of the corporation are only liable for corporate obligations to the extent of their investment.² Under traditional corporate rules, a subsidiary corporation's liability is also limited to the amount of its shareholders' investment, and the parent cannot be held liable for the subsidiary's obligations.³

Like the United States, the European Union (EU) has traditionally recognized the corporation as a separate legal entity from its shareholders.⁴ European Company Law generally limits shareholder liability to the amount of investment in the corporation.⁵ The rule of limited liability applies not only when the shareholders are individuals but also

² For example, DEL. GEN. CORP. LAW § 102(b)(6) states that the certificate of incorporation may include:

A provision imposing personal liability for the debts of the corporation on its stockholders or members to a specified extent and upon specified conditions; otherwise, the stockholders or members of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts. [emphasis added].

See also REV. MODEL BUS. CORP. ACT § 6.22, which limits shareholder liability for corporate obligations: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." Id.
³ See CARY & EISENBERG, supra note 1, at 91.
⁵ See WERLAUFF, supra note 4, at 25. While this is the general rule, the shareholders may become personally liable if they fail to follow the basic corporate formalities. See id.
when they are other corporations. Under traditional European Company Law, like U.S. law, a parent corporation could not be reached to satisfy obligations of a subsidiary corporation.

Under both United States and European Union Company Law, courts have ignored the corporate entity doctrine and have "pierced the corporate veil," holding shareholders personally liable for corporate obligations. The guiding principle in both systems is that: "[A] corporation will be looked upon as a legal entity as a general rule... but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Piercing the corporate veil is the central issue in parent corporation liability for the environmental torts of their subsidiaries. The general rule, under both United States and EU law, is that if the parent had a certain level of control over the subsidiary, the court may lift the corporate veil and hold the parent liable. Thus, in both legal systems, the victims of environmental torts can reach the assets of parent corporations to satisfy a judgment if they can establish the requisite level of control.

The most significant difference between United States and EU law is the extent and scope of liability once the veil has been pierced. In the United States, once the veil of a subsidiary is pierced for an environmental tort, the parent is strictly liable for damages under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). Courts interpreting CERCLA have held that the fact that the parent did not know about the prohibited conduct of the subsidiary is completely insignificant in determining liability. Under

---

6 See Pennington, supra note 4, at 33.
7 For application of this doctrine in European Company Law, see Werlauff, supra note 4, at 25. In the United States, this doctrine was first articulated in United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (7th Cir. 1905).
8 The consequence of being regarded as an association of persons is that the investors are personally liable for the association's obligations. See Milwaukee Refrigerator Transit Co., 142 F. at 255; see also, Werlauff, supra note 4, at 25.
EU law, on the other hand, even when the veil of the subsidiary has been pierced, the parent cannot be held liable for environmental torts without fault.12 Thus, the potential for liability to parent corporations is much greater in the United States than in the EU. This potential liability affects both foreign and domestic investment in the United States and contributes to decreasing domestic production, unemployment, and an increasing trade deficit.13

The best way to protect citizens on both continents from environmental harm and create a global economic level playing field is for the EU to adopt the Proposed Civil Liability Directive.14 Under the Proposed Civil Liability Directive, parties responsible for environmental torts would be held strictly liable for damages.15 Under this system a parent corporation could not escape liability for the environmental torts of its subsidiary simply because it lacked knowledge of the harmful conduct.16 Enacting the Proposed Civil Liability Directive would, therefore, create a level playing field for corporations on both continents.

Part I of this Note examines the doctrine of piercing the corporate veil in the United States. Part II focuses on the issue of piercing the veil of subsidiary corporations for environmental torts in the United States. This section also considers the impact of CERCLA on parent corporation liability and focuses on the way courts have imposed liability under CERCLA. Part III analyzes the doctrine of piercing the corporate veil in the EU, with a special emphasis on the role of the Economic Unit Theory in the area of piercing the corporate veil. Part IV highlights the necessary conditions for reaching the parent corporation for environmental torts committed by a subsidiary in the EU. This section also analyzes the Proposed Civil Liability Directive and discusses its potential impact. Finally, this Note concludes that the United States must pressure the EU to enact the Proposed Civil Liability Directive in order to level the global economy and protect citizens from environmental torts.

16 See id.
I. The Doctrine of Piercing the Corporate Veil in the United States

A basic principle of corporate law in the United States is that the shareholders of a corporation are not liable for the obligations of the corporation beyond the capital they invest in exchange for their shares. U.S. law treats the corporation as a separate entity from its shareholders, directors, or officers. Most state corporation statutes simply do not recognize the possibility of holding shareholders personally liable for corporate obligations. The Delaware statute, for example, shields the shareholders of a corporation from personal liability unless an express provision in the certificate of incorporation provides otherwise. The Model Business Corporation Act provides that the shareholders may become personally liable for corporate obligations only if the articles of incorporation expressly impose liability or the shareholder(s) becomes liable "by reason of his acts or conduct." Both statutes fail to specify the types of conduct that lead to personal liability for corporate obligations.

To hold shareholders personally liable for corporate obligations, a court must pierce the corporate veil. The most common reasons for piercing the corporate veil are: (1) the finding that the corporation is merely an "alter ego" of the shareholders; (2) fraud and misrepresentation; and (3) undercapitalization. Each factor merits separate analysis.

A. The Alter Ego Doctrine

The "alter ego" doctrine holds that the corporate veil must be pierced when: (1) a subsidiary corporation is owned and controlled by

---

22 See Thompson, supra note 19, at 1064. Professor Thompson studied over 2000 piercing the corporate veil cases and found that when the "alter ego" issue was involved, courts pierced the corporate veil over 95% of the time. Id.
23 Id. When misrepresentation was at issue the court lifted the veil 94% of the time. Id.
24 Id. In undercapitalization cases the court lifted the corporate veil 73% of the time. Thompson, supra note 19, at 1064.
the parent and the subsidiary has been relegated to the status of the “alter ego” of the parent; and (2) where recognition of them as separate entities would lead to an inequitable or fraudulent result.\footnote{25} In \textit{Zaist v. Olson},\footnote{26} the court stated that:

If plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation of one corporation for the benefit of the whole enterprise.\footnote{27}

Some courts impose liability even in the absence of inequitable conduct, for example, where the subsidiary has been dominated by the parent and lacks any independent business purpose other than to serve the interests of the parent.\footnote{28} Other courts, however, do not impose liability unless the plaintiff demonstrates inequitable or wrongful conduct which caused the plaintiff’s injury, regardless of the excessive exercise of control and the lack of indicia of separate existence.\footnote{29}

\textbf{B. Misrepresentation}

Shareholders may become personally liable for corporate obligations when a corporation misrepresents the nature of its activities, its ability to perform, its financial condition, or its financial structure.\footnote{30} In \textit{Pau-}

\begin{footnotes}
\footnotetext[25]{See RRX Industries, Inc. v. Lab-Con, Inc., 772 F.2d 543, 545 (9th Cir. 1985); Van Dorn Co. v. Future Chemical & Oil Corp., 753 F.2d 565, 569–70 (7th Cir. 1985); Flynt Distribution Co. v. Harvey, 734 F.2d 1389, 1399 (9th Cir. 1984); FMC Financial Corporation v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980).}
\footnotetext[26]{227 A.2d 552, 558 (Conn. 1967).}
\footnotetext[27]{Id.}
\footnotetext[28]{See United States v. JON-T Chemicals, Inc., 768 F.2d 686 (5th Cir. 1985), \textit{cert. denied}, 475 U.S. 1014 (1986); Farkar Company v. R.A. Hanson, 583 F.2d 68, 71 (2d Cir. 1978). For example, in \textit{In re Sbarro Holding}, the court stated:}
\footnotetext[29]{The corporate veil will be pierced (1) to achieve equity, even absent fraud, where the officers and employees of a parent corporation exercise control over the daily operations of a subsidiary corporation and act as the true prime movers behind the subsidiary’s actions and/or (2) where a parent corporation conducts business through a subsidiary which exists solely to serve the parent.}
\footnotetext{See Frank H. Easterbrook & Daniel R. Fischel, \textit{Limited Liability and the Corporation}, 52 U.
mier v. Barge B.T., for example, the sole shareholder of a corporation was held personally liable for expenses incurred in the operation of a tug leased by the corporation. The court found that the defendant lied to a creditor with respect to ownership of the barge pledged as security for a loan. The defendant argued that he made the representation in good faith based on his belief that he could arrange for a consensual security interest with the actual owner of the barge. In refusing to consider good faith as a defense to misrepresentation, the court noted that:

"Good faith is immaterial. If good faith were to become a defense in actions of this type, every defendant would claim good faith of some sort even though he did exactly what he intended to do in misrepresenting certain facts to an innocent party. . . . The corporate identity can be pierced to prevent not only fraud, but any injustice."

Some courts, eager to protect the public from inaccurate information, have held that confusion, even without a positive misrepresentation, is a sufficient basis for piercing the corporate veil. In Cumberland Farms, for example, the plaintiff leased baking racks to a number of subsidiaries owned by the defendant. When the subsidiaries refused to return the racks, plaintiff sought recovery from the parent. Plaintiff argued that the parent and the subsidiary used a common name, operated out of the same office, and caused confusion as to the real identity of the enterprise. The court held that the structure of the enterprise created confusion as to its real identity and held the parent liable for the claims against the subsidiaries.

---

32 Id. at 1038-39.
33 Id. at 1039.
34 Id. at 1037-38.
35 Id. at 1039.
37 Id. at 749.
38 Id. at 749-50.
39 Id. at 750.
40 Id. at 752-53.
C. Undercapitalization

When a corporation is formed without enough capital to meet the basic needs of its business, the shareholders become personally liable for corporate obligations. The traditional rationale for piercing the corporate veil in these cases is that undercapitalization is a deliberate abuse of the corporate form and the shareholders must account for this abuse. In 1946, Professor Ballantine explained the policy behind the undercapitalization rule:

It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is ground for denying the separate entity privilege.

According to Professor Ballantine, undercapitalization is determined by examining whether or not the corporation was properly capitalized at the time of formation.

The major issue in undercapitalization cases is the appropriate time for determining whether the corporation was properly capitalized. In *DeWitt Truck Brothers v. W. Ray Fleming Fruit Co.*, the Fourth Circuit held that the determination of adequate capitalization goes far beyond the moment of formation. The court viewed the obligation to provide adequate capital as a continuing obligation which exists throughout the corporation’s existence. Courts that have adopted this standard view a continuous excess of liabilities over assets as an indication of undercapitalization.

41 For examples of undercapitalization, see Weisser v. Mursam Shoe Corp., 127 F.2d 344, 348 (2d Cir. 1942) (holding that a representation that a subsidiary's liabilities are the same as the parent is a basis for piercing the corporate veil); Yacker v. Weiner, 109 N.J. Super. 351, 263 A.2d 188 (N.J. Super. Ct. Ch. Div. 1970).

42 See Easterbrook & Fischel, supra note 30, at 113.

43 HENRY W. BALLANTINE, BALLANTINE ON CORPORATIONS, § 129, 302-03 (1946).

44 Id. at 302.

45 540 F.2d 681 (4th Cir. 1976).

46 Id. at 688.

47 Id. The court noted that: “[T]he obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter ... during the corporations operations.” Id. at 686.

48 See United States v. Healthwin-Midtown Convalescent Hospital & Rehabilitation Center Inc., 511 F. Supp. 416, 419 (C.D. Cal. 1981); see also Bucyrus-Erie Corp. v. General Products, 643 F.2d
In *Re Mobile Steel Co.*, the court set a limit on shareholder obligations to provide adequate capitalization for the corporation. In *Mobile Steel*, the court noted that a corporation is adequately capitalized when:

> [R]easonably prudent men with a general background knowledge of the particular type of business and its hazards would determine was reasonable capitalization in light of any special circumstances which existed at the time of incorporation. This general definition is helpful because it focuses on the culpability of the organizer stockholders and pegs the assessment to more specific standards which do not involve open-ended quantitative question.

Unlike the Fourth Circuit, the Fifth Circuit would only pierce the corporate veil in an undercapitalization case if the corporation was undercapitalized at the time of formation.

A major issue in the undercapitalization cases is whether inadequate capitalization, without more, is enough to pierce the corporate veil. In *Minton v. Cavaney*, the court held that inadequate capitalization, in and of itself, is enough to pierce the corporate veil. In *Minton*, the defendant was a director, secretary, and treasurer of a corporation that operated a public swimming pool which they leased from the owner. The plaintiff sued the defendant personally when his daughter drowned in the pool, and he could not recover the $10,000 wrongful death judgment from the corporation. In holding the defendant personally liable for the judgment, Justice Traynor noted that: "[O]wners of a corporation are personally liable when they... provide

---

413, 418 (6th Cir. 1981) (upholding instruction to determine undercapitalization by looking at the entire period the corporation was in business).

49 563 F.2d 692 (5th Cir. 1977).

50 Id. at 702-03.

51 Id.

52 In *Pierson v. Jones*, 625 P.2d 1085, 1087 (Idaho 1981), the court applied this test in determining that a corporation was adequately capitalized. *Id.* The court relied on the accounting firm's testimony that the corporation was properly capitalized at the time of formation. *Id.* The court stated that: "[F]inancial inadequacy is measured by the nature and magnitude of the corporate undertaking or the reasonableness of the cushion for creditors at the time of the inception of the corporation." *Id.*


54 Id. at 475.

55 Id. at 474.

56 Id. By the time the plaintiff won the judgment, the corporation had no assets. *Id.*
inadequate capitalization and actively participate in the conduct of corporate affairs.”

Most courts, however, have rejected the Minton holding. In Walkovsky v. Carlton, the plaintiff was struck by a taxicab owned by a corporation which was part of a chain of corporations owned, in part, by the defendant Carlton. Each of the corporations had no assets other than the taxicabs which were heavily leveraged. The court refused to pierce the corporate veil despite the fact that the pattern of income withdrawal from the corporations was designed to avoid tort liability. The court rejected the idea that this undercapitalization should be enough to disregard the corporate entity, reasoning that: “[T]he corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought.” The court noted further that if the plaintiff could prove that the defendant was doing business in his individual capacity, the court would pierce the corporate veil and hold Carlton personally liable. In holding that undercapitalization alone is not enough to pierce the corporate veil, Walkovsky represents the majority view in the United States.

D. A Successful Attempt to Pierce the Corporate Veil in the United States: Ampex Corporation v. Office Electronics, Inc.

The case of Ampex Corporation v. Office Electronics, Inc. illustrates the circumstances in which the court is likely to pierce the corporate veil in the United States. In Ampex, the court allowed the plaintiff-creditor to pierce the veil of a subsidiary in order to find Office Electronics, the parent corporation, liable. In its analysis, the court considered

---

57 364 P.2d at 475. Since Minton, California courts have adopted the view that undercapitalization is only one factor in a piercing the corporate veil analysis. See Robert C. Clark, Corporate Law 81 (1986).
58 See Clark, supra note 57 at 81.
60 Id. at 7.
61 Id.
62 Id. at 10.
63 Id. at 9.
65 See Clark, supra note 57, at 81.
67 Id. at 487.
the extent to which the parent intervened in the operations of the subsidiary. The court considered the following facts relevant in this analysis: (1) two of the three directors of the subsidiary were officers of the parent; (2) the parent owned fifty-one percent of the subsidiary; (3) the parent advanced money to the subsidiary for its commission sales accounts; (4) the parent received merchandise for the subsidiary from the plaintiff, along with monthly statements and invoices; and (5) the parent did all the shipping and billing to the customers of the subsidiary. Additionally, the parent paid for orders made by the subsidiary even after the parent had given written instructions to the plaintiff not to conduct business on that basis.

These factors established direct intervention by the parent and indicated that the plaintiff-creditor had been misled by the parent because the parent, not the subsidiary, dealt with the plaintiff. The plaintiff sent statements and inventories to the parent, met with the parent and the subsidiary when discussing the subsidiary’s credit arrangements, and received payments from the parent for merchandise sold to the subsidiary. Additionally, there was evidence that the subsidiary was undercapitalized.


The case of American Trading & Production Corp. v. Fischbach & Moore, Inc. illustrates the circumstances that courts focus on when refusing to pierce the corporate veil. In Fischbach, the subsidiary corporation installed electrical wiring in a large Chicago exhibition hall. The building was subsequently destroyed by fire, allegedly because of improper wiring. In an action for losses arising out of the fire, the court determined that the plaintiff could not reach the assets of the parent despite the fact that four of the subsidiary’s directors were also

---

68 Id. at 489.
69 Id.
70 Id.
71 Ampex, 320 N.E.2d at 489.
72 Id. at 487. It had $16,000 initially, with no other assets, and, from the outset, it planned to
inventory $20,000 worth of magnetic tapes and to incur other expenses. Id.
74 Id. at 413.
75 Id.
The court considered the following factors in refusing to pierce the corporate veil: (1) the corporations maintained separate offices and conducted separate directors’ meetings; (2) the subsidiary maintained its own financial records; (3) the subsidiary had its own bank account and negotiated its own loans from third parties; (4) the subsidiary filed a separate tax return; (5) the subsidiary managed its own payroll; (6) the two corporations never sold goods or services to each other; and (7) each corporation handled its own labor disputes with employees.

The court observed that the facts showed, at most, that the parent exercised supervision and guidance over the general performance of the subsidiary. The court noted: “Such participation in a subsidiary’s affairs does not amount to the domination of day-to-day business decisions and disregard of the corporate entity necessary to impose liability on a parent.” Clearly, as long as a subsidiary corporation maintains a separate corporate identity, the court will not allow a plaintiff to pierce the corporate veil and reach the parent.

II. Piercing the Corporate Veil of Subsidiary Corporations for Environmental Torts in the United States

In his 1931 treatise, Professor Frederick J. Powell provided a list of factors that indicate when a subsidiary corporation’s veil ought to be pierced to hold the parent corporation liable for a subsidiary’s obligations. These factors center on the level of control that the parent

---

76 Id. at 414.
77 Id. at 414–16.
78 Fischbach, 311 F. Supp. at 415.
79 Id.
80 Frederick J. Powell, Parent And Subsidiary Corporations § 6, at 9 (1931). These factors are: (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 records 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 directors 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; and (k) the formal legal requirements of the subsidiary are not observed. Id. To support a finding that piercing the veil
exercises over the subsidiary and the extent to which the parent has respected the corporate formalities of the subsidiary.\textsuperscript{81} Virtually all U.S. courts use some form of the Powell test to determine whether to pierce the veil of a subsidiary corporation to reach the assets of its parent.\textsuperscript{82}

Under the Powell test, neither ownership nor the general ability to control the subsidiary is sufficient to pierce the corporate veil of the subsidiary corporation.\textsuperscript{83} To pierce the veil of the subsidiary, there must be additional evidence of domination by the parent over the subsidiary.\textsuperscript{84} The rationale behind this rule is that every parent corporation, by virtue of its controlling interest in the subsidiary, has the right to exercise a certain level of control over the subsidiary.\textsuperscript{85} Therefore, to hold a parent corporation liable for environmental torts committed by its subsidiary, a plaintiff must show that the parent dominated the subsidiary.\textsuperscript{86}

A. \textit{Piercing the Corporate Veil of Subsidiary Corporations under the Comprehensive Environmental Response Compensation and Liability Act in the United States}

In 1980, the United States Congress enacted CERCLA to ensure that every party that was potentially responsible for environmental torts would be held responsible for the resulting harm.\textsuperscript{87} To achieve this

\textsuperscript{81} See id.

\textsuperscript{82} See \textit{Stephen B. Presser, Piercing the Corporate Veil} § 1.03[4] (1993). Commenting on the acceptance of the Powell test in this area, Presser stated that: "Powell's specific tests are often applied without even attributing them to their author, so common and accepted they have become." \textit{Id.} at 1-31 & n.47.\textsuperscript{83}

\textsuperscript{83} See, e.g., \textit{Baker v. Raymond Int'l, Inc.,} 656 F.2d 173, 180 (5th Cir. 1981) ("Ownership of a controlling interest in a corporation entitles the controlling shareholder to exercise the normal incidents of stock ownership without forfeiting the protection of limited liability."); \textit{cert. denied, 456 U.S. 983 (1982); Wehner v. Syntex Agribusiness, Inc.,} 616 F. Supp. 27, 29-30 (E.D. Mo. 1985) ("The fact that the parent may own all of the stock of the subsidiary and even maintain control incident to stock ownership does not justify ignoring the separateness of the two corporations") (quoting \textit{Escude Cruz v. Ortho Pharmaceutical Corp.,} 619 F.2d 902, 905 (1st Cir. 1980)).\textsuperscript{84}

\textsuperscript{84} \textit{Wehner,} 616 F. Supp. at 29-30.\textsuperscript{85}

\textsuperscript{85} See \textit{Lynda J. Oswald, Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control,} 72 Wash. U. L.Q. 223, 246 (1994). Otherwise, every subsidiary would be susceptible to veil piercing. \textit{Id.}\textsuperscript{86}

\textsuperscript{86} See \textit{id.}\textsuperscript{87}

\textsuperscript{87} 42 U.S.C. §§ 9601–75 (1980); see, e.g., \textit{Pennsylvania v. Union Gas Co.,} 491 U.S. 1, 21 (1989) ("The remedy that Congress felt it needed in CERCLA is sweeping: \textit{everyone} who is potentially responsible for hazardous waste contamination may be forced to contribute to the costs of cleanup."); 1986 \textit{U.S.C.C.A.N. 6119, 6128} (noting that Congress' main goals in enacting CERCLA
goal, Congress provided for broad liability under CERCLA. Under
CERCLA, responsible parties can be held liable retroactively,\textsuperscript{88} and
without fault.\textsuperscript{89}

There are four classes of potentially responsible parties for environ-
mental torts under section 107 of CERCLA.\textsuperscript{90} These include: (1) the
current owners and operators of a facility; (2) persons who formerly
owned or operated the facility at the time of disposal of any hazardous
substance; (3) persons who arranged for the disposal or treatment of
hazardous substances; and (4) transporters of hazardous waste.\textsuperscript{91} CER-
CLA defines "person" to include corporations and other business en-
tities as well as individuals,\textsuperscript{92} but makes no specific reference to parent
corporation or shareholder liability.\textsuperscript{93}

\textsuperscript{88} See United States v. NEPACCO, 810 F.2d 726, 732 (8th Cir. 1986) (court stated in dicta that
Congress intended CERCLA to have a retroactive effect), cert. denied, 484 U.S. 848 (1987).

\textsuperscript{89} See, e.g., Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir.
1988) (applying strict liability under CERCLA); New York v. Shore Reality Corp., 759 F.2d 1032,
1042 (2d Cir. 1985) (applying strict liability under CERCLA).

\textsuperscript{90} Section 107 of CERCLA provides, in relevant part:

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

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

(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 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, or sites selected by such person, from which there is a
release, or a threatened release which cause the incurrence of response costs, of a
hazardous substance, shall be liable for—

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

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

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

\textsuperscript{91} Id. § 9607 (a)(1)-(a)(4) (1980).

\textsuperscript{92} "The term 'person' means an individual, firm, corporation, association, partnership, consor-
tium, joint venture, commercial entity, United States Government, State, municipality, commis-
sion, political subdivision of a State, or any interstate body," Id. § 101 (21).

\textsuperscript{93} In United States v. McGraw-Edison Co., 718 F. Supp. 154, (W.D.N.Y. 1989), the court rejected
the notion that shareholders are immune from liability under CERCLA:
B. Piercing the Corporate Veil of Subsidiary Corporations Under CERCLA: The Development of the United States Case Law

In Josalyn Mfg. Co. v. T.L. James and Co., the court addressed the issue of whether to pierce the veil of a subsidiary corporation under CERCLA and hold the parent liable. The case arose as a result of discharges from a creosoting plant constructed by Lincoln Creosoting Company, Inc. (Lincoln) in 1935, a subsidiary of T.L. James & Company (T.L. James). In 1950, Josalyn Manufacturing Company (Josalyn) bought Lincoln, and it owned and operated the plant until 1969. In response to the Environmental Protection Agency’s (EPA) cleanup order, Josalyn brought suit against T.L. James, arguing that T.L. James was liable as an “owner or operator” under CERCLA because of its relationship with the Lincoln subsidiary.

The district court granted T.L. James’ motion for summary judgment. The court stressed that the issue of parent corporation liability is not addressed under CERCLA. The Fifth Circuit declined to follow other courts and indicate that corporate officers could be held directly liable because such liability would “ignore the corporate form without an express congressional directive.” The district court concluded that “neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers or direct liability on parent corporations.” The court noted in dicta that the only way the parent corporation could be held liable under CERCLA was indirectly, through a piercing of the subsidiary’s corporate veil.

Both individuals and corporations are included within the definition of “person” under Section 101(21) of CERCLA. Accordingly, if an individual or an individual stockholder can be liable under CERCLA for his corporation’s disposal, a corporation which holds stock in another corporation (e.g., a subsidiary) and actively participates in its management can be held liable for cleanup costs incurred as a result of that corporation’s disposal.

Id. at 156–57 n.1.


95 Id. at 81. T.L. James owned all of the non-voting preferred stock and 60% of the common stock of Lincoln. The other two shareholders endorsed their shares to T.L. James as security for their unpaid capital subscription, giving T.L. James complete control of Lincoln’s stock. Id.

96 Id. at 82.

97 Id.


99 Josalyn, 893 F.2d at 83.

100 Josalyn, 696 F. Supp. at 226.

101 See id.
On appeal, the Fifth Circuit affirmed.\textsuperscript{102} The court agreed that “without an express Congressional directive to the contrary, common-law principals of corporation law such as limited liability,” must define when the corporate veil should be pierced.\textsuperscript{103} Furthermore, the court noted that a parent corporation would be liable for CERCLA violations of its subsidiary if the facts support a piercing of the corporate veil.\textsuperscript{104} Under \textit{Josalyn}, the fact that the parent owns the offending corporation is not enough to impose liability under CERCLA.

Other courts have been similarly reluctant to use mere ownership, in the absence of affirmative acts of control, as a basis for CERCLA liability.\textsuperscript{105} In \textit{Acushnet}, the court rejected the government’s argument that the purposes of CERCLA were so paramount “that the most punctilious and complete corporate separateness must be observed” and that “the point of piercing occurs just as soon as the parent’s contact with the subsidiary transcends a ‘pure investment relationship.’”\textsuperscript{106} The court found that such a standard would undermine the doctrine of limited liability in corporate law, a result that Congress never intended.\textsuperscript{107}

The \textit{Acushnet} court specifically rejected the government’s argument that the court should pierce the subsidiary’s veil simply because the parent organized the subsidiary with the intent of limiting its own liability for environmental torts.\textsuperscript{108} The court stressed that there was nothing illegal about using the corporate form to limit liability as long as this is done appropriately.\textsuperscript{109} One of the main purposes of the doctrine of limited liability in corporate law is to lessen financial risks to shareholders and thereby encourage more risk-taking in the market.\textsuperscript{110} The court did, however, articulate the following test for piercing

\textsuperscript{102} \textit{Josalyn}, 893 F.2d at 83.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 82. The Fifth Circuit applied the Powell test and held that the facts in this case did not warrant a piercing of the corporate veil. \textit{Id.} at 83.
\textsuperscript{106} Id. at 31–32.
\textsuperscript{107} Id. at 32. The court stated that imposition of “CERCLA liability on parent corporations for no reason other than the fact that they did not ignore the performance of their subsidiary” would eradicate the traditional corporate law doctrine of limited liability. \textit{Id.}
\textsuperscript{108} Id. at 34.
\textsuperscript{109} \textit{Acushnet}, 675 F. Supp. at 34 (quoting Miller v. Honda Motor Co., 779 F.2d 769, 773 (1st Cir. 1985)).
\textsuperscript{110} \textit{See United States v. JON-T Chemicals Inc.}, 768 F.2d 686 (5th Cir. 1985) \textit{cert. denied}, 475 U.S. 1014 (1986). The court stated:

Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation's debts. Creditors of the corporation have recourse only against the corpo-
the corporate veil under CERCLA: “the Court looks closely for suggestions of pervasive control by [the parent] over [the subsidiary’s] hazardous waste disposal policies, or for an indication that [the parent] treats [the subsidiary] as a mere instrumentality with regard to the hazardous waste of [the parent].”\textsuperscript{111}

Under the second half of the \textit{Acushnet} test, the doctrine of piercing the corporate veil is broader under CERCLA than under traditional corporate law.\textsuperscript{112} In \textit{Acushnet}, the court suggested that if the parent is involved in the hazardous waste activities of the subsidiary, a plaintiff can pierce the veil of the subsidiary under CERCLA.\textsuperscript{113} Despite the emphasis on hazardous waste activities, however, in evaluating parent corporation liability, the court focused \textit{exclusively} upon the financial relationship between the parent and the subsidiary.\textsuperscript{114} Therefore, there is no special piercing test for CERCLA liability, and the statutory objectives can be fulfilled under the traditional tests for piercing the corporate veil.\textsuperscript{115}

\section*{III. The Doctrine of Piercing the Corporate Veil in the European Union}

European Company Law recognizes that the corporation is a separate legal entity from its shareholders.\textsuperscript{116} Under European Company Law, corporations are considered independent entities with a complete separation between the corporation’s obligations and the shareholders.\textsuperscript{117} Corporate rights and obligations cannot be imputed to shareholders and shareholders cannot sue or be sued under the company’s name.\textsuperscript{118} This rule applies not only when the shareholders are natural persons, but also when the shareholders are corporations.\textsuperscript{119}

\begin{flushright}
\textsuperscript{111} \textit{Acushnet}, 675 F. Supp. at 33–34.
\textsuperscript{112} See id. at 33.
\textsuperscript{113} See id.
\textsuperscript{114} Id. at 35.
\textsuperscript{115} See Oswald, supra note 85, at 256. As Oswald points out, both \textit{Josalyn} and \textit{Acushnet} recognize that in order to hold the parent liable under CERCLA as an “owner,” the plaintiff must pierce the subsidiary’s veil. See id. at 257.
\textsuperscript{116} Pennington, supra note 4, at 32; Werlauff, supra note 4, at 13–18.
\textsuperscript{117} Pennington, supra note 4, at 32; Werlauff, supra note 4, at 13–18.
\textsuperscript{118} Pennington, supra note 4, at 32; Werlauff, supra note 4, at 13–18.
\textsuperscript{119} Pennington, supra note 4, at 37–38; Werlauff, supra note 4, at 13–18.
\end{flushright}
The International Court of Justice (ICJ) has accepted the separate legal entity principle of corporate law. In *Barcelona Traction, Light & Power Company*, (Belg. v. Spain), the ICJ stated:

[International law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. . . Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights.]

Clearly, the ICJ views the corporation as an entity which is separate from its shareholders and which has its own rights and liabilities.

The separate corporate entity principle, however, is not absolute. Courts and legislatures have pierced the corporate veil to protect more important interests. The most popular justification for piercing the corporate veil is a finding that the corporation is serving as a tool for the shareholders to achieve goals that are prejudicial to public policy, such as fraud or evasion of contractual obligations.

EU courts apply the "economic unit theory," (EUT) to define the corporate entity. The EUT concentrates on economic reality rather than on legal norms and considers a number of separate corporations a single entity if they are controlled and managed by the same shareholder(s). Under the EUT the rights and obligations of one corporation are imputed to another. Accordingly, EU courts can lift the corporate veil of a parent corporation to meet the obligation’s of the subsidiary when they are subject to the same control:

Where a subsidiary is wholly owned by its parent company and it is found as a matter of fact that the subsidiary is not able to engage in economic action which is autonomous of its parent company, then in spite of their separate legal identities the two companies will be regarded as one for the purposes of Community competition law.

---

1970 I.C.J. 3, 34–35 (case involving Belgium’s standing to grant diplomatic protection to a Canadian corporation on the ground that the shareholders were Belgian Nationals).

121 *Id.*

122 *See* Pennington, *supra* note 4, at 38–48.


124 *See* Decision 69/195, Re Christiani & Nielsen N.V., 1969 C.M.L.R. D36 (Supp.).

125 *Id.* at D36.
A. Piercing the Corporate Veil with the Economic Unit Theory: The Development of European Case Law

When the parent corporation has control over the subsidiary, the parent is generally liable for the subsidiary’s obligations. In Central Wine Buyers v. Moet et Chandon, a British champagne importing company, a wholly owned subsidiary of a French wine manufacturer and exporter, imposed export bans on its dealers in the United Kingdom (UK) in violation of EC competition law. The Commission held that the French parent corporation was responsible for the acts of the British subsidiary corporation solely because the subsidiary acted according to the parent’s general policy.

The Commission applied the same reasoning in Re Deere & Co. (National Farmers Union v. Cofabel N.V.), to hold the parent corporation liable for acts of the subsidiary. In that case, the parent company was incorporated in the United States, but had a registered office in Germany. The Commission based its finding on the fact that the parent company controlled the subsidiary. Clearly, the Commission may use the EUT to pierce the corporate veil when a number of separate corporations are controlled by the same ownership.

In Re Deutsche Philips GMBH, however, the parent company used the corporate veil to shield itself from liability arising out of actions of its subsidiary. In Philips, the parent was fully aware of the anti-competitive conduct of its subsidiary corporation. Despite parental control over the subsidiary, the court refused to pierce the corporate veil because the parent had made a written demand on the subsidiary to stop the anti-competitive conduct. Furthermore, in Bandengroothandel Friescherbrug v. Nederlandsche Banden-Industrie Michelin NV, the Commission did not fine the parent for anti-competitive conduct of its

126 Id.; see also Werlauff, supra note 4, at 25.
127 2 C.M.L.R. 166 (1982).
128 Id. at 167.
129 Id.
130 2 C.M.L.R. 554 (1985) (where the Commission fined the U.S. producer for export bans introduced by its subsidiaries according to its instructions in certain Member States).
131 Id. at 555–56.
132 Id. at 564.
133 1973 O.J. (L 293) 40 (case involving price fixing and export bans imposed by the subsidiary in the German electric shavers market).
134 See id. at 41.
135 See id. at 42. The subsidiary was fined. See id.
136 1 C.M.L.R. 643 (1982).
subsidiary even though the parent did not protest this conduct.\textsuperscript{137} In \textit{Michelin}, a subsidiary of the Michelin group abused its dominant position in the Dutch tire market by introducing a bonus system that made its dealers totally dependent.\textsuperscript{138} The Commission did not fine the parent because the parent did not take part in the restrictive practice.\textsuperscript{139} These decisions suggest that the fact that a parent controls the subsidiary is not enough to pierce the veil of the parent.

In \textit{Re Sperry New Holland},\textsuperscript{140} the Commission departed even further from the EUT. In that case, the Commission fined a subsidiary for introducing export bans in the agricultural machinery market, even though the parent may have ordered the restrictive practices.\textsuperscript{141} This decision implicitly rejected the EUT because the parent exercised a large degree of control over the subsidiary and yet was still allowed to use the corporate shield.\textsuperscript{142}

One year later, in \textit{Re Polypropylene},\textsuperscript{143} the Commission decided not to impute the anti-competitive conduct of a Norwegian petrochemical corporation to its parent corporation. The Commission based its decision on the fact that the parent did not control the actions of the subsidiary:

Saga Petrokejmi always operated as a separate commercial entity and cannot be considered as forming part of the same economic unit as SAGA Petroleum. By contrast however the subsidiaries of SAGA Petrokejmi in Denmark and the U.K. did not form part of the same business and their actions can be imputed to SAGA Petrokejmi.\textsuperscript{144}

This decision indicates that the Commission now looks at the entire enterprise and the level of control within the enterprise in determining whether to pierce the corporate veil.

B. \textit{Piercing the Corporate Veil in the European Union: The Proper Conditions}

Courts are most likely to apply the EUT to pierce the corporate veil when the subsidiary lacks autonomy and control in the enterprise as a

\textsuperscript{137} See id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} 1985 O.J. (L 376) 2.
\textsuperscript{141} See id. at 25, 28.
\textsuperscript{142} See id. at 28.
\textsuperscript{143} 4 C.M.L.R. 347 (1986).
\textsuperscript{144} Id.
When members of an enterprise are subjected to the same control, the fact that they have separate corporate personalities is meaningless. Accordingly, anti-competitive actions of any member of the enterprise may be imputed to the parent corporation which is the real force behind the prohibited conduct. Like U.S. corporate law, the crucial issue in imposing liability on the parent is whether or not the parent exercised control over the subsidiary and caused the subsidiary to act in a prohibited manner.

1. The Definition of Control: The Burden of Proof Required to Pierce the Corporate Veil

EU institutions have advanced two approaches to define the requisite level of control necessary to reach parent corporations for actions of their subsidiaries. Under the Presumption approach, wholly or majority owned subsidiaries are presumed to be under the absolute control of the parent company. Once this presumption is established, the burden of proof shifts to the parent company to demonstrate that the subsidiary had a certain level of autonomy which it exercised in engaging in the prohibited conduct. Under the Examination approach, on the other hand, the plaintiff seeking to pierce the corporate veil must prove that the parent actually controlled the subsidiary:

[the burden of proof lies with the prosecuting authority or, in a civil law litigation, with the plaintiff. The actual exercise of the parent's power of control must be shown by those who request the veil to be lifted. For even in the cases of 100 percent ownership it is perfectly conceivable that the parent chooses not to use its ultimate authority.]

In Instituto, Advocate General Warner expressly supported the Presumption approach to piercing the corporate veil. In that case, Warner stated:

---

146 See id.
149 See id.
150 See Lev, supra note 147, at 237. Under this approach there is no presumption of control by the parent company over the subsidiary. See id.
Unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of Articles 85 and 86 of the EEC Treaty; and that the presumption can only be rebutted if it is shown affirmatively, by those concerned to rebut it, that the subsidiary in fact conducted its business autonomously.¹⁵²

Subsequently, the Commission has applied the EUT to pierce the veil of a parent solely because the prohibited conduct involved wholly-owned subsidiaries, indicating that the Commission has adopted the Presumption approach.¹⁵³

Even when the Examination approach has been applied, however, the European Court of Justice (ECJ) has allowed circumstantial evidence to establish control.¹⁵⁴ In Metro,¹⁵⁵ the ECJ implied that, under an Examination approach, circumstantial evidence could establish the level of control required to pierce the corporate veil. In Metro, the Court pointed out that the plaintiff had not:

adduced any evidence which would enable the Court to find that the undertakings in the Thompson-Brandt group are not only linked at the level of capital but also pursue a coordinated marketing strategy in accordance with the directions of their parent company or with a plan agreed between themselves.¹⁵⁶

The court stated further that: "[i]n the absence of such evidence, the Court must proceed on the basis that so far as the distribution of its products are concerned SABA is independent of the parent company and of the other undertakings in the group."¹⁵⁷ This language implies that had Metro introduced circumstantial evidence to show control by the parent over the market strategy of the subsidiaries, the burden of proof would have shifted to the parent.

¹⁵² Id.
¹⁵³ For cases where the veil of the parent was lifted due to conduct of wholly-owned subsidiary, see, e.g., Case 85/76, Hoffmann-La Rouche & Co. v. Commission, 1979 E.C.R. 461, 531; Case 107/82, Allgemeine Elektricitats-Gesellschaft AEG-Telefunken AG v. Commission, 1983 E.C.R. 3151, 3158.
¹⁵⁵ Id.
¹⁵⁶ Id. at 166.
¹⁵⁷ Id.
2. Defining "Control"

EU institutions have employed two criteria to define control by the parent of its subsidiary corporation: (1) the structural/managerial test; and (2) the functional/operational test. Under the structural/managerial test, parental control is established when the parent holds more than fifty percent of the subsidiary's capital, has the power to appoint representatives to the subsidiary's board of directors, and exercises these powers. Under the functional/operational test, a parent has control over a subsidiary corporation when the parent exercises "actual influence" over its subsidiaries on a daily basis. Critics of the structural/managerial test maintain that it conflicts with widely accepted principles of corporate law. European Company Law prohibits majority shareholders from abusing their power and directors have an affirmative duty to act in the best interests of the corporation. Therefore, the test cannot be applied in Member States that expressly forbid abuse of power by the majority of the shareholders. The functional/operational test, on the other hand, does not conflict with these principals of European Company Law.

IV. PIERCING THE CORPORATE VEIL OF SUBSIDIARY CORPORATIONS FOR ENVIRONMENTAL TORTS IN THE EUROPEAN UNION

Article 100 of the EEC Treaty grants the EU the authority to "approximate" laws that have a direct impact on the working of the internal market, and article 235 allows the EU to use procedures not granted in the Treaty in order to achieve any of the EU's objectives. In 1973, the first of four action programs on the environment was

---

158 See Lev, supra note 147, at 234.
159 See id.
160 See Bentil, supra note 9, at 64–65.
161 See Lev, supra note 147, at 234.
162 See BARACK, supra note 145, at 57–59 (citing Italian statute that prohibits majority shareholders from oppressing minority shareholders).
163 Treaty Establishing the European Economic Community Art. 100 (EEC Treaty). Article 100, provides in relevant part: "[T]he Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation, or administrative action in Member States as directly affect the establishment or functioning of the Common Market." Id.
164 Id. art. 235. Community objectives include the promotion of a harmonious economic system, a continuous and balanced expansion, increased stability in the Community, increased standard of living, and closer relations among Members States. Id. art. 2.
adopted by the EC Council of Ministers (Council). These non-binding programmes outlined the main objectives of the environmental policy of the EC. These programs emphasized the need to develop a uniform system of addressing environmental torts in order to help protect the citizens of the Community and ensure future economic growth.

In 1987, the EEC treaty was amended by the Single European Act (SEA). The SEA added Articles 100A and 130R-T, which increased the power of the EC to enact environmental legislation. Following the SEA Amendments, the Community adopted over 100 directives and 25 regulations dealing with environmental protection. The European Parliament has called for action on the part of the Commission to ensure Member States’ compliance with this environmental legislation. The Commission’s main goals in drafting this legislation were: (1) prevention of environmental torts; (2) correction of environmental damage at the source; and (3) assuring that polluters paid for the full extent of any damages that they create. In response, in 1989, the Commission introduced the Council Directive on Civil Liability for Damage Caused by Waste (Proposed Civil Liability Directive). In 1991, the Commission began considering an Amended Proposal to the Proposed Civil Liability Directive.

---


166 Haigh, *supra* note 165, at 620.


172 See id. at 318.

173 1989 O.J. (C 251) 3.

174 1991 O.J. (C 192) 6. Throughout this article, reference to the Proposed Civil Liability Directive includes the Amended Proposal.
A. Liability Under the Proposed Civil Liability Directive

One of the main goals of the Proposed Civil Liability Directive is to ensure that the "polluter pays."175 Under the Proposed Civil Liability Directive, the "producer" of waste is liable for harm caused by waste regardless of fault.176 The Amended Proposal defines producer as "any person who, in the course of commercial or industrial activity, produces waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste."177 To pierce the veil of a subsidiary corporation under the Amended Proposal, a plaintiff must prove that the parent corporation is a "producer of waste."

The term "waste" is defined by reference to the definition given in the Council Directive on Waste (Waste Directive).178 The Amended Waste Directive defines "waste" as "any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard."179 The sixteen categories in Annex I include, among others, off-specification products, residues from pollution abatement processes, adulterated materials, and a residual category for "any materials, substances or products which are not contained in the above categories."180 Clearly, the definition of waste is very broad and is certain to include almost any hazardous substance.

Under the Amended Proposal, the party with "actual control of the waste when the incident giving rise to the damage to or impairment of the environment occurred," is considered a producer.181 The term "actual control" is not defined and it is unclear how much control the parent has to have over the subsidiary to be held liable for environmental torts. What is clear is that if it is determined that the parent had "actual control" over the harmful activities of the subsidiary the veil will be pierced and the parent will be liable for damages.182

175 See Alderman, supra note 171, at 318.
177 Amended Proposal, 1991 O.J. (C 192) 6, art. 2(1)(a).
178 Id. art. 2(1)(b).
180 Id. at 36.
181 Amended Proposal, 1991 O.J. (C 192) 6, art. 2(2)(b).
182 The Proposed Civil Liability Directive imposes joint and several liability so that both the parent and the subsidiary would be liable in such a case. See Proposed Civil Liability Directive, 1989 O.J. (C 251), art. 5.
B. The Extent of Liability in the EU under the Proposed Civil Liability Directive

In 1985, the EC first adopted the concept of strict liability.\textsuperscript{183} Most Member States, however, have rejected the idea of strict liability and require a showing of fault in hazardous waste cases.\textsuperscript{184} To prevail in these Member States, a plaintiff must show that the defendant acted without due care, and that the defendant’s actions actually caused the harm.\textsuperscript{185} One of the most important goals of the Proposed Civil Liability Directive is to impose a uniform standard of strict liability for environmental torts, and to thereby level the economic conditions in the European market.

V. Analysis

Courts in the United States and in the EU use some form of the EUT to pierce the corporate veil.\textsuperscript{186} Under the EUT, the main factor in piercing the corporate veil is the level of control by the parent over the subsidiary.\textsuperscript{187} Courts in the United States use the Powell test to define the type of control by a parent which will lead to successful piercing.\textsuperscript{188} EU institutions, use the functional/operational approach to define the type of control that leads to successful piercing.\textsuperscript{189} The functional/operational approach requires “actual influence” on the subsidiary’s conduct, on a daily basis.\textsuperscript{190} Under both systems, when a parent has control over the daily activities of the subsidiary a plaintiff may successfully pierce the veil of the subsidiary.

\textsuperscript{184} See Sheehan, supra note 12, at 415.
\textsuperscript{185} See id.
\textsuperscript{186} See Ampex, 320 N.E.2d 486 (Ill. App. Ct. 1974). While the court did not expressly use the economic unit theory to pierce the corporate veil, it used an EUT analysis. See id. at 488. The court looked at the enterprise as a whole and the level of intervention by the parent in the management of the subsidiary’s affairs and lifted the corporate veil. Id.
\textsuperscript{187} In the United States control without more is not enough to successfully lift the veil. Oswald, supra note 85, at 246. In the EU, control can be enough to pierce the veil, if the subsidiary cannot act autonomously. See Christiansen, 1969 C.M.L.R. D36, D39 (Supp.).
\textsuperscript{188} See Presser, supra note 82, § 1.03[4], n.47. Under the Powell test, when the parent is actually involved in the management of the subsidiary, the subsidiary may lose the corporate shield. See Oswald, supra note 85, at 246.
\textsuperscript{189} See Barack, supra note 145, at 56–60; see also Bentil, supra note 9, at 64–65.
\textsuperscript{190} See Bentil, supra note 9, at 64–65.
Once a plaintiff establishes a successful piercing claim, the parent can be held liable under CERCLA in the United States,\textsuperscript{191} and would be liable under the Proposed Civil Liability Directive in the EU.\textsuperscript{192} Because both statutes impose strict liability on responsible parties a plaintiff would not have to show that the parent had actual knowledge of the harmful conduct.\textsuperscript{193} The fact that the EU has not enacted the Proposed Civil Liability Directive has a negative impact on the transactional costs of doing business in the United States due to the potential for strict liability under CERCLA.\textsuperscript{194}

A. The Broad Liabilities Under CERCLA And Under The Proposed Civil Liability Directive Significantly Increase Transaction Costs And Discourage Capital Investment

The far-reaching liability of CERCLA has had a profound impact on companies doing business in the United States, and the enactment of the Proposed Civil Liability Directive will lead to similar results in the EU. Under CERCLA, parent corporations face sudden and unexpected costs for environmental torts of their subsidiaries, even where they were not at fault.\textsuperscript{195} CERCLA’s liability scheme changes the value of property in the United States because potential cleanup liabilities for torts of subsidiary corporations may far exceed the real value of the property.

The CERCLA liability scheme has also raised transaction costs as acquisitions of real estate must include environmental investigations.\textsuperscript{196} These costs, and the potential for liability resulting therefrom, affect both foreign and domestic investment in the United States and influence decisions about where to produce goods.\textsuperscript{197} This, in turn, has

\textsuperscript{191} See supra notes 87–115 and accompanying text.
\textsuperscript{192} See supra notes 175–85 and accompanying text.
\textsuperscript{194} See Alderman, supra note 171, at 338.
\textsuperscript{195} These costs have run into the millions. See id. at 314.
\textsuperscript{196} See Elizabeth A. Glass, The Modern Snake in the Grass: An Examination of Real Estate and Commercial Liability Under Superfund & SARA and Suggested Guidelines for the Practitioner, 14 B.C. ENVTL. AFF. L. REV. 381 (1987). These investigations may include expert inspection analysis, on-site inspection, insurance history of the site, search of county records and newspapers for the history of the site, and discussions with environmental and citizens groups in the area. Id. at 432–34.
\textsuperscript{197} See Freeman & McSlarrow, supra note 13, at 2–3, for statements supporting this view.
handicapped the ability of American corporations to remain competitive in the global market and is likely to contribute to a decrease in domestic production, a reduction in employment, and an increasing trade deficit. Enactment of the Proposed Civil Liability Directive would lead to similar results in the EU.

B. The CERCLA Liability Scheme And The Proposed Civil Liability Directive Are Necessary To Protect Citizens From Environmental Disasters

Environmental disasters have provided the main impetus for environmental legislation on both continents. The late 1970's marked the beginning of the period of significant environmental legislation in the United States. The Love Canal disaster, where citizens of Love Canal, New York, discovered that they were living atop cancer causing chemicals, spurred the movement toward strict liability for environmental torts. The public outcry and media attention following this disaster had a direct impact on environmental legislation in the United States.

As in the United States, environmental disasters in the EU provided the main impetus for environmental legislation. In 1976, an explosion at a chemical plant in the Italian town of Seveso created a cloud of dioxide over the village. Within days, many of the animals in the surrounding area died as a result of the exposure to the dioxide. Then, in March of 1983, a shipment of Dioxin-contaminated soil from Seveso was discovered in France. This discovery and the resulting public outcry led to the enactment of the Transfrontier Shipment Directive.

In 1986, a fire at a warehouse in Basel, Switzerland, released toxic chemicals into the Rhine River, causing extensive damage in Switzerland, France, Germany, and the Netherlands. This disaster led the

198 See id.
199 See Alderman, supra note 171, at 312.
201 Alderman, supra note 171, at 312.
202 See id. at 318.
204 Id. at 243.
205 Id.
206 Id.
207 Sheehan, supra note 12, at 406.
Commission to consider a comprehensive liability scheme for environmental damages. This was the main factor leading to the promulgation of the Proposed Civil Liability Directive in 1989.

The main goal of the CERCLA liability system and of the Proposed Civil Liability Directive is to protect citizens from environmental harm by assuring that the "polluter pays." This marks a sharp departure from the current EU policy where the injured citizens have to pay the polluter to stop polluting. The fact that the SEA officially incorporated the "polluter pays" concept as a guiding principle of the EEC Treaty demonstrates that the main goal of this legislation is to protect citizens from environmental torts.

C. The EU Must Adopt The Proposed Civil Liability Directive To Protect Citizens From Environmental Disasters And To Create A Truly Competitive Marketplace

It is indisputable that the CERCLA liability scheme and the Proposed Civil Liability Directive increase transaction costs and may even hurt the overall economy when implemented. Until the Member States of the EU enact the Proposed Civil Liability Directive, the United States will continue to be at a considerable disadvantage in the world market, because there is no strict liability in the EU. The potential for parent liability for environmental torts of a subsidiary is much less in the EU. To both remedy this situation and protect citizens from environmental harm, the EU must enact the Proposed Civil Liability Directive and create a uniform standard of strict liability.

The United States must lead the way in pressuring the Member States of the EU to adopt the Proposed Civil Liability Directive, because the directive faces strong opposition by insurance and industry groups in the EU. The most disturbing aspect of the current system in the EU is that parent corporations can hide behind the corporate shield and escape liability for the environmental torts of their subsidiaries if they can establish that they were not at fault. While this system hurts

208 Id.
209 Id.
210 Alderman, supra note 171, at 320–21.
211 Sheehan, supra note 12, at 440.
212 EEC Treaty, art. 130R(2). Additionally, protection of human health is one of the implicit objectives of the EU’s environmental policy. See id. art. 2.
213 See Alderman, supra note 171, at 338.
214 See Sheehan, supra note 12, at 415.
215 Feely, supra note 203, at 282–83.
216 See Sheehan, supra note 12, at 415.
the United States from an economic standpoint, the real losers are the citizens of Europe who have no real recourse against environmental tortfeasors.217

CONCLUSION

There are a number of traditional corporate law doctrines which are applied equally both in the United States and in the EU. These include the separate entity principle, the limited liability principle, the general conditions for piercing the corporate veil, and the liability of parent corporations for obligations of their subsidiaries. The conflict between these two systems arises in the context of environmental torts committed by subsidiary corporations. In the United States, once the corporate veil is pierced the parent is strictly liable under CERCLA. The EU, on the other hand, requires a demonstration of fault before the parent becomes liable. There are a number of important consequences which flow from this difference. First, the potential for liability is smaller in the EU so that the United States is at an economic disadvantage. Second, the citizens of Europe have little recourse against environmental polluters. Finally, the European system allows corporations to hide behind the corporate shield while committing environmental torts. For these reasons, the United States must act to ensure the enactment of the Proposed Civil Liability Directive in all the Member States of the EU.

David S. Bakst

217 See id. at 440.