

## NOTES

### LIABILITY OF PARENT CORPORATIONS FOR HAZARDOUS WASTE CLEANUP AND DAMAGES\*

In response to the public outcry following the discovery of leaking hazardous waste disposal sites throughout the United States,<sup>1</sup> Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.<sup>2</sup> CERCLA created a \$1.6 billion fund — commonly known as the “Superfund” — to enable federal and state agencies to begin immediately cleaning up dangerous hazardous waste disposal sites.<sup>3</sup> To preserve the fund and to impose the costs of unsafe disposal of hazardous waste on culpable parties, CERCLA authorizes government agencies to recover “response costs” — clean-up costs and damages for injuries to natural resources<sup>4</sup> — from responsible parties.

Section 107 of CERCLA evinces Congress’s intent to impose liability broadly upon all parties responsible for the unsafe disposal of hazardous waste. It imposes liability for response costs upon owners and operators of unsafe disposal facilities,<sup>5</sup> generators of hazardous substances sent to such facilities,<sup>6</sup> and transporters of hazardous substances who selected such facilities.<sup>7</sup> Congress eased the government’s burden in recovering costs and damages from these parties<sup>8</sup> by requiring only a minimal showing of causation,<sup>9</sup> tacitly imposing strict

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<sup>1</sup> See generally S. EPSTEIN, L. BROWN & C. POPE, *HAZARDOUS WASTE IN AMERICA* 89–132 (1982) (discussing the hazardous waste crisis); *Waste Control Issue Follows Air, Water to Become Top U.S. Environmental Priority*, 16 ENV’T REP. (BNA) 6–7 (May 3, 1985) (charting the emergence of waste disposal concerns on the national regulatory agenda).

<sup>2</sup> Pub. L. No. 96-510, 94 Stat. 2767 (codified in part at 42 U.S.C. §§ 9601–9657 (1982)).

<sup>3</sup> See CERCLA § 221, 42 U.S.C. § 9631 (1982). The \$1.6 billion Superfund was derived primarily from taxes and penalties imposed on chemical manufacturers. See 26 U.S.C. §§ 4611, 4661 (1982); 33 U.S.C. § 1321(b)(6)(B) (1982).

<sup>4</sup> CERCLA defines “response costs” broadly to include all costs of removal of hazardous substances, remedial action, and damages for injuries to natural resources (including the cost of assessing such injuries). See CERCLA § 107(a)(4)(A)–(C), 42 U.S.C. § 9607(a)(4)(A)–(C) (1982).

<sup>5</sup> See *id.* § 107(a)(1)–(2), 42 U.S.C. § 9607(a)(1)–(2) (1982).

<sup>6</sup> See *id.* § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1982).

<sup>7</sup> See *id.* § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1982).

<sup>8</sup> See generally Rikleen, *Negotiating Superfund Settlement Agreements*, 10 B.C. ENVTL. AFF. L. REV. 697, 697–702, 703–05 (1982–1983) (describing how CERCLA’s liability provisions were designed to foster settlement by imposing liability broadly and strictly).

<sup>9</sup> See *United States v. South Carolina Recycling & Disposal, Inc.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,272, 20,274–75 (D.S.C. Feb. 21, 1984) (noting that a requirement of specific proof of causation would eviscerate CERCLA’s liability scheme); *United States v. Wade*, 577 F. Supp. 1326, 1333–34 (E.D. Pa. 1983); W. FRANK & T. ATKESON, *SUPERFUND: LITIGATION AND CLEANUP* 41–45 (BNA Special Report 1985).

liability and joint and several liability,<sup>10</sup> and sharply curtailing the availability of defenses to liability.<sup>11</sup>

In its haste to enact CERCLA,<sup>12</sup> however, Congress did not address the liability of a class of actors that plays a major role in the disposal of hazardous waste: parent corporations<sup>13</sup> of parties who are responsible for the unsafe disposal of hazardous waste.<sup>14</sup> The traditional rule of limited corporate liability appears to create a legal presumption that shields shareholders from liability for the debts of their corporations.<sup>15</sup> The possibility that courts might extend this rule to enable parent corporations of responsible parties to escape CERCLA liability undermines the purposes of the Act. Given the large number of hazardous waste disposal sites owned and operated by poorly capitalized corporations,<sup>16</sup> a rule limiting the liability of

<sup>10</sup> CERCLA defines liability by reference to § 311 of the Clean Water Act, 33 U.S.C. § 1321 (1982). See CERCLA § 101(32), 42 U.S.C. § 9601(32) (1982). Before CERCLA was enacted, courts routinely imposed strict liability under § 311 of the Clean Water Act. See, e.g., *Steuart Transp. Co. v. Allied Towing Co.*, 596 F.2d 609, 613 (4th Cir. 1979); *United States v. Tex-Tow Inc.*, 589 F.2d 1310, 1316 (7th Cir. 1978); *Burgess v. M/V Tamano*, 564 F.2d 964, 981-83 (1st Cir. 1977). Relying on these cases, courts have held that CERCLA imposes strict liability. See, e.g., *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984). Similarly, relying on the legislative intent of Congress in passing CERCLA and on cases interpreting § 311 of the Clean Water Act, courts have held that joint and several liability can be imposed under CERCLA. See, e.g., *id.* at 844-45; *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1254-55 (S.D. Ill. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 804-10 (S.D. Ohio 1983).

<sup>11</sup> See CERCLA § 107(b), 42 U.S.C. § 9607(b) (1982); *State v. General Elec.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984); Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1, 27-28 (1982); W. FRANK & T. ATKESON, *supra* note 9, at 59-60.

<sup>12</sup> See Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982); W. FRANK & T. ATKESON, *supra* note 9, at 5-6.

<sup>13</sup> A parent corporation owns "more than 50 percent of the voting shares of" another corporation. BLACK'S LAW DICTIONARY 1004 (5th ed. 1979).

<sup>14</sup> The government can recover response costs from parent corporations that act as "operators" of waste disposal facilities. Section 9607(a)(1)-(2) of CERCLA imposes liability on "persons" who "operate" an unsafe disposal facility. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 848 (W.D. Mo. 1984) (noting that "a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste" (footnote omitted)); *United States v. Carolawn Co.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,699, 20,700 (D.S.C. June 15, 1984) (holding that corporate officers may be held personally liable under CERCLA); see also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (holding that a stockholder who managed a corporation may be held liable under CERCLA); *United States v. Mirabile*, No. 84-2280 (E.D. Pa. June 6, 1985) (same). The term "person" includes corporations. See CERCLA § 101(21), 42 U.S.C. § 9601(21) (1982).

<sup>15</sup> See H. HENN, HANDBOOK ON THE LAW OF CORPORATIONS § 73, at 96 (2d ed. 1970).

<sup>16</sup> See COUNCIL ON ENVTL. QUALITY, TENTH ANNUAL REPORT 174 (1979) (noting that 500 to 800 waste sites are abandoned); Note, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 871 n.14 (1985) (noting the increasing frequency with which defendants seek shelter from environmental enforcement through bankruptcy).

parent corporations would hinder the government's efforts to recover response costs and would thereby threaten to deplete the Superfund before all dangerous disposal sites can be cleaned up.<sup>17</sup> In addition, shielding parent corporations from CERCLA liability would encourage corporations to set up hazardous waste disposal operations in inadequately capitalized and poorly monitored subsidiaries, thereby increasing the risk of future releases of hazardous waste.

This Note analyzes the economic effects of and legal basis for holding parent corporations of responsible parties liable under CERCLA. Part I shows that economic considerations favor imposing full liability on parent corporations of subsidiaries that cannot cover their share of response costs under CERCLA.<sup>18</sup> Part II argues that federal common law and CERCLA authorize courts to hold parent corporations liable for these costs.

## I. THE ECONOMIC EFFECTS OF LIMITING THE LIABILITY OF PARENT CORPORATIONS

Commentators have offered several economic justifications for limiting the liability of shareholders to the capital invested in the corporation. The traditional justification for limited liability is that it fosters economic growth by encouraging investors to take risks.<sup>19</sup> Limited liability is also defended as a means of fostering the efficient spreading of risk among corporations and their creditors.<sup>20</sup> In addition, limiting liability to the net worth of the corporation reduces the costs of resolving legal disputes when the corporation becomes insolvent.<sup>21</sup> This Part shows, however, that these factors — investment

<sup>17</sup> Even when the government can sue other parties — such as generators and transporters — for recovery, such alternative enforcement efforts will be more time-consuming and costly than suit against parent corporations. See Mintz, *A Response to Rogers, Three Years of Superfund*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,036, 10,036-37 (Feb. 1984); Rikleen, *supra* note 8, at 703-04; Note, *supra* note 16, at 871 n.14.

<sup>18</sup> The analysis presented in this Note applies equally to many state superfund laws. See generally ENVIRONMENTAL LAW REPORTER, STATE SUPERFUND STATUTES 1984 (Nov. 1983) (compiling state superfund laws).

<sup>19</sup> See *Hanson v. Bradley*, 298 Mass. 371, 380, 10 N.E.2d 259, 263-64 (1937); Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1368, 1378 (1948); Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 617-19 (1975); Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967); Comment, *Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation*, 45 S. CAL. L. REV. 823, 830, 833-34 (1972).

<sup>20</sup> See Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 94-95 (1985); Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 507-09 (1976); R. Clark, *Corporate Law*, ch. 1, at 24-25, 26-27 (Aug. 19, 1985) (manuscript on file at Harvard Law School Library).

<sup>21</sup> See R. Clark, *supra* note 20, ch. 1, at 25-26.

incentives, risk spreading, and costs of dispute resolution — favor imposing full liability for releases of hazardous waste upon parent corporations of insolvent responsible parties.

### *A. Incentives to Operate Hazardous Waste Disposal Facilities*

The traditional justification for limiting the liability of shareholders of a corporation to their invested capital is that full exposure to the risk of business failure might discourage shareholders from investing in socially desirable but risky ventures.<sup>22</sup> In economic terms, this asserted justification reflects the observation that most investors are risk averse<sup>23</sup> when a large portion of their wealth is at stake. Without a rule limiting liability, the purchaser of one share of a corporation would place her entire wealth at risk: if the corporation suffered a devastating loss, creditors of the corporation could seek recovery from that shareholder for the difference between the corporation's assets and its debts. Risk-averse investors, therefore, would underinvest in socially desirable but risky ventures. Limited liability alleviates this problem by insulating investors from liability for any more than the value of their investment in a corporation's stock.

Although this underinvestment concern might justify limiting the liability of individual shareholders of corporations, it does not support limiting the liability of corporations that are shareholders in other corporations. First, corporations do not need limited liability as an incentive to invest in socially desirable but risky ventures. Second, limited liability encourages investment in inefficient ventures.

Corporations will invest in socially desirable but risky ventures regardless of whether they can limit their liability. Unlike individuals, corporations generally do not exhibit risk aversion when investing.<sup>24</sup> Because the objective of the corporation is to maximize shareholder wealth,<sup>25</sup> corporations will invest in all projects that have a positive net present value.<sup>26</sup> Of course, corporations will not undertake projects for which the risks are not adequately compensated by increased return. But unlike risk-averse individual investors, corporations will

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<sup>22</sup> See sources cited *supra* note 19.

<sup>23</sup> A person is risk averse if she prefers a certain payoff of  $SX$  to participation in a risky venture offering an expected payoff (computed as the probability of a payoff times its value) that is slightly greater than  $SX$ . For an extensive discussion of the concept of risk aversion, see K. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* 90-120 (1971).

<sup>24</sup> See R. BREALEY & S. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 125, 132-33 (2d ed. 1984). It is assumed here that the corporate veil of parent corporations insulates their shareholders from liability for the debts of insolvent subsidiary corporations.

<sup>25</sup> See J. VAN HORNE, *FINANCIAL MANAGEMENT AND POLICY* 6-7 (6th ed. 1983).

<sup>26</sup> The net present value of a project is the discounted value of the stream of revenues and costs attributable to that project. See R. BREALEY & S. MYERS, *supra* note 24, at 26-39, 64-81.

not overcompensate for such risks.<sup>27</sup> Furthermore, because individual investors can themselves diversify the risks specific to particular corporations by holding shares in a variety of corporations,<sup>28</sup> they will not pay corporations any extra to diversify such risks for them.<sup>29</sup> Therefore, allowing corporations to insulate themselves from liability for the failure of particular projects through the use of subsidiary corporations will not attract additional capital to risky, yet socially desirable, projects. Corporations will invest in such projects in the absence of limited liability.

The main effect of affording limited liability to parent corporations is to subsidize inefficient investment, that is, investment in ventures in which the total expected costs exceed the total expected benefits. In particular, limited liability enhances the attractiveness of projects that pose a risk of devastating loss.<sup>30</sup> In such cases, the parent corporation reaps the full reward if the subsidiary is successful but does not bear the full loss if it is a disaster.

This adverse incentive is mitigated, however, to the extent that voluntary creditors<sup>31</sup> of the subsidiary corporation anticipate such losses.<sup>32</sup> These creditors can charge the subsidiary corporation premiums that reflect the risk that it will be unable to pay for capital, goods, and services provided by the creditors. For example, banks charge an interest rate on loans that reflects the financial security of the borrower. In this way, private markets internalize some of the costs of risky projects undertaken by subsidiary corporations, thereby reducing the risk-shielding benefits that a parent corporation derives from setting up the subsidiary.

Unfortunately, some risks of corporate investments are borne by involuntary creditors such as tort victims. These creditors do not charge corporations in advance for assuming the risk that insolvency will leave the corporation unable to pay its obligations. If insolvency

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<sup>27</sup> The risk aversion of corporate managers, who tie up their human capital (a substantial portion of their wealth) in the corporation, may bias the corporation toward a less risky course. See Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 291-92 (1980). But the effect of managers' risk aversion on corporate decisionmaking is constrained by the disciplinary actions of shareholders, the labor market, and the capital market. See *id.*; Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 700-03 (1982).

<sup>28</sup> See R. BREALEY & S. MYERS, *supra* note 24, at 125.

<sup>29</sup> See *id.* at 132-33.

<sup>30</sup> See Halpern, Trebilcock & Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 143-45 (1980); Landers, *supra* note 19, at 621-26; Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 69 (1980); A. Schwartz, *Products Liability, Corporate Structure and Bankruptcy: Toxic Substances and the Remote Risk Relationship* 39-40 (Civil Liability Program, Center for Studies in Law, Economics, and Public Policy, Yale Law School, Working Paper No. 20, Sept. 1984).

<sup>31</sup> Voluntary creditors of a corporation are firms, banks, and individuals (such as bondholders) that extend credit — through explicit or implicit contracts — to that corporation.

<sup>32</sup> See Posner, *supra* note 20, at 503.

occurs, a rule limiting liability would protect shareholders against claims brought by unpaid creditors of their corporations. Therefore, limited liability encourages corporations to place high-risk activities in the hands of poorly capitalized subsidiary corporations.<sup>33</sup>

The incentive for corporations to use subsidiaries as a shield against liability is particularly great in the hazardous waste disposal field because the costs of waste disposal activities may be readily shifted onto involuntary creditors.<sup>34</sup> As an illustration, consider the allocation of risks created by the operation of a hazardous waste disposal facility near a residential community. If health-threatening releases occur, the subsidiary may lack adequate funds to clean up the site, restore destroyed natural resources, and compensate victims suffering release-related health problems. Some of these costs may fall upon voluntary creditors such as generators who sent wastes to the site.<sup>35</sup> Many of the costs, however, will fall upon involuntary

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<sup>33</sup> Even commentators who praise the doctrine of limited liability acknowledge that the problem of involuntary creditors impairs its desirability:

Where high transactions costs prohibit those affected by risky activities from charging an appropriate risk premium . . . the probability that firms with limited liability will undertake projects with an inefficiently high level of risk increases. Firms capture the benefits of such activities while bearing only some of the costs; other costs are shifted to involuntary creditors.

Easterbrook & Fischel, *supra* note 20, at 107; see also Posner, *supra* note 20, at 519-20 (suggesting that businesses that impose risks on involuntary creditors should be required to post bonds equal to the highest reasonable estimate of their tort liability); cf. Landers, *Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy*, 43 U. CHI. L. REV. 527, 534 (1976) (arguing that involuntary creditors of insolvent subsidiary corporations should be able to recover from parent corporations).

<sup>34</sup> See *State v. Ventron Corp.*, 94 N.J. 473, 500, 468 A.2d 150, 164 (1983) (noting that "the limited liability generally inherent in the creation of a corporation presents the potential for avoidance of responsibility for the dumping of toxic waste by the creation of a wholly-owned subsidiary"); cf. Stone, *supra* note 30, at 71 n.269 (describing how Allied Chemical set up a corporation to take over production of Kepone, a highly toxic pesticide).

CERCLA itself has the effect of encouraging corporate officers to prefer setting up subsidiary corporations to perform hazardous waste disposal activities rather than to perform such activities internally. Under § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1982), any person who participates in the operation of an unsafe hazardous waste disposal facility may be held personally liable for response costs and natural resource damages. See *supra* note 14. By establishing subsidiary corporations, the officers of the parent corporation make their participation in the management of hazardous waste disposal activities more remote, thereby shielding themselves from direct responsibility for unsafe disposal activities.

<sup>35</sup> Generators of waste are voluntary creditors because they might have bargained for the risk of being held liable for future releases of waste they sent to the disposal site. But, given the fact that generators would not have been liable for illegal waste disposal by waste site operators prior to the late 1970s, it is unlikely that many generators of waste extracted risk premiums (such as lower disposal charges) from site operators.

Because users of waste disposal facilities may be held jointly and severally liable for response costs under CERCLA, see *supra* pp. 986-87, such users will take the risk of unsafe disposal into account when dealing with waste disposal facilities. They will demand a discount that reflects the risk of liability for unsafe disposal and thus internalize some of the future risks affecting involuntary creditors.

creditors: the government, residents of the community, and recreational users of natural resources. Thus, rather than encourage responsible investment in hazardous waste disposal activities, a rule limiting the liability of parent corporations would encourage investment in inefficient hazardous waste disposal activities by allowing corporations to externalize some of the costs associated with such activities through the use of poorly capitalized subsidiaries.

### *B. Risk Spreading*

A second justification for limited liability is that it provides an efficient means of risk spreading by shifting some of the risk of a corporation's failure from its shareholders to its creditors. Such risk spreading is desirable when creditors can monitor the corporation better than its shareholders can.<sup>36</sup> In the absence of a legal presumption of limited liability, it would be more costly for shareholders and creditors to reallocate the risk of business failure to creditors.

Although limited liability may efficiently allocate risk between shareholders of a corporation and its voluntary creditors, it does not necessarily allocate risks between shareholders and involuntary creditors efficiently.<sup>37</sup> Involuntary creditors do not bargain for the risk of business failure. Limited liability enables shareholders to impose this risk upon them free of charge. Because of the great transaction costs of reallocating this risk through private bargains,<sup>38</sup> the market does not ensure that the risk of business failure will be efficiently allocated between a corporation's shareholders and its involuntary creditors. Therefore, the legal rule should allocate such risk efficiently in the first instance.

To determine the most efficient allocation of risk between a parent corporation and the involuntary creditors of a subsidiary operating a hazardous waste disposal facility, two criteria should be examined: the ability of the parties to avoid the risk and their ability to bear the risk.<sup>39</sup> According to the risk-avoidance criterion, liability should be imposed on the party who can, at lowest cost, mitigate or avoid a

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<sup>36</sup> See Easterbrook & Fischel, *supra* note 20, at 94-95; Posner, *supra* note 20, at 501-05, 508-09.

<sup>37</sup> Similarly, the efficient-risk-allocation argument does not justify shifting the risk of business failure onto voluntary creditors who cannot assess the risk of business failure.

<sup>38</sup> According to the Coase theorem, parties bargain to an efficient allocation of resources in the absence of transaction costs. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Therefore, if shareholders and involuntary creditors of a corporation could bargain without cost, they would reallocate the risk of the corporation's failure in the most efficient way. In practice, however, the costs of assessing and bargaining over this risk are prohibitive.

<sup>39</sup> See G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 35-129 (1970) (positing an economic framework for designing liability rules); cf. Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89-92 (1977) (applying economic analysis to the doctrine of impossibility in contract law).

release of hazardous waste.<sup>40</sup> Potential liability encourages this party to take the most efficient precautions to reduce this risk. The second criterion suggests that when parties are risk averse, liability should be imposed upon the party best able to bear (or to insure against) the risk of loss.<sup>41</sup>

1. *Risk Avoidance.* — A party's ability to reduce the risks associated with a subsidiary corporation's hazardous waste disposal operations depends on the party's costs of monitoring the risky activity and the ease with which the party can influence the subsidiary's behavior.<sup>42</sup> Parent corporations are typically organized to minimize these costs. They use hierarchical structures to facilitate the flow of information, thereby enabling corporate officers to monitor activities throughout the organization inexpensively.<sup>43</sup> Moreover, because of their controlling interest, parent corporations can exercise strong influence over the decisions of their subsidiaries. Therefore, parent corporations can cheaply and effectively oversee the activities of their subsidiaries.

In contrast, a subsidiary corporation's involuntary creditors face great obstacles to effective monitoring and directing of the subsidiary's hazardous waste disposal operations. Government agencies — involuntary creditors because they bear ultimate responsibility for cleaning up hazardous waste — must rely upon costly and sometimes inefficient regulation, licensing, and enforcement to deter unsafe hazardous waste disposal.<sup>44</sup> Uniform regulations cannot account for the diversity of technologies in use and the wide variety of hazards that may arise. As a result, they often under- or overregulate such activities.<sup>45</sup> The greatest impediment to effective risk avoidance by government agen-

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<sup>40</sup> See G. CALABRESI, *supra* note 39, at 68–94.

<sup>41</sup> See *id.* at 39–67.

<sup>42</sup> The risk-avoidance criterion is particularly important in the hazardous waste disposal context because preventive measures are generally the most efficient way of addressing the risk of releases of hazardous substances. Studies of waste site cleanups find that the savings from careful disposal practices greatly outweigh the costs of such precautions. See *Proper Hazardous Waste Disposal is Cheaper*, EPA Administrator Says, 9 ENV'T REP. (BNA) 2082, 2082 (1979); Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 585–86 (1981); see also OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 6 (1983) (noting that the cost of cleaning up an unsafe hazardous waste disposal site and compensating victims of releases might be 10 to 100 times the cost incurred to prevent releases).

<sup>43</sup> See generally H. MINTZBERG, THE STRUCTURING OF ORGANIZATIONS 17–64 (1979) (describing the hierarchical structure of modern corporations); O. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR: AN INQUIRY INTO THE EFFECTS OF ORGANIZATIONAL FORM ON ENTERPRISE BEHAVIOR 14–40, 109–19 (1970) (describing the advantages of the multidivision form of corporate organization).

<sup>44</sup> The Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1982), establishes an elaborate federal-state regulatory program for tracking hazardous waste from “cradle to grave.”

<sup>45</sup> See OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 42, at 265.



cies, however, is the high cost of monitoring the more than 8,000 disposal facilities in the United States and then enforcing compliance with safety regulations.<sup>46</sup> Inadequate inspection and enforcement programs have allowed many hazardous waste facilities to operate in violation of regulatory requirements.<sup>47</sup>

Even if government agencies could deter releases of hazardous waste inexpensively, it is unlikely that imposing liability for clean-up costs on the government would lead to greater risk-avoidance efforts. Government programs regulating hazardous waste disposal have been plagued by delays caused by bureaucratic impediments<sup>48</sup> and inter-governmental problems,<sup>49</sup> as well as insufficient funding.<sup>50</sup> In 1982, the Council on Environmental Quality estimated that the federal hazardous waste management program would not be fully operational for close to a decade.<sup>51</sup> Thus, institutional considerations, rather than liability rules, are the most important determinants of government regulatory efforts.

The other major groups of potential involuntary creditors — people who reside near hazardous waste disposal facilities and recreational users of natural resources — face large impediments to overseeing hazardous waste disposal activities. First, they encounter a free-rider problem<sup>52</sup> in trying to organize a concerted monitoring effort: all involuntary creditors of the subsidiary benefit from monitoring, while only those who undertake such efforts bear the costs. And even if potential victims of releases could organize a broad-based monitoring effort, they would find it difficult both to gather the information needed to evaluate the safety of disposal activities and to influence the decisions of the corporations disposing of the waste.

It thus seems implausible that the government, local residents, or recreational users of natural resources could foster avoidance of risk by a subsidiary corporation more efficiently than could the subsidiary's

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<sup>46</sup> See Note, *supra* note 42, at 603.

<sup>47</sup> See U.S. GEN. ACCOUNTING OFFICE, INTERIM REPORT ON INSPECTION, ENFORCEMENT, AND PERMITTING ACTIVITIES AT HAZARDOUS WASTE FACILITIES app. III, at 6-9 (1983).

<sup>48</sup> See OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 42, at 265; U.S. GEN. ACCOUNTING OFFICE, *supra* note 47, app. IV, at 8; Riley, *Toxic Substances, Hazardous Wastes, and Public Policy: Problems in Implementation*, in THE POLITICS OF HAZARDOUS WASTE MANAGEMENT 24, 33-42 (J. Lester & A. Bowman eds. 1983).

<sup>49</sup> See OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 42, at 265, 267-68; Lieber, *Federalism and Hazardous Waste Policy*, in THE POLITICS OF HAZARDOUS WASTE MANAGEMENT, *supra* note 48, at 60, 60-72.

<sup>50</sup> See CONGRESSIONAL BUDGET OFFICE, HAZARDOUS WASTE MANAGEMENT: RECENT CHANGES AND POLICY ALTERNATIVES 62 (1985); OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 42, at 265, 267; U.S. GEN. ACCOUNTING OFFICE, *supra* note 47, at 13; Riley *supra* note 48, at 24, 34-42.

<sup>51</sup> See COUNCIL ON ENVTL. QUALITY, TWELFTH ANNUAL REPORT 99 (1982).

<sup>52</sup> See generally M. OLSON, THE LOGIC OF COLLECTIVE ACTION 9-16 (1977) (discussing the free-rider problem).

parent. The risk-avoidance criterion therefore favors a rule imposing liability for releases of hazardous waste caused by a subsidiary corporation on its parent corporation rather than on the subsidiary's involuntary creditors.<sup>53</sup>

2. *Risk Bearing.* — All parties would prefer not to be exposed to potential losses; risk-averse parties suffer an additional cost resulting from the uncertainty about whether a loss will occur.<sup>54</sup> This risk-bearing cost depends upon the degree of the party's averseness to risk and the magnitude of the potential loss relative to the party's wealth: for a given set of risk preferences, a wealthy person can bear a given loss more easily than a poorer person.<sup>55</sup> This risk-bearing cost is mitigated, however, to the extent that parties exposed to risk insure against the loss. To minimize risk-bearing costs, therefore, liability should be imposed on parties who are least averse to the risk of losses or who can most inexpensively insure against the losses.<sup>56</sup>

A parent corporation can typically bear the risk of a release of hazardous waste better than those who reside near a disposal facility and those who use the surrounding natural resources. As discussed above,<sup>57</sup> parent corporations are usually not risk averse. And any loss the parent might suffer would be spread widely among its shareholders and customers, thereby mitigating its impact on any individuals. The parent corporation's shareholders would still be protected by limited liability and therefore risk only the amount of their investment in the parent corporation. In addition, the parent corporation can, through the pricing of its products, spread part of the risk of hazardous releases among its customers.<sup>58</sup> Moreover, because of the parent corporation's extensive knowledge of the activities of its subsidiaries, it is in a good position to insure against the risk of a release.<sup>59</sup>

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<sup>53</sup> See Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency 2 (June 13, 1984) [hereinafter cited as EPA Memorandum] (asserting that holding shareholders, including parent corporations, liable "would promote corporate responsibility for those shareholders who in fact control the corporate decision-making process").

<sup>54</sup> See G. CALABRESI, *supra* note 39, at 39-45.

<sup>55</sup> See *id.*; cf. K. ARROW, *supra* note 23, at 101-02 (noting that a wealthy risk-averse individual would make a larger investment in a risky asset than would a poorer person with the same utility function).

<sup>56</sup> See G. CALABRESI, *supra* note 39, at 39-67; cf. Posner & Rosenfield, *supra* note 39, at 89-92 (applying this analysis to the doctrine of impossibility in contract law).

<sup>57</sup> See *supra* pp. 989-90.

<sup>58</sup> See G. CALABRESI, *supra* note 39, at 50-51. Furthermore, a liability rule that internalizes the costs of unsafe waste disposal fosters efficient consumption decisions by consumers of products of the parent corporation. See A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 89-91 (1983); cf. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 42, at 6 (noting that "[c]osts incurred today by improved management of hazardous waste would be borne, more equitably, by waste generators and by consumers of 'hazardous waste-intensive' products").

<sup>59</sup> It is uncertain whether the pollution-exclusion terms of most comprehensive general lia-

In contrast, local residents and users of nearby natural resources are ill-suited to bear the risk of releases of hazardous waste. Such individuals are likely to be extremely risk-averse in the face of large losses such as life-threatening diseases and the decline in value of their homes. Because their costs of monitoring are high,<sup>60</sup> these parties are not in a good position to insure against these risks.

The government, the other major involuntary creditor, concededly is in a good position to bear the risks of hazardous waste disposal: it has vast assets and can spread risks broadly through taxation and expenditure policies. But the government is not necessarily a significantly better risk-bearer than are parent corporations. Parent corporations are in a good position to purchase insurance or to self-insure against the risk of releases of hazardous waste.<sup>61</sup> In addition, shareholders of parent corporations can diversify the risk of their stockholdings through financial markets.<sup>62</sup> Because insurance and financial markets enable parent corporations and their shareholders to spread the risks of hazardous waste disposal activities broadly, there does not appear to be any significant difference between the abilities of the government and parent corporations to bear these risks.<sup>63</sup>

In summary, parent corporations are in a better position to avoid releases of hazardous waste by their subsidiaries than are involuntary creditors of such subsidiaries. Moreover, parent corporations can bear the risk of releases better than potential victims of releases and as well as the government. Therefore, risk-spreading considerations favor imposing liability for releases of hazardous waste by insolvent subsidiary corporations on their corporate parents.

### *C. Costs of Dispute Resolution*

Commentators have suggested that limited corporate liability may be justified because it reduces the costs of resolving legal disputes.<sup>64</sup> If creditors could recover the outstanding debts of the corporation from individual shareholders, the costs of litigation might greatly

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bility insurance policies exclude costs of cleanup and damages for releases of hazardous substances. See Fields, *Superfund: The Court Search for Insurance Money*, BRIEF, Fall 1984, at 7. Even if such coverage were not available, however, parent corporations could self-insure by directing their subsidiaries to take precautions against the risk of a release.

<sup>60</sup> See *supra* p. 994.

<sup>61</sup> See *supra* p. 995 & note 59.

<sup>62</sup> See *supra* p. 990.

<sup>63</sup> Cf. Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 536 n.74 (1986) (noting that the government and financial markets are in similar positions to spread risks due to changes in government policy).

<sup>64</sup> See R. Clark, *supra* note 20, ch. 1, at 25-26; see also Kaplow, *Private versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. (forthcoming 1986) (noting that a rule prohibiting suit may be desirable when litigation costs are high).

exceed the gains from internalizing the costs of the corporation's activities. Creditors would expend substantial resources to haul particular shareholders into court and obtain judgments. In addition, shareholders targeted for restitution might seek contribution from other shareholders; apportioning liability would be complicated and costly.

Although this argument might justify limiting the liability of shareholders of large, widely held public corporations, it does not apply when the insolvent corporation is the subsidiary of another corporation. When a corporation is owned by one easily identifiable shareholder, the cost of seeking recovery from that entity is little more, and possibly less,<sup>65</sup> than the cost of suing the subsidiary.

Moreover, a clear rule imposing CERCLA liability on parent corporations of responsible parties would reduce legal costs by fostering settlement of clean-up and damages actions.<sup>66</sup> Congress designed the liability provisions of CERCLA to encourage expeditious resolution of disputes: by attempting to cast a net of liability around all actors involved in the disposal of hazardous substances and by limiting defenses to liability, Congress intended to minimize disputes about who is liable, thereby focusing parties' attention on how to apportion liability among themselves.<sup>67</sup> The equitable doctrine of piercing the corporate veil,<sup>68</sup> however, would provide parent corporations of insolvent waste disposal facilities a colorable claim for circumventing liability. Efforts by a parent corporation to minimize its share of a multiparty settlement (or to avoid liability altogether) could cause a break-down in the settlement process that would result in costly and protracted litigation. Although any clear rule — such as full liability or no liability — would remedy the impediment to negotiation created by a discretionary legal standard, a rule imposing full liability on parent corporations would better promote settlement because responsible parties may lack sufficient resources to satisfy the government's response costs and damage claims.<sup>69</sup>

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<sup>65</sup> It may be less costly for the government to recover from a defendant with "deep pockets."

<sup>66</sup> See Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16-17 (1984) (noting that parties are more likely to settle a legal dispute when they are more certain about how a court would resolve the dispute); see also EPA Memorandum, *supra* note 53, at 2 (noting that "the establishment of shareholder liability [under CERCLA] would aid the negotiation process and motivate responsible parties toward settlement"); cf. Scott, *Corporate Wire Transfers and the Uniform New Payments Code*, 83 COLUM. L. REV. 1664, 1712 (1983) (making similar argument with regard to liability for wire transfer accidents).

<sup>67</sup> See Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 285-87; Rikleen, *supra* note 8, at 697-705.

<sup>68</sup> See generally R. Clark, *supra* note 20, ch. 2, at 112-68 (describing the doctrine of piercing the corporate veil).

<sup>69</sup> The federal government adheres to a policy of accepting only settlements of 100% recovery for response costs and natural resource damages. See Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5037-38 (1985) (EPA's interim settlement criteria).

### D. Conclusions

Economic analysis favors holding parent corporations of responsible parties liable for the outstanding portion of any judgment for hazardous waste clean-up costs and natural resource damages.<sup>70</sup> Application of this liability rule would internalize the risks of setting up subsidiary corporations to perform hazardous waste disposal activities.<sup>71</sup> Therefore, corporations would have strong incentives to exercise care when delegating and overseeing hazardous waste disposal activities. In addition, application of the rule would reduce the exposure of involuntary creditors to the risk of releases of hazardous waste — a risk that they are ill-suited to avoid or bear. Finally, the rule would reduce the enforcement costs of cleaning up unsafe hazardous waste disposal facilities and restoring natural resources.<sup>72</sup>

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<sup>70</sup> Such liability should be imposed on all parent corporations of insolvent subsidiaries, regardless of how they acquired their controlling interest. A parent corporation may have acquired a controlling interest in a responsible party by: (1) setting up the subsidiary corporation after the enactment of CERCLA; (2) purchasing a controlling interest prior to the enactment of CERCLA; or (3) purchasing a controlling interest after the enactment of CERCLA. The first case invokes all three of the economic effects discussed above. The second case, although not necessarily raising the overinvestment problem, invokes the risk-spreading and dispute-resolution concerns. As for the third case, it might be argued that there would be little advantage to holding a parent corporation liable for the past illegal activities of an insolvent subsidiary it recently acquired. Holding a parent corporation liable, however, would internalize the costs of unsafe disposal by encouraging acquiring corporations to scrutinize the potential CERCLA liabilities of target corporations. In addition, a contrary rule for successor parent corporations would be inconsistent with CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1982), which has been interpreted as imposing successor liability on owners. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042-45 (2d Cir. 1985); *United States v. Carolawn Co.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,698, 20,698-99 (D.S.C. June 15, 1984). But see *Cadillac Fairview/Cal. Inc. v. Dow Chem. Co.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,376, 20,378 (C.D. Cal. Mar. 5, 1984) (holding that CERCLA does not impose liability on persons who owned a disposal site after the disposal occurred but who subsequently sold the land).

<sup>71</sup> This rule might not internalize the entire risk of a devastating loss because the parent corporation might be unable to satisfy the outstanding portion of the judgment. Such a situation would raise the further question of whether a court should pierce the veil of the parent corporation and impose liability on its shareholders. As indicated above, not all of the arguments presented in Part I carry over to the situation in which there are many shareholders. This important question, however, is beyond the scope of this Note.

<sup>72</sup> One possible objection to this rule is that holding parent corporations liable for the outstanding CERCLA liability of their subsidiaries would push large, well-financed corporations out of the business of operating hazardous waste disposal sites through subsidiaries, thereby leaving this vitally important activity to small, undercapitalized concerns. Cf. Posner, *supra* note 20, at 520 (discussing similar problem in the context of separate incorporation of taxi cabs within one fleet). Yet limited liability encourages large corporations to undercapitalize their subsidiary corporations and discourages them from overseeing such subsidiaries. Hence, a rule imposing CERCLA liability on parent corporations of responsible parties would no more encourage the creation of undercapitalized waste disposal operations than would a rule of limited liability. Rather, the flaw lies in the system of regulation that permits undercapitalized and poorly monitored corporations to operate hazardous waste disposal facilities. CERCLA attempts to address this problem directly by requiring the President to establish minimum levels of

## II. THE LEGAL STANDARD FOR PIERCING THE VEIL OF SUBSIDIARY CORPORATIONS IN CERCLA ACTIONS

Although American corporate law generally limits the liability of corporate shareholders to their invested capital,<sup>73</sup> in appropriate circumstances courts will pierce the corporate veil to hold shareholders — including parent corporations — liable for the debts of an insolvent corporation. Section A of this Part notes that federal courts have the power to develop federal common law to govern piercing the corporate veil in CERCLA cases; it then argues that courts should exercise this power to develop a uniform federal rule. In order to effectuate the principal purposes of CERCLA, Section B proposes a uniform federal rule imposing liability on parent corporations in CERCLA actions.

### A. Choice of Law in CERCLA Actions

Federal courts have broad power to develop federal common law in cases arising under federal statutes.<sup>74</sup> Under the doctrine of *Clearfield Trust Co. v. United States*,<sup>75</sup> federal courts may develop federal common law to govern matters affecting the rights of the federal government.<sup>76</sup> In a recent clarification of this doctrine, the Supreme Court noted that “federal law governs questions involving the rights of the United States arising under nationwide federal programs.”<sup>77</sup> The Court has more generally recognized that “the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts.”<sup>78</sup> Because the liability of shareholders of responsible parties under CERCLA affects the rights of the federal government and falls within the interstices of the statute, federal courts have authority to develop federal common law governing when to pierce the corporate veil of insolvent responsible parties.<sup>79</sup>

In deciding whether to exercise their power to develop a uniform federal rule, courts consider whether national uniformity is needed,

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financial responsibility for hazardous waste disposal facilities. See CERCLA § 108(b), 42 U.S.C. § 9608(b) (1982).

<sup>73</sup> See H. HENN, *supra* note 15, § 73, at 96.

<sup>74</sup> See generally Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986) (describing the broad power of federal courts to develop federal common law).

<sup>75</sup> 318 U.S. 363 (1943).

<sup>76</sup> See *id.* at 366–67.

<sup>77</sup> *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979).

<sup>78</sup> *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

<sup>79</sup> See *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984); *cf.* *United States v. Pisani*, 646 F.2d 83, 86 (3d Cir. 1981) (holding that federal courts have power to develop federal common law to govern piercing the corporate veil in cases involving federal rights under the Medicare program).

whether a federal rule would "disrupt commercial relationships predicated on state law," and whether "application of state law would frustrate specific objectives of the federal programs."<sup>80</sup> CERCLA's legislative history indicates that Congress intended courts to develop uniform federal rules for governing liability under CERCLA. Congressman Florio, the House sponsor of CERCLA, noted that "[t]o insure the development of a uniform rule of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area."<sup>81</sup>

Although a uniform federal rule governing the liability of parent corporations in CERCLA actions would undoubtedly affect commercial relationships predicated on state law,<sup>82</sup> it would be improper to characterize such effects as "disruptive." As discussed in Part I, the principal economic effects of a rule imposing CERCLA liability on parent corporations would be to discourage corporations from setting up undercapitalized subsidiaries to engage in hazardous waste disposal activities and to encourage parent corporations to oversee the hazardous waste disposal activities of their subsidiaries. Thus, a uniform federal rule would merely limit the ability of states to create a haven for unsafe hazardous waste disposal activities.

Furthermore, application of state law governing the piercing of the corporate veil would frustrate the important health and safety objectives of CERCLA. Although the federal government typically leaves local matters of health, safety, and welfare to the states,<sup>83</sup> the grave threat of irreparable harm to valuable natural resources and human life posed by unsafe hazardous waste disposal justifies the federal government's entry into this field of regulation. Application of a state rule affording limited liability to parent corporations would undermine the principal objectives of CERCLA — prompt and effective cleanup of unsafe hazardous waste disposal facilities and deterrence of future hazards.<sup>84</sup> Because of the importance of the health

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<sup>80</sup> *Kimbell Foods*, 440 U.S. at 726-29; see *A & F Materials*, 578 F. Supp. at 1255; *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (S.D. Ohio 1983); cf. *Pisani*, 646 F.2d at 86-87 (applying the *Kimbell Foods* test to determine whether to develop a uniform rule governing piercing the corporate veil in Medicare cases).

<sup>81</sup> 126 CONG. REC. 31,965 (1980); see also *A & F Materials*, 578 F. Supp. at 1255 (declaring that a uniform federal rule should govern the imposition of joint and several liability in CERCLA cases); *Chem-Dyne*, 572 F. Supp. at 809 (same).

<sup>82</sup> Cf. Angelo & Bergeson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. REV. 101 (1985) (describing the many transactions affected by the expanding scope of liability for environmental damages).

<sup>83</sup> See *Brown v. Maryland*, 25 U.S. 419, 433 (1827). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-12 (1978) (noting that state regulations that seek to promote public health and safety are usually not viewed as burdens on interstate commerce).

<sup>84</sup> See *infra* pp. 1001-03.

and safety objectives underlying CERCLA, in addition to the strong need for a uniform national rule, federal courts should develop a federal rule to govern piercing the veil of subsidiary corporations in CERCLA actions.<sup>85</sup>

### *B. Piercing the Veil of Subsidiary Corporations in CERCLA Actions*

When neither the federal statute that created the cause of action at issue nor the statute's legislative history express standards for piercing the corporate veil, courts look to the federal interests and policies underlying the applicable statute for guidance in fashioning a federal common law standard.<sup>86</sup> Federal courts have consistently pierced the corporate veil when limited corporate liability would undermine a significant federal interest or policy advanced by the applicable statute.<sup>87</sup>

The principal federal interests advanced by Congress in CERCLA are (1) "prompt and effective response to problems of a national magnitude resulting from hazardous waste disposal" and (2) imposition of liability for clean-up costs and natural resource damages on "those responsible for problems caused by the disposal of chemical poisons."<sup>88</sup>

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<sup>85</sup> Federal courts have developed uniform federal rules to fill other gaps in the liability provisions of CERCLA. For example, federal courts have interpreted § 107 of the Act as authorizing imposition of joint and several liability. See *supra* note 10.

<sup>86</sup> See *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (noting that courts applying federal common law "will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, . . . an inquiry that usually gives less respect to the corporate form than does the state common law alter ego doctrine"); *Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (refusing to apply the Delaware test for piercing the corporate veil because "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy . . . which Congress has announced"); Note, *Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?*, 13 PAC. L.J. 1245, 1249-50, 1253-55 (1982).

<sup>87</sup> See *Anderson*, 320 U.S. at 363 (noting that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement); *Town of Brookline*, 667 F.2d at 221; *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981) (disregarding the corporate entity when limited liability would enable a shareholder to circumvent a federal statute); *Capital Tel. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) (piercing the corporate veil under the federal common law "in the interests of public convenience, fairness, and equity"); *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 119 (D. Vt.) (holding that under § 311 of the Federal Clean Water Act "[t]he public interest in preserving the environmental integrity of Lake Champlain . . . is sufficiently paramount that the parent corporation, . . . which profits from the operations of its alter-ego subsidiaries, should be accountable for any violation"). *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974); Note, *supra* note 86, at 1254-55. But cf. *Wehner v. Syntex Agribusiness, Inc.*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 20,346, 20,346-47 (E.D. Mo. Apr. 1, 1985) (adhering to the presumption against exercising jurisdiction over an out-of-state parent corporation that owns a subsidiary conducting business in the state).

<sup>88</sup> *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).



To effectuate these purposes, Congress intended that the liability provisions of CERCLA be given a "broad and liberal" interpretation.<sup>89</sup>

Affording limited liability to parent corporations would undermine these vital federal interests. First, prompt and effective government responses depend crucially on the availability of funds — the tool most needed for cleanup and restoration.<sup>90</sup> In order to ensure the availability of sufficient funds, Congress designed the liability provisions of CERCLA to foster the expeditious negotiation of settlement agreements.<sup>91</sup> As explained above, however, the mere possibility that the parent corporation of an insolvent responsible party could escape liability undermines this scheme by delaying or reducing recovery of response costs.<sup>92</sup> Thus, affording limited liability to parent corporations would frustrate one of CERCLA's primary purposes — prompt and effective cleanup of the hundreds of unsafe hazardous waste sites<sup>93</sup> — by inhibiting the government's ability to replenish the Superfund.<sup>94</sup>

Second, CERCLA's broad liability rules reflect Congress's intent to deter the creation of unsafe hazardous waste disposal sites by imposing liability on all responsible parties. Affording limited liability to parent corporations of responsible parties would promote overly risky hazardous waste disposal activities by encouraging corporations to place hazardous waste operations in the hands of poorly capitalized subsidiaries<sup>95</sup> and by discouraging parent corporations from overseeing the hazardous waste disposal carried out by their subsidiaries.<sup>96</sup> The federal interest in imposing liability on all parties responsible for the

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<sup>89</sup> See *id.* ("The statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided." (emphasis added)).

<sup>90</sup> See, e.g., *EPA Delays Cleanup at 4 Mass. Sites*, Boston Globe, Aug. 17, 1985, at 21, col. 5 (noting that shortage of funds caused the delay).

<sup>91</sup> See Rikleen, *supra* note 8, at 703-05.

<sup>92</sup> See *supra* p. 997.

<sup>93</sup> In 1979, the EPA estimated that 1200 to 2000 of the 30,000 to 50,000 waste disposal sites in the United States pose potential threats to public health and the environment. See *Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomm. on Env't'l Pollution and Resource Protection of the Senate Comm. on Env't. and Public Works*, 96th Cong., 1st Sess., pt. 4, at 37 (1979) (statement of Thomas C. Jorling, Assistant Administrator, EPA).

<sup>94</sup> This rationale would not necessarily justify piercing the corporate veil in all CERCLA cases. When the insolvent responsible party does not have a parent corporation but instead has many shareholders, the litigation costs of piercing the corporate veil might exceed the benefits of internalizing the costs.

<sup>95</sup> See *supra* pp. 990-92. In interpreting New Jersey's Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11 to -23.112 (West 1977), to impose liability on parent corporations, the New Jersey Supreme Court noted that "[a] contrary result would permit corporations, merely by creating wholly-owned subsidiaries, to pollute for profit under circumstances when the Legislature intended liability to be imposed." *State v. Ventron Corp.*, 94 N.J. 473, 502-03, 468 A.2d 150, 165 (1983).

<sup>96</sup> See *supra* pp. 993-95.

release of hazardous waste empowers courts to close the important loophole that might allow parent corporations to escape CERCLA liability.

### III. CONCLUSION

In its haste to address the great threat to public health and welfare posed by hazardous waste disposal, Congress did not specifically state whether parent corporations of responsible parties should be brought within the purview of CERCLA. This Note has shown that economic considerations, reflected in CERCLA, favor imposing liability on parent corporations of insolvent responsible parties. A rule limiting liability would frustrate the government's enforcement efforts and afford parent corporations a "safe harbor" for conducting overly risky hazardous waste disposal activities. To effectuate the principal purposes of CERCLA — prompt and effective cleanup of unsafe disposal sites and imposition of liability upon all responsible parties — courts should pierce the corporate veils of insolvent subsidiaries. Federal common law principles empower courts to impose liability upon parent corporations in order to implement fully Congress's manifest intent and purpose.