Liability of Parent Corporations for the Operations of Their Subsidiaries in the Minerals Industry

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1 The authors note that they represent parties to some of the cases discussed in this paper, and caution that the views expressed herein are solely their own personal views and do not necessarily reflect the views of their clients.
§ 2.01. Introduction.²

As the nature of the mining business has become more complex, so too has the business form to carry out different aspects of the enterprise. For various reasons, including the desire to limit or manage risk and the need for substantial capital investment, the mining industry today is heavily reliant on the corporate form of enterprise, and frequently uses multiple but related corporations to serve discrete functions and exploit new opportunities. Limited liability, one attribute of the corporate form of business, has been treated traditionally as the rule, and not the exception. However, the exceptions have grown through contemporary derivations of the equitable doctrine of piercing the corporate veil and the expansive application of remedial statutes.

Historically the corporate liability universe was the realm of tort and contract liabilities, governed, like the corporation itself, primarily by state law and subject to private litigation. The rise of the modern federal regulatory state has altered all that. Many, if not most, aspects of corporate conduct are controlled by federal (and derivative state) regulatory requirements which are result-oriented, focused more directly on controlling corporate conduct than on compensating injured third parties.

At the same time, federal regulators are less concerned than the states with protecting the rights of corporations organized under and nurtured by state law. Each federal agency tends to focus single-mindedly on achieving the particular policy objectives of its own regulatory scheme and preserving corporate viability is not one of them. Unfortunately for the minerals industry, it is among the most pervasively regulated and therefore the most subjected to the consequent disregard for the corporate form and encroachment upon principles of limited liability.

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² The authors gratefully acknowledge the valuable assistance of Rodrigo Garcia, Jr., J.D., 1995 University of Texas, in the preparation of this chapter.
This chapter examines those trends that expose parent corporations to potential liability for the activities of their subsidiaries, particularly as they arise under environmental and safety statutes applicable to the minerals industry. In particular, after a review of some general principles, we focus on the state of the law for parental liability under four such regulatory schemes: CERCLA, OSHA, MSHA, and SMCRA.

§ 2.02. The Corporate Form and Limited Liability.


As a general matter, a corporation is a legal person distinct from those persons who compose its members or owners with its property vested in itself and its obligations separate from its owners. The doctrine of corporate separateness is a legal theory intended to serve the public policy to promote commerce and economic growth. Although the corporation is referred to as a legal fiction, it is often said that it is a fiction to be acted upon as if true.3

The distinct, or separate, corporate personality carries with it various attributes including the power to contract and to hold or convey property in its name; the power to sue or be sued in its name; centralization of management; ease in transferability of ownership; perpetual succession; and limited liability.4 The last attribute, limited liability, is cited as the principal reason for the corporation becoming the dominant business form in the United States.5 However, the attribute of limited liability may be secured under other business forms such as the Limited Liability Company which is essentially a hybrid that combines the advantage of limited liability of a corporation with the tax benefits available to a partnership.6 The corporation may issue various types of stock for purposes of allocating control, degree of risk and return to the owners.7 As a creature of law,

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essentially state law, a corporation must satisfy and maintain formal requirements for legal recognition of its distinct personality.⁸


The doctrine of corporate separateness carries with it the principle that shareholders of the corporation are not normally liable for the obligations of the corporation. This principle remains the rule and not the exception.⁹ Limited liability emerged as an attribute of the corporate personality well after the recognition of the corporate form when some of the early constraints the states placed upon the corporation eventually yielded to the demands posed by a rapidly industrializing economy.¹⁰ In order to facilitate the attraction of capital necessary for more complex enterprises in an increasingly industrialized economy, it was generally believed that the corporate veil must, among other things, insulate, or shield, the personal wealth of investors from the risks attendant to owning these enterprises. Thus, under the doctrine of limited liability, stockholders’ exposure to liability is limited to their capital contribution to the enterprise.¹¹ It has been on the basis of this doctrine that “large undertakings are rested [and] vast enterprises are launched.”¹² The separate corporate identity will be upheld even when the principal purpose of using that business form is to secure the advantage of its shield to limit the risk of its owners.¹³


The principle of limited liability applies equally to parent and subsidiary corporate arrangements. Corporations owned by other corporations do not lose their identity due to dominant or exclusive ownership. A subsidiary corporation has a separate corporate existence,

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⁸ Id. §§ 2.01-2.07.
¹¹ 1 W. Fletcher, § 14, at 464.
¹³ Id. at 361.
or identity, from its parent just as a corporation owned by a dominant or sole individual shareholder does.\textsuperscript{14}

The adaptation of the corporate form into multiple and related organizational structures evolved from the increasing complexity of the enterprises. The use of the multi-corporation structure may produce efficiencies associated with specialization in discrete functions of an enterprise, or isolate the risks of a particular undertaking. In the mining industry it is not uncommon to find distinct but affiliated corporations or other business forms whose purposes relate to the various functions that comprise the enterprise, such as reserve holdings, mining, product preparation or transportation, marketing and support services. A variety of economic, management and legal considerations will influence the deployment of affiliated corporate and other business forms.\textsuperscript{15}

For example, the increased use of multi-corporation organizations was probably inevitable in an industry such as coal mining that has undergone substantial restructuring in response to fundamental economic forces. The structure of the U.S. coal industry has changed dramatically in terms of the number and size of firms. Fewer firms operating less than half as many mines produce almost twice as much coal today then two decades ago.\textsuperscript{16} The significant change in industry structure occurred through an increase in merger and acquisition activity driven by a deteriorating price structure that forced less efficient, and often smaller, producers to exit the business.\textsuperscript{17}

\textsuperscript{14} 1 W. Fletcher, § 25, at 513. See also United States v. Jon. T. Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985).

\textsuperscript{15} Some of these discrete functions may also be pursued through contract with unaffiliated organizations. See generally McJunkin, at 6-8 (listing various factors influencing the use of affiliated corporations in the coal industry, e.g., historic identity; property law; labor considerations; tax considerations; and transactional advantages).


\textsuperscript{17} See generally U.S. Dep’t of Energy, Energy Information Administration, The U.S. Coal Industry, 1970-1990: Two Decades of Change 22 (1992). Several factors generally provided the impetus for the merger activity, including: (1) acquisition of a reserve base that enhanced a company’s strategic market position; (2) diversification of the reserve base into lower-sulfur, or “compliance” coal; (3) acquisition of firms with favorable
The competitive pressures that produced the restructuring of the coal industry will likely continue as the principal market for coal — electricity generation — begins its own transformation from a cost of service regulation to market competition.\(^\text{18}\) Cost pressures placed upon coal to remain a competitive base-load fuel for electricity generation in a less geographically confined marketplace will force the search for greater efficiencies in coal production, handling and transportation. Moreover, as the evolution of a competitive electricity market reaches the point of functional unbundling of the generation, transmission and distribution services, coal (energy) producers will likely explore new organizational relationships to facilitate some form of participation in the electricity generation business in order to maintain and enhance the competitive position of their product.

§ 2.03. **Exceptions to the General Rule.**

[1] — **Theories.**

The general rule of limited liability will be abrogated in exceptional circumstances, and the corporate organization disregarded in order to impose the corporation’s obligations upon shareholders or parent corporation.\(^\text{19}\) Various theories have evolved to accomplish this end directly or indirectly. The equitable doctrine of piercing the corporate veil is the most familiar theory for imposing indirect — or vicarious — liability upon shareholders. Other theories, sometimes characterized interchangeably as imposing either direct or indirect liability, are agency and the public policy exception. More recent derivations of the public policy exception arise in the context of remedial statutes where expansive interpretations of statutory directives are used independently or in combination with equitable theories to impose obligations upon corporate shareholders.

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\(^\text{19}\) 1 W. Fletcher, § 41.10, at 614-15.
Although the circumstances vary for invoking these different, but sometimes overlapping, theories, they are all nurtured by equitable considerations. Since the corporate identity is a privilege conferred by law to advance a public policy, it cannot be extended beyond these purposes so as to shield fraud, perpetuate an injustice or defeat a legislative policy.\textsuperscript{21}

\textbf{[2] — Piercing the Corporate Veil.}

The doctrine of piercing the corporate veil fastens liability upon shareholders under various theories, the most familiar being the “alter ego” theory and the “instrumentality” rule.\textsuperscript{22} It has been suggested, perhaps correctly, that the various metaphors used to describe the circumstances for abrogating the principle of limited liability obscure rather than enlighten the analysis.\textsuperscript{23}

The most widely accepted formulation, or test, for piercing the corporate veil embodies two elements: (1) the corporation is not only influenced by the owners, but there is such unity of interest and ownership that the separate personalities of the corporation and shareholders have ceased to exist; and (2) an inequitable result will follow from the treatment of its actions as those of the corporation alone.\textsuperscript{24} A showing that the owners dominate and control the corporation will generally satisfy the first element. However, the level of control must manifest itself through total domination of the corporate policy, practice and finances as to the act or

\begin{footnotes}
\item[20] \textit{See} United States v. Jon T. Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985) (characterizing the theories of limited liability and piercing the corporate veil as a “legal quagmire”).
\item[22] \textit{See}, e.g., \textit{White} v. Winchester Land Development Corp., 584 S.W. 2d 56, 61-62 (Ky. App. 1979) (discussing three theories used under Kentucky common law).
\item[23] \textit{E.g.}, \textit{Laya} v. Erin Homes, Inc., 352 S.E. 2d 93, 99 (W. Va. 1986) \textit{citing} Berkeley v. Third Avenue Ry., 155 N.E. 58, 61 (N.Y. 1926); \textit{White}, 584 S.W. 2d at 61 (questioning whether various theories are truly distinct); \textit{Jon T. Chems., Inc.} 768 F.2d at 691 (using interchangeably the metaphors “alter ego,” “agent” and “instrumentality”).
\end{footnotes}
transaction in question rather than mere majority or complete stock ownership. 25 The second element, an inequitable result, lacks a precise standard. While fraud or misrepresentation will often satisfy the element of injustice or fundamental unfairness, it is not always a prerequisite to disregard the corporate identity. 26 Another factor that may satisfy the element of injustice is the gross undercapitalization of the corporation as measured against the purpose and nature of the corporate undertaking. 27 Undercapitalization would appear to serve as the principal means for satisfying the injustice element in cases where the corporate veil would defeat a legislative policy. 28 However, the mere fact that a corporation is unable to pay its debts does not satisfy the requirement to show fraud or

25 1 W. Fletcher, § 41.10, at 616. See also DeWitt Trade Brokers, Inc. v. W. Ray Fleming Fruit Co., 540 F.2d 681, 685 (4th Cir. 1976)(complete or dominant stock ownership by individual insufficient grounds to disregard corporate identity of closely held corporation); Jon T. Chems., Inc., 768 F.2d at 691 (complete ownership and identity of officers and directors insufficient basis to disregard distinct identities of parent and subsidiary). As the court in Jon T. Chems., Inc. observed, since every subsidiary is in some sense an alter ego of its parent, the operation of the subsidiary independent of the parent not only has little practical meaning, but “it would also constitute a breach of the subsidiary’s duty to further the interest of its owner.” 768 F.2d at 691.

26 Compare DeWitt Truck Brokers, Inc., 540 F.2d at 684 (proof of fraud not necessary element to disregard corporate identity), with Edwards Co. v. Monogram Industries, 730 F.2d 977, 980-982 (5th Cir. 1984)(en banc)(fraud is an essential element in contract cases but not in tort cases). The distinction drawn in Edwards is premised upon the voluntary nature of a contract transaction, whereas in tort the relationship is forced upon the innocent third party who should not assume the risk of loss due to the corporate owner’s tortious acts. Jon T. Chems., Inc., 768 F.2d at 693. In Laya, the West Virginia Supreme Court suggests that the assumption of risk in a contract case may depend upon the sophistication of the creditor. 352 S.E. 2d at 100.


28 Abbott, 321 U.S. at 362-3 (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).
injustice.\textsuperscript{29} Indeed, the inability to pay its debts will, as a practical matter, exist in most corporate veil-piercing cases.\textsuperscript{30}

To assist in the analysis in deciding whether to pierce the corporate veil, courts have suggested various factors for consideration.\textsuperscript{31} As applied to a parent and subsidiary organization, these factors can be summarized generally to include:

1. parent and subsidiary have common owners, directors or officers;
2. subsidiary fails to observe corporate formalities;
3. subsidiary is financed by the parent and/or parent pays expenses of subsidiary;
4. subsidiary is grossly undercapitalized;
5. commingling or diversion property and other assets; and
6. parent’s day-to-day control of subsidiary’s activities.

The determination whether to disregard the corporate identity does not turn on any single factor, nor does it require the presence of every factor. The examination of these factors has been characterized as the “totality of circumstances approach” that weighs the policy of limited liability \textit{i.e.}, incentive for capital investment, against the policy for piercing the corporate veil, \textit{i.e.}, basic fairness to parties dealing with the corporation.\textsuperscript{32}


The equitable doctrine of piercing the corporate veil has long embodied the principle that the corporate form will be disregarded when it has been formed or used to evade a statute or public policy.\textsuperscript{33} This public policy exception is most forceful where a statute provides specific directives as to when the separate corporate identity may be disregarded, and courts will often defer to a clear mandate regardless of whether insulation from liability was the aim or only the result of the use of the corporate form.\textsuperscript{34}

\textsuperscript{29} Scarbrough v. Perez, 870 F.2d 1079, 1084 (6th Cir. 1989).
\textsuperscript{30} NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1053 (10th Cir. 1993).
\textsuperscript{31} See, \textit{e.g.}, \textit{Jon T. Chems., Inc.}, 768 F.2d at 691-2; \textit{Labadie Coal Co.}, 672 F.2d at 97-99; \textit{Laya}, 352 S.E. 2d at 98-99.
\textsuperscript{32} See \textit{Laya}, 352 S.E. 2d at 99; \textit{Labadie Coal Co.}, 672 F.2d at 96.
\textsuperscript{33} \textit{E.g.}, United States v. Lehigh Valley R.R. Co., 220 U.S. 257, 259 (1911).
\textsuperscript{34} Anderson v. Abbott, 321 U.S. 349, 363 (1944).
Indeed, since the legislature has endowed the corporation with limited liability for reasons of public policy, the legislature is entitled to decide when those public policy concerns should yield to others which may be deemed more compelling. In addition to the traditional considerations of whether piercing the corporate veil is justified by the public convenience, fairness and equity, the courts may look to see if the statute places importance on the corporate form.

The public policy exception is employed more frequently by government agencies urging expansive application of statutory terms defining responsible parties as supported by the broad public policy underlying the statute. Toward this end, agencies and private parties seeking redress under these statutes advocate a broader public policy exception to lighten their burden to impose liability upon parent corporations for their subsidiary’s activities either indirectly through equitable doctrines or directly as an independent statutory basis, but without having to satisfy the traditional criteria for veil piercing.

35 E.g., Capital Telephone Co. v. F.C.C., 498 F.2d 734, 738 (D.C. Cir. 1974).
36 Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981). Several of the statutes discussed in this chapter also contain provisions that target corporate agents, including officers and directors, as specific persons potentially subject to affirmative obligations. See, e.g., Mine Act, § 108(a)(1) 110(c), 30 U.S.C. §§ 818 (a)(1), 820(c)(1994); SMCRA §§ 518(f), 521(c), 30 U.S.C. §§ 1268(f), 127(c)(1994). These provisions do not, however, provide specific statutory directives to disregard the corporate identity generally. Instead, these provisions codify a longstanding rule that corporate agents or officers may be held individually liable for their own wrongful acts. This liability is independent of the corporation’s and does not arise directly from the individual’s status in the corporation. 3A W. Fletcher, § 1137, at 276; Lobato v. Pay Less Drug Stores, Inc. 261 F.2d 406, 408 (10th Cir. 1958).
38 E.g., Mine Act § 2(e), 30 U.S.C. § 801(e)(1994)(operators of mines have primary responsibility to prevent the existence of unsafe and unhealthful conditions); SMCRA § 102(a), 30 U.S.C. § 1202(a)(1994)(establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations).
39 See § 203[2].
While these expansive interpretations of statutory terms and purpose have acquired some acceptance for certain federal interests, they have met with judicial skepticism for others. No clear standard has emerged for determining whether a federal statute evinces an intent to displace the principle of limited liability and impose liability directly upon the corporation’s owners, for public policy reasons, as an independent statutory basis. If anything, the cases disclose an ad hoc approach akin to that associated with piercing the corporate veil. Certainly, in view of the fact that limited liability remains a fundamental principle of our nation’s corporate law, the mere regulation of a corporation’s activities under a federal statute that embodies broad definitions and general purposes should not, standing alone, displace the state laws governing those organizations.


Corporate veil-piercing cases arising in federal court often present the question of the choice of law — state or federal — that governs the analysis. At least since *Erie R.R. Co. v. Tompkins*, it is clear that the law of the state that creates the cause of action provides the law of the case in diversity litigation. The same rule would apply where the federal courts exercise ancillary jurisdiction over state-law claims brought with a federal claim.

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40 E.g., Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983)(construing the term “employer” under Fair Labor Standards Act to include shareholders); Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996)(finding former parent of subsidiary directly liable as “operator” of subsidiary’s plant under CERCLA).

41 E.g., Connors v. P & M Coal Co. 801 F.2d 1373 (D.C. Cir. 1986)(rejecting view that term “employer” under Employee Retirement Income Security Act includes dominant shareholder); Elliot Coal Mining Co. v. Director, OWCP, 17 F.3d F.3d 616 (3d Cir. 1994)(rejecting agency’s position that under the Black Lung Benefits Act the term “operator” imposes liability per se upon all owners or lessees of coal lands).


44 E.g., Poyner v. Lear Siegler, Inc., 542 F.2d 955, 958 (6th Cir. 1976).

The answer to this question in federal question litigation remains less clear. It is generally accepted that when a federal statute shows clear legislative intent to disregard the corporate form, this directive controls the question. Even in the absence of a clear statutory directive, where a substantive federal interest is implicated by the corporate form, federal law governs and the courts will often resort to a federal common law for piercing the corporate veil.

Although federal law controls in federal question litigation, the remaining, and more difficult, issue is the appropriate rule of decision. For cases involving nationwide federal programs, the determination of the appropriate rule of decision would be guided by the considerations set forth in United States v. Kimbill Foods, Inc. for evaluating the need to adopt a uniform federal rule of decision. This inquiry considers the need for uniformity; the degree to which application of state law would frustrate specific federal program objectives; and the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. Where the state law veil-piercing doctrine appears functionally equivalent to the federal common law in a particular case, the rule of decision question will prove largely academic. However, when state law purportedly frustrates the aim of the federal statute or policy, pleas for uniformity will likely precede the call for imposition of liability under either expansive statutory interpretations or federal alter ego theories that accord less respect to the corporate form than traditional state common law doctrines.

48 E.g., Seymour v. Hull & Moreland Eng’g, 605 F.2d 1105, 1109 (9th Cir. 1979)(federal substantive law applies to matters under Labor Management Relations Act but courts may look to state law for guidance); Capital Telephone v. F.C.C., 498 F.2d 734, 738 (D.C. Cir. 1974)(approving F.C.C.’s use of a federal alter ego theory to deny a radio license under Communications Act of 1934).
51 Id. at 728-29.
§ 2.04. Corporate Separateness and Contemporary Regulation.

The pervasive regulation of the minerals industry subjects its participants to numerous complex regulatory schemes that often impose strict liability for infractions. Some of these regulatory schemes are directed at businesses in general, while others focus exclusively upon all or specific segments of the minerals industry. Because the government agencies which administer and enforce these programs have no particular responsibility for protecting the public interests served by principles of limited liability, they invariably prefer to avoid and tend to disregard the constraints posed by the doctrine of corporate separateness when searching for a viable responsible party. Accordingly, these agencies will generally advocate the creation of either special alter ego standards or expansive application of statutory terms to reach officers and shareholders including the parent corporation, as justified by the need to achieve their regulatory objectives and the public interest in effectuating their particular statutory scheme.

[1] — CERCLA.

[a] — Statutory Purpose and Liability Scheme.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) was enacted to address weaknesses identified in existing laws governing storage and disposal of hazardous wastes in the past. To this end, the purpose of CERCLA is to establish


broad cleanup, enforcement and funding mechanisms to remediate closed, abandoned or uncontrolled hazardous waste sites.\textsuperscript{56} The statute authorizes the government to either compel cleanup by responsible parties,\textsuperscript{57} or undertake the cleanup\textsuperscript{58} and then seek reimbursement from the responsible parties.\textsuperscript{59} Private parties who undertake cleanup or remediation activities may seek contribution from other responsible parties.\textsuperscript{60} Although not explicit, the CERCLA liability standard\textsuperscript{61} has been consistently construed to impose liability without fault, \textit{i.e.}, strict liability.\textsuperscript{62} Moreover, even in the absence of a clear statutory directive, the courts have typically imposed joint and several liability unless a reasonable basis exists for apportionment.\textsuperscript{63}

The broad reach of CERCLA's liability scheme arises from the classes of persons potentially liable for costs and damages arising from the release of hazardous substances. Section 107 of CERCLA establishes four categories of potentially responsible parties:

1. current owners and operators of a facility;\textsuperscript{64}
2. past owners or operators of facilities at the time of disposal;\textsuperscript{65}
3. persons who arranged for disposal, treatment or transportation of a hazardous wastes (including waste generators);\textsuperscript{66} and,
4. persons who accepted hazardous waste for transport to a disposal or treatment facility selected by them.\textsuperscript{67}

The statute supplements these broad categories of potentially responsible parties with typically expansive definitions of the terms within

\textsuperscript{56} \textit{Id.}  
\textsuperscript{57} CERCLA § 106(a) 42 U.S.C. § 9606(a)(1994).  
\textsuperscript{58} CERCLA § 104 42 U.S.C. § 9604 (1994).  
\textsuperscript{60} \textit{Id.}  
\textsuperscript{62} \textit{E.g., Tippin’s Inc. v. USX Corp.}, 37 F.3d 87, 92 (3d Cir. 1994).  
\textsuperscript{63} \textit{E.g., In re Bell Petroleum Services,} 3 F.3d 889 (5th Cir. 1993); O’Neil v. Piccilo, 883 F.2d 176 (1st Cir. 1989).  
\textsuperscript{64} 42 U.S.C. § 9607(a)(1)(1994).  
\textsuperscript{65} \textit{Id.} § 9607(a)(2).  
\textsuperscript{66} \textit{Id.} § 9607(a)(3).  
\textsuperscript{67} \textit{Id.} § 9607(a)(4).
each category. For example, an “owner or operator” includes any person owning or operating the facility, or anyone who owned, operated or otherwise controlled a facility prior to abandonment. Person includes individuals and business entities such as corporations.

[b] — Theories for Parent Liability.

The tension between CERCLA’s broad liability scheme and the longstanding principle of limited liability is amply demonstrated by the two distinct theories that have emerged for parent liability. One theory imposes indirect liability on the parent corporation as an “owner” of a facility based upon the doctrine of piercing the corporate veil. The other theory imposes as an independent statutory basis direct liability on the parent corporation as an “operator” of the facility. Even the direct operator liability theory exhibits two distinct approaches, or standards, related to the level of parental control over the subsidiary’s activities.

Two federal appellate courts, the Fifth and Sixth Circuits, have rejected the call for imposing direct liability upon parent corporations as “operators” under an expansive interpretation of CERCLA’s liability scheme for potentially responsible parties. In each instance, the courts eschewed the notion that CERCLA evinces a clear congressional intent to abandon the traditional concepts of limited liability. Instead, those courts held that parent liability under CERCLA may attach as an “owner or operator” only under a traditional veil-piercing analysis. Both cases

69 Id. § 9601(21).
71 Joslyn, 893 F.2d at 82-83; Cordova Chem. Co., 59 F.3d at 589-90.
72 Joslyn at 83-84; Cordova Chem. Co., 59 F.3d at 591. In Joslyn the Fifth Circuit applied the circuit’s general federal alter ego analysis adopted in United States v. Jon T. Chemicals, 768 F.2d 686 (5th Cir. 1985), but in Cordova Chem. Co. the Sixth Circuit held that state law applies.
also demonstrate the difficulty in imposing derivative liability upon the parent as an “owner” by piercing the subsidiary’s veil. In *Joslyn Mfg. Co. v. T. J. James & Co.*, the first element, parent domination, was absent,\(^{73}\) while in *United States v. Cordova Chemical Co.*, the active participation of the parent in the subsidiary’s environmental and financial matters was deemed insufficient to meet the second element of fraud or injustice.\(^{74}\)

At least four circuits have adopted the view that, though mere ownership of a subsidiary which is an operator of a facility is not enough to make the parent liable as owner of the facility, CERCLA imposes direct liability upon parent corporations as the constructive *operator* of a facility where there is a showing of its control of the subsidiary’s hazardous waste activities or facilities.\(^{75}\) The independent statutory basis for imposing direct liability upon a parent corporation as essentially the constructive “operator” of its subsidiary’s facility is based upon an expansive view of both the remedial purpose and language of CERCLA. The extension of direct liability is seen as compatible with the statutory goal to ensure that those responsible for creating the harm and damage from the release of hazardous wastes bear the costs of their actions.\(^{76}\) The structure and language of the

\(^{73}\) 593 F.2d at 83-84.

\(^{74}\) 59 F.3d at 591.


statute which identifies responsible parties as both “owners” and “operators” is considered evidence of congressional intent to impose two distinct basis for CERCLA liability. Finally, the definition of “person” which includes a corporation or commercial entity has been cited as additional indicator of intent to hold parent corporations directly liable for violations at a subsidiary’s facility which it can be deemed to have operated. For parent and subsidiary organizations then, indirect owner liability arises in circumstances that warrant piercing the corporate veil, while direct operator liability turns upon the independent actions of the parent as shown by its control over the subsidiary’s activities or facilities.

Just as different theories have emerged for owner and operator liability, two distinct approaches have developed for the level of control necessary to impose direct parent operator liability. Most courts require actual control over, or active participation in, the subsidiary’s activities. However, the degree of involvement that satisfies the “actual control” standard remains unclear. The standard has been described as more than merely the general authority that comes with complete ownership, but not necessarily requiring a showing of the parent corporation’s actual involvement in hazardous waste disposal decisions, or even, in one case, its control of the general environmental decisions of the subsidiary. It would appear

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77 Lansford-Coaldale, 4 F.3d at 1220. See also Pearce, 79 F.3d 248. Ironically, the courts that place great weight on statutory structure and language for this interpretation have also characterized CERCLA as “notorious for its lack of clarity and poor draftsmanship,” Lansford Coaldale, 4 F.3d at 1221, and a product of “an eleventh hour compromise,” Shore Realty Corp., 759 F.2d at 1040.

78 Lansford-Coaldale, 4 F.3d at 1221 n. 11; Kayser-Roth, 910 F.2d at 26 n.5.

79 E.g., Lansford-Coaldale, 4 F.3d at 1220.

80 Lansford-Coaldale, 4 F.3d at 1220; Jacksonville Elec. Auth., 996 F.2d at 1110; Kayser-Roth, 910 F.2d at 27; see United States v. Gurley, 43 F.3d 1188, 1193 (8th 1994).

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

82 Jacksonville Elec. Auth., 996 F.2d at 110.

83 Lansford-Coaldale, 4 F.3d at 1222 n. 13.
that the “actual control” standard may require something less than day-to-day involvement in management of the subsidiary but more than the general oversight expected from an interested owner.  

In the Fourth Circuit, mere “authority to control” the facility or site has been used as the standard for imposing direct operator liability. The Ninth Circuit appears split on this issue. The mere “authority” standard, as applied to parent-subsidiary relationships, would appear to impose direct operator liability simply by virtue of status as an owner since, in some sense, the parent will always have some capacity, or general authority, to control its subsidiary. This would be a backdoor way of holding corporate parents liable as owners in the guise of holding them liable as operators, producing what the Eighth Circuit has criticized as “the anomalous result of imposing liability on an ‘operator’ who in fact never ‘operated’ a facility.”

Some commenters have attempted to reconcile these distinct approaches for CERCLA liability by characterizing the analysis and results under the direct operator liability and traditional veil-piercing theories as similar. Although the ad-hoc, or fact-intensive, nature of the inquiry for

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84 See, e.g., Kayser-Roth, 910 F.2d at 27 (discussing factors focusing on financial controls and identity of officers and directors).

85 Nurad, Inc., 966 F.2d at 842 (holding that “authority to control” operations and decision as proper standard but declining to hold other officer/shareholders directly liable where evidence showed that their authority was subordinate to president and major stockholder).

86 Compare Kaiser Aluminum & Chem. Company, 976 F.2d at 1341 (imposing direct operator liability on contractor based upon authority to control cause of release.) and Idaho v. Bunker Hill Co., 635 F. Supp. 665, 670-71 (D. Idaho 1986)(direct operator liability may be imposed on parent who has capacity, or reserved authority, to control decisions at the subsidiary’s facility) with Long Beach Unified School Dist. v. Dorothy B. Godwin Calif. Living Trust., 32 F.3d 1364, 1367 (9th Cir. 1984)(to be an operator requires “hands-on, day-to-day participation”).

87 See United States v. Jon T. Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985)(observing in the context of veil-piercing analysis that complete ownership and identity of officers has little practical meaning since every subsidiary is an alter ego of its parent).

88 Gurley, 43 F.3d at 1193.

89 E.g., Worden, “CERCLA Liability of Parent Corporations For the Acts of Their Subsidiaries,” 30 Idaho L. Rev. 73, 74 (1993)(noting that while liability under each theory
these theories share some resemblance, the elusive “control standard” under the direct operator theory falls short of the more stringent standards (the elements of corporate domination and fraudulent purpose) imposed by the traditional piercing-the-corporate-veil doctrine.\(^{90}\) Certainly, the direct operator liability theory eases substantially the transactional costs, if not the burden, normally associated with the pleading and proof of claims under the traditional approach of piercing the corporate veil.\(^{91}\)


[a] — Statutory Purpose and Liability Scheme.

The Occupational Safety and Health Act (“OSH Act”)\(^{92}\) The OSH Act imposes an affirmative duty upon employers to furnish to its employees both “employment and a place of employment” free from recognized

is distinct, courts appear to use similar analysis); Dent, “Limited Liability in Environmental Law,” 26 Wake Forest L. Rev. 151, 160 (1991)(the necessary participation under CERCLA to establish direct liability differs little from that necessary to pierce the subsidiary’s corporate veil).

\(^{90}\) See, e.g., Cordova Chem. Co., 59 F.3d at 591 (control of financial matters and participation in environmental decisions do not indicate use of corporate form to perpetuate a fraud or wrong). Although gross undercapitalization may satisfy the second element in an alter-ego analysis, in view of CERCLA’s retroactive application one may maintain that the adequacy of capital should be measured against the nature of legal requirements at the time of the undertaking and not those imposed after the undertaking, or participation, has ceased.

\(^{91}\) See Stewart & Campbell, “Lessons from Parent Liability Under CERCLA,” 6 Nat. Resources & Env’t. 8 (Winter 1992). Cf. Pearce, 79 F.3d at 252 (noting the different basis of proof for derivative “owner” liability and direct “operator” liability). The Pearce decision also demonstrates the practical consequences associated with the characterization of the CERCLA liability. Because the seller’s liability was deemed independent — i.e., direct operator liability — of its former subsidiary’s, and not derivative — i.e. as the former parent under a veil-piercing theory — the indemnification provision of the stock purchase agreement was construed not to absolve the seller of direct responsibility for contamination at its former subsidiary’s plant.

hazards that are causing or are likely to cause death or serious injury.\textsuperscript{93} It also imposes a duty on employers to comply with occupational safety and health standards promulgated under the Act.\textsuperscript{94} The Secretary of Labor is given authority to promulgate national occupational safety and health standards,\textsuperscript{95} and the Occupational Safety and Health Administration ("OSHA") enforces the Act by inspections and investigations.\textsuperscript{96} Violations may result in the issuance of citations\textsuperscript{97} and assessment of civil and criminal penalties.\textsuperscript{98}

Under the OSH Act, only “employers” may be cited for a violation.\textsuperscript{99} The Act defines an “employer” to be a “person engaged in a business affecting commerce who has employees, but does not include the United States or any State or any political subdivision of a State.”\textsuperscript{100} Because of the circularity of the statutory definitions, the Occupational Health Safety Review Commission ("the Review Commission") has adopted an “economic realities” test, relying on common-law criteria, to determine whether a parent company or other third party could be held to have acted as an “employer.”\textsuperscript{101}

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\begin{footnote}{95} 29 U.S.C. § 655 (1994).
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\begin{footnote}{99} The OSH Act provides that if the Secretary or his representative believe that an employer has violated the OSH Act, he shall issue a citation to the employer. 29 U.S.C. § 658 (1994)(emphasis added). See United States v. Doig, 950 F.2d 411, 413 (7th Cir. 1991); Atlantic & Gulf Stevedores v. Occupational Safety and Health Review Comm’n, 534 F.2d 541, 553-54 (3d Cir. 1976); Vergona Crane Co., 1992 O.S.H.D. (CCH) ¶ 29,775 at 40,495.
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\begin{footnote}{101} Reliance upon common-law criteria seems to be required after Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992). In Darden, the Court held that the term “employee,” when used in a federal statute, should be interpreted under common law principles, unless Congress has specifically provided otherwise in the statute. Id. at 322-24. The Review Commission has held that its economic realities test conforms with the
\end{footnotes}
The economic realities test looks at such factors as
(1) Whom do the workers consider their employer?
(2) Who pays the workers’ wages?
(3) Who has the responsibility to control the workers?
(4) Does the alleged employer have the power to control the workers?
(5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
(6) Does the workers’ ability to increase their income depend on efficiency rather than initiative, judgment or foresight?
(7) How are the workers’ wages established?102

In recent decisions, the Commission has placed special emphasis on factors relating to who has control over the workers and their work environment.103

[b] — Theories of Parent Liability.

The Review Commission has declined to impose liability on the parent corporation for OSH Act violations committed by its subsidiaries except where traditional grounds for piercing the corporate veil exist. When the issue was posed squarely in Hills Department Stores,104 the ALJ held that the parent corporation could not be held liable for its subsidiary’s violations in the absence of grounds for piercing the corporate veil. In Hills Department Stores, the store cited was owned by Hills Stores Company, which had been purchased by Hills Department Stores, Inc., a holding company.105 OSHA fined the holding company, however, instead of Hills Stores Company, and refused to amend the complaint after having

requirements of Darden. C. Abbonzio Contractors, 1995 O.S.H.D. (CCH) ¶ 30,615, at p.42,339 n.3.
105 Id. at *1.
been notified of the parent-subsidiary relationship.\textsuperscript{106} Hills Department Stores, Inc. contested the citation on the grounds that it was not an employer under the Act.\textsuperscript{107} The ALJ agreed, stating that the evidence showed that the employees were employees of the Hills Stores Company.

Hills Department Stores, Inc. cannot be held responsible for employees of Hills Stores Company absent a finding that it and Hills Stores Company are alter egos, or that the two constitute a single employer, or without otherwise determining that the situation is appropriate for piercing the corporate veil.\textsuperscript{108}

The only evidence offered by the Secretary of Labor in support of piercing the corporate veil was common management personnel in both corporations. This evidence was insufficient to establish grounds to pierce the corporate veil.\textsuperscript{109}

Likewise, the Review Commission has refused to count workers who work for subsidiaries in calculating fines to be meted out to violators. The general rule followed by OSHA is to reduce fines levied against small businesses,\textsuperscript{110} The size of a business is calculated as “the maximum number of employees of an employer at all workplaces at any one time during the previous 12 months.” \textsuperscript{111}

In \textit{E & R Erectors, Inc.},\textsuperscript{112} OSHA tried unsuccessfully to convince the ALJ that a small subsidiary of a larger parent should not have its fine reduced, because application of the policy under such circumstances did

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\item Id. at **2, 4.\textsuperscript{106}
\item Id. at *1. \textsuperscript{107}
\item Id. at *2. \textsuperscript{108}
\item Id. at *3. \textsuperscript{109}
\item Under OSHA’s Field Inspection Reference Manual, Chapter IV(C)(2)(i)(5)(a), \textit{republished in} CCH Employment Safety and Health Guide ¶ 7966.195 at 12,111, a violation is to be reduced by 60 percent for employers who employ 1 to 25 employees, 40 percent for employers who employ 26 to 100 employees, and 20 percent for employers who employ 101 to 250 employees. These reductions may be in addition to reductions for good faith and a lack of history of prior violations. \textsuperscript{110}
\item Id. \textsuperscript{111}
\item \textit{E & R Erectors, Inc.}, 17 O.S.H. Cas. (BNA) 1028 (1994)(A.L.J. Frye). \textsuperscript{112}
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not really benefit small business. The firm challenged the size of its penalty, claiming the fine should be reduced because the firm only had nineteen employees. The OSHA inspector had been told that E & R Erectors employed eighty people by E & R’s Vice President, who apparently forgot that E & R was a separate subsidiary of the larger Samuel Grossi, Inc.113 Rather than seek to pin the liability on Samuel Grossi through an alter ego approach, the Secretary instead argued that reducing E & R’s penalty was incorrect because the reduction did not take into account the size of E & R’s parent operation.114 In support of this proposition, the Secretary pointed to Commission precedent115 holding that the size of the parent was a factor in considering eligibility under the Equal Access to Justice Act (EAJA),116 which was also enacted in part to help small businesses.117

The ALJ rejected this argument, simply because the Secretary was unable to produce evidence that it would effectuate the intent of Congress to interpret the definition of “employer” so as to ignore E & R’s corporate status because E & R’s stockholders own another business entity. By contrast, the ALJ noted, counting a parent’s size and assets in calculating eligibility for an EAJA award clearly effectuated Congress’ intent in helping only small businesses.118

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113 Id. at 1030.
114 Id.
116 Under § 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96-481, Tit. II, 94 Stat. 2321, 2325-27, codified as amended as 5 U.S.C. § 504 (1994), agencies cannot award attorney fees to a prevailing corporate party that either (1) had a net worth of more than $7 million when the adversary adjudication was initiated, or (2) had more than five hundred employees when the adversary adjudication was initiated. Department of Labor regulations further provide that in order to qualify, “the net worth and number of employees of the applicant and all its affiliates shall be aggregated to determine eligibility.” 29 C.F.R. § 16.105(f)(1995).
117 Id.
118 Id.

[a] — Statutory Purpose and Liability Scheme.

The Federal Mine Safety and Health Review Act of 1977 (“Mine Act”) was enacted to protect the safety and health of the Nation’s miners. The Mine Act is administered by the Secretary of Labor through the Mine Safety and Health Administration (MSHA). The Secretary is authorized by the Mine Act to promulgate and enforce mandatory safety and health standards, and MSHA inspectors ensure compliance with the Mine Act through frequent inspections and investigations.

Under the Mine Act, mine “operators” are strictly liable for violations, including vicarious liability for violations committed by miners. For most purposes, including violations of mandatory safety and health standards, only a mine “operator” may be held liable. The Mine Act provides that an operator may be “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.”

The Mine Act also imposes additional civil and criminal penalties against officers, directors and agents of corporate operators who commit knowing violations. Agents may include “any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine.” To this extent,

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123 The Mine Act provides that authorized representatives of the Secretary shall inspect each underground coal mine at least four times a year, and each surface coal or other mine at least twice a year. 30 U.S.C. § 813(a)(1994).
LIABILITY OF PARENT CORPORATIONS

Congress has thus expressly provided for piercing the corporate veil, but only where the officer, director, or agent has knowingly ordered, authorized, or carried out a violation of the Mine Act on behalf of the corporation.\(^{128}\)

In meting out penalties, there are no MSHA regulations that make parent corporations liable for their subsidiaries’ violations. However, in assessing civil penalties, MSHA’s regulations have long considered the size of a parent corporation or controlling entity as a factor in determining an appropriate penalty for a subsidiary.\(^{129}\)

[b] — Theories of Parent Liability.

Where the corporate form has been misused to evade liability, MSHA clearly may rely on traditional common-law criteria to pierce the corporate veil and prosecute a parent corporation for its subsidiary’s Mine Act violations.\(^{130}\) Unwilling to limit liability to those parent companies and affiliates it could reach by satisfying the prerequisites for common law veil-piercing, however, MSHA has recently taken the position that all those “who profit from the coal production process must recognize the need to become involved in health and safety aspects of mining, [which can only be accomplished by] holding them and their contractors jointly and severally liable” as mine operators.\(^{131}\)

\(^{129}\) 30 C.F.R. § 100.3(a) provides six factors that should be taken into consideration in calculating the appropriate penalty for violations, pursuant to 30 U.S.C. §§ 815(b) and 820(i). One of these factors is “the size of the business of the operator.” 30 C.F.R. 100.3(a)(1)(1995). In clarifying how this factor should be weighed, the regulations further provide that “both the size of the mine cited and the size of the controlling entity of which the mine is a part” must be taken into consideration in determining whether the size of the penalty is appropriate. 30 C.F.R. § 100.3(b)(1995).
\(^{130}\) See, e.g., United States v. WRW Corp., 986 F.2d 138, 143-44 (6th Cir. 1993).
In *Berwind (I & II)*, MSHA sought to hold Berwind Natural Resources Corporation (“Berwind”), the parent corporation, directly liable as a mine operator for violations committed by an independent contractor engaged by a subsidiary.\(^{132}\) The alleged violations were discovered during an investigation into an explosion at a mine that killed one miner.\(^{133}\) Under four distinct theories, MSHA argued that Berwind was an “operator” of the mine operated by its subsidiary’s independent contractor.

Under one theory, MSHA argued that persons who ultimately own the mineral rights (or that own the companies that own the mineral rights) have the ultimate authority to control how the mine is operated, even if that authority is never exercised. Under this passive owner theory, such persons should themselves be deemed “operators” *per se* for purposes of the Mine Act.\(^{134}\) Under a second theory, MSHA argued that because a parent corporation can indirectly control how its subsidiary’s mine is operated, by way of its control over the subsidiary’s finances and capital expenditures, such indirect control is sufficient to make the parent an “operator” under the Mine Act.\(^{135}\) Third, MSHA cited by analogy the Fair Labor Standards Act (FLSA) in proposing also a “single enterprise” theory of liability. Under FLSA, a parent may be part of a single “enterprise,”\(^{136}\) which along with other affiliated entities together comprise a unitary operation. MSHA argued that a unitary or integrated operation involving a parent and one or more subsidiary corporations should be

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132 In addition to Berwind, the Secretary cited AA&W Coals, Inc., which was the independent contractor hired to operate the mine, as well as three Berwind subsidiaries, Kyber Coal Company (“Kyber”), Jesse Branch Coal Company (“Jesse Branch”), and Kentucky Berwind Land Company (“Kentucky Berwind”). AA&W Coals, Inc. was the only party cited that did not challenge its status as an “operator” of the mine under the Mine Act.

133 17 F.M.S.H.R.C. at 684.

134 Secretary’s Motion for Partial Summary Decision at 52.

135 Secretary’s Motion for Partial Summary Decision at 49-50.

136 An “enterprise” is defined by FLSA as “the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units[.].” 29 U.S.C. § 203(r)(1)(1994).
treated as the “operator” of the mine, and that each entity making up the unitary operation should be directly liable as an operator. 137 Finally, MSHA argued that the parent corporation, its subsidiaries, and the independent contractor all constituted an “association” or “other organization.” As such, they should be treated as a “person” under the Mine Act,138 and collectively constituted an “operator.”139

ALJ Barbour rejected all four of MSHA’s theories and held that Berwind was not a mine operator.140 The judge held that “separate corporate entities are entitled to be treated on their own merits provided they function separately, and those acting for them do so in a manner consistent with their distinct nature.”141 The judge noted that in this case, Berwind and its officers had “virtually nothing to do with the day-to-day operations of the mine.”142

Judge Barbour found that the goals of the Mine Act were best fulfilled when liability was imposed on those who maintained day-to-day control over the working conditions at the mine. “Those who control day-to-day mining, and/or have the authority to do so, are those who and should control the conditions and practices that ensure compliance with the Act and the mandatory safety and health regulations promulgated pursuant to it.”143 The ALJ’s decision has been appealed, however, and it is currently

137 Secretary’s Post-Hearing Brief at 29-32; Secretary’s Motion for Partial Summary Decision at 46 n.33.
139 Secretary’s Post-Hearing Brief at 26-33; Secretary’s Motion for Partial Summary Decision at 45-48.
140 In *Berwind I*, ALJ Barbour granted a motion for summary decision in favor of Berwind, holding that Berwind was not an “operator” as a matter of law. 17 F.M.S.H.R.C. at 717. He granted a similar motion in favor of Jesse Branch. However, he denied motions for summary decision in regards to Kentucky Berwind and Kyber, finding that questions of fact remained as to their status. In *Berwind II*, ALJ Barbour reaffirmed his holding that neither Berwind nor Jesse Branch was an “operator,” while finding that only Kyber, and not Kentucky Berwind, should be treated as an operator. 18 F.M.S.H.R.C. at 243-45.
141 18 F.M.S.H.R.C. at 234.
142 *Id.*
143 18 F.M.S.H.R.C. at 232.
pending before the full Review Commission where MSHA continues to press its assault on the limited liability of a parent corporation.

[4] — SMCRA.

[a] — Statutory Purpose and Liability Scheme.

The Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA)\(^{144}\) was enacted to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations. The Act also sought to achieve this objective without denying access to this coal, an essential source of energy for the nation.\(^{145}\)

SMCRA prohibits persons from engaging in “surface coal mining operations”\(^{146}\) without a permit.\(^{147}\) Permits may be issued by either a state agency with its own regulatory program approved by the Secretary of the Interior or, if there is no approved state program, by the Office of Surface Mining Reclamation and Enforcement (OSM),\(^{148}\) which administers the program at the federal level.\(^{149}\) The permit requires that mining and reclamation activity be conducted in accordance with detailed environmental performance standards.\(^{150}\) Furthermore, before a permit is issued, the applicant must file with the appropriate regulatory authority a performance bond to insure that funding for reclamation exists.\(^{151}\)

SMCRA gives the Secretary and the state regulatory authorities broad powers. Regular inspections are required to ensure that operations are in compliance with the Act.\(^{152}\) Violations may result in notices of violation,

\(^{146}\) “Surface coal mining operations” is defined broadly to include both “activities conducted on the surface of lands in connection with a surface coal mine or . . . surface operations and surface impacts incident to an underground coal mine.” 30 U.S.C. § 1291(28)(1994).
cessation orders and the assessment of civil and criminal penalties.\textsuperscript{153} SMCRA provides that States may assume “exclusive jurisdiction” over the program,\textsuperscript{154} subject to several limitations.\textsuperscript{155} The Act also gives the Secretary authority to designate some areas as unsuitable for surface mining and to prohibit such operations in these areas altogether.\textsuperscript{156}

SMCRA provides that only a “permittee”\textsuperscript{157} can be held liable for most violations,\textsuperscript{158} but this term has been construed to include persons who are required to obtain a permit but have failed to do so.\textsuperscript{159} “Agents”\textsuperscript{160} of the permittee are liable for various sanctions in a civil action by the United States.\textsuperscript{161} Agents of a corporate permittee may be held liable for individual civil and criminal penalties for willfully and knowingly ordering, authorizing or carrying out a violation or failure to comply with a cessation order.\textsuperscript{162}

[b] — Theories of Parent Liability.

SMCRA prohibits the issuance of surface coal mining operation permits to anyone who “own[s] or control[s]” a surface coal mining

\textsuperscript{155} 30 U.S.C. 1253(a)(1994) grants exclusive jurisdiction to the States “except as provided in sections 521 and 523 and Title IV.” As to section 521, 30 U.S.C. § 1271 (1994), the uncertain scope of this exception has been a source of longstanding contention among OSM, industry and the States. See, \textit{e.g.}, National Mining Ass’n v. United States Dep’t of the Interior, 70 F.3d 1345 (D.C. Cir. 1995).
\textsuperscript{158} Any “person” may be held liable for willful and knowing violations of the conditions of a permit, or for failure to comply with an order issued under 30 U.S.C. §§ 1271 or 1276, or an order incorporated in a final decision issued by the Secretary. 30 U.S.C. § 1268(e)(1994). Likewise, “whoever” knowingly makes a false statement, representation, or certification may be fined and imprisoned. 30 U.S.C. § 1268(g)(1994).
\textsuperscript{160} Although the term “agent” is undefined by SMCRA, it has been held to have the same meaning as “agent,” defined at 30 U.S.C. § 802(e) of the Mine Act. United States v. Dix Fork Coal Co., 692 F.2d 436 (6th Cir. 1982).
\textsuperscript{161} 30 U.S.C. § 1271(c)(1994).
operation that is currently in violation of SMCRA or other environmental laws. 163 Broadly construing this provision purportedly to effectuate the remedial objectives of the statute, OSM has promulgated expansive regulations (of questionable legality)164 that impose de facto, albeit not legal, liability on third parties (i.e., parties other than the person or entity directly liable for the violation), including corporate parents (and even on subsidiaries for their parent corporation’s violations). These regulations allow OSM to use its control over the permit process to collect from parent corporations unpaid civil penalties and AML fees, and to compel reclamation work (or contribution to the costs of same) for which subsidiary corporations (and other third parties) may be liable, despite the fact that no direct liability is imposed on the parent, nor has the corporate veil been pierced.

OSM regulations define ownership or control as “any one or a combination of relationships” through which one is deemed to own or control, or be owned or controlled by someone who owns or controls, a surface coal mining operation, directly or indirectly.165 Although ownership or control is a question of fact, the regulations provide that under certain circumstances, ownership or control will be presumed. Permittees, those who own more than 50 percent of an entity, and those with any other relationship that gives authority (directly or indirectly) to control the manner in which someone controls surface coal mining operations are classified “per se” as owners and controllers.166 A much larger group of parties may be classified as “presumed” owners and controllers. This group includes officers, directors, mine operators, persons or entities who own between 10 and 50 percent of an entity, and general partners.167 A person falling into one of these categories is subject to the presumption unless he can demonstrate that he does not in fact have direct

166 30 C.F.R. § 773.5(a).
167 30 C.F.R. § 773.5(b)(1)-(6).
or indirect authority to determine how the surface coal mining operation is or was conducted.\footnote{30 C.F.R. § 773.5(b).}

If OSM determines that there is an “ownership or control link”\footnote{“Ownership or control link” is defined as any relationship included in the definition of “owned and controlled” in this section or 30 C.F.R. § 773.15(b), and any relationship presumed to constitute ownership or control in this section, unless that presumption has been rebutted. 30 C.F.R. § 773.5.} between any violator and the applicant, the permit request will be denied.\footnote{30 C.F.R. § 773.15(b)(1995).} In order to facilitate the finding of such links, OSM maintains an Applicant/Violator System (AVS).\footnote{30 C.F.R. § 773.5.} AVS is a computer database “maintained by OSM to identify ownership or control links among applicants, permittees, and violators.”\footnote{Id.} Once the AVS identifies that such a link exists, the person or entity seeking a permit bears the burden or proof that there is no link.\footnote{The regulations provide that it is the burden of the agency to make a \textit{prima facie} showing that a link exists between a violator and the applicant. Once the agency has made its \textit{prima facie} case, then the applicant must establish by a preponderance of the evidence that either (1) there is no link between the applicant and the violator, (2) the violator does not or did not have direct or indirect authority to determine the manner in which surface coal mining operations are or were conducted, or (3) that the alleged violator was not guilty of a violation or that the violation is being or has been corrected. 30 C.F.R. § 773.25(c)(1995).} However, the presumptions are rarely contested by industry because of the time and expense required to persuade OSM, an administrative law judge in the Interior Department’s Office of Hearings and Appeals, and perhaps a federal court that one is not an owner or controller, thus delaying issuance of the permits urgently needed to continue mining operations.\footnote{Under the regulations, it appears that any challenge must first be presented to the Chief of the AVS office. 30 C.F.R. § 773.24(b)(1995). \textit{But see} 30 C.F.R. 773.25(b)(1995)(outlining states’ authority to make such determinations under various circumstances). If the Chief of the AVS office denies the challenge, Interior Department rules provide that an appeal must be brought within 30 days of service of the AVS Chief’s decision to the Department’s Office of Hearings and Appeals. 30 C.F.R. § 773.24(d)(2)(1995).} Instead, the coal company usually settles
the matter by arranging for the abatement of the outstanding violations so that it can get its permit quickly and move on.

The far-reaching effects of the OSM regulations can be seen in the following hypothetical: Company A owns Company A-1, which seeks a surface coal mining operation permit. Mr. X, an outside director of Company A, also sits on the board of Company B. Company B owns Company B-1, which is a partner in a joint venture with Company C. Company C owns Company C-1, a subsidiary that engaged an independent contractor to mine and deliver coal from leases owned by C-1, but which abandoned the mine without reclaiming it, leaving unpaid civil penalties and AML fees as well.

In this hypothetical, Companies C and C-1 are "per se" owners and controllers, and would be prohibited from acquiring additional surface coal mining permits. However, Companies B and B-1 are also so prohibited, because B-1’s status as a joint venturer with C makes B-1 a "presumed" owner or controller of C, and B is a "per se" owner or controller of B-1.

This disqualification is then imputed to Mr. X, as a director of Company B. Because Mr. X is also a director for Company A, which owns Company A-1, Company A-1 cannot obtain a permit unless and until it can prove to OSM’s satisfaction that Mr. X does not, directly or indirectly, have the authority to control the manner in which Company A-1 conducts surface mining operations. OSM will not accept the proposition that any one member of a board of directors lacks the authority to control the corporation. In practice, Company A or Company A-1, in urgent need of a permit or permit revision, will most likely pay the debts of the independent contractor and do (or pay for) the needed reclamation. The fact that neither the parent nor the subsidiary is legally liable for the violations and could not have prevented them serves only to convince both companies that OSM’s rules are unfair and improper.

OSM denies that these regulations, by their use of expanded concepts of “ownership” or “control,” totally disregard laws governing corporate separateness and limited liability. OSM notes that the regulations do not

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175 “[I]ndividuals cannot escape responsibility merely because a group collectively has control and the person is but part of the group.” 53 Fed. Reg. 38873 (1988).
make the corporate parent legally liable for its subsidiaries’ debts (or those of other third parties).\textsuperscript{176} Rather, OSM argues that there is no right to a permit, and that by conditioning the issuance of future permits on the applicant’s lack of links to violators, it creates incentives for parent corporations and others interested in obtaining permits to take an active role in preventing future violations and to remedy any unabated violations to which OSM links them through ownership or control.\textsuperscript{177} In any case, since these regulations have the purpose and effect of compelling the completion of reclamation and the payment of outstanding civil penalties and AML fees, OSM claims that they are justified by SMCRA’s remedial objectives and the public policy interest in environmental protection.\textsuperscript{178}

\section*{Summary.}

The foregoing case studies of CERCLA, OSHA, MSHA and SMCRA liabilities demonstrate that the principle of limited liability is under attack today, especially in the minerals industry. In fact, of the four regulatory schemes studied, only the OSH Act — the only one of the four that does not apply to mining at all, and applies to the oil and gas branch of the minerals industry no more than to any other industry in the country — has not been aggressively applied to prosecute parent corporations for their subsidiaries’ violations. Rather than seeking to pierce the corporate veil under traditional tests, the regulatory agencies are invoking public policy as the basis for broadly construing the statutes to impose liability on parent corporations.

\section*{Conclusions.}

The traditional tests for piercing the corporate veil are carefully crafted to build into the calculus the broader public interests in protecting settled expectations and preserving limited corporate liability. The public policy exception as applied by the regulatory agencies generally does not.

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\item \textsuperscript{176} 53 Fed. Reg. 38875, 38885 (1988).
\item \textsuperscript{177} See, e.g., 53 Fed. Reg. 38885 (1988).
\item \textsuperscript{178} “The rule is justified because it is a powerful means of inducing remedial action in situations where such action is possible.” 53 Fed. Reg. 38875 (1988).
\end{itemize}
\end{footnotesize}
The problem is that such single purpose, result-oriented agencies naturally are focused solely on achieving the objectives of their own narrow regulatory programs. Indeed, that is the extent of their charge from the legislature. The danger is that the institutional myopia or tunnel-vision of the regulatory agency converts the public policy exception into a dangerous instrumentality. Since the public policy concerns of the regulatory agency do not take into account the broader and different public policy interests that the legislature and the courts inherently bring to the analysis, there is a risk of damage to the overall public interest. Since the protection of the economic interests of the investors and the viability of the capital markets is not a part of most regulatory agencies’ mandates, the corporate entity may readily be disregarded in what any one agency conceives to be in the interests of “public convenience, fairness and equity.”

This problem has only become acute in the last decade. Historically, such agency excesses could be curbed by the courts under judicial review. However, the effectiveness of that judicial buffer against over-zealous enforcement actions running roughshod over the principles of limited corporate liability has been badly eroded because of the Supreme Court’s decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* Under *Chevron*, unless they find that Congress has directly spoken to the specific issue, the courts are required to defer to the administering agency’s interpretation so long as it is reasonable. Thus, since *Chevron*, each agency has license — unless the statute expressly states that the parent corporation is *not* to be liable for the violations of its subsidiary — to construe the statute to hold the parent corporation liable. The agency can argue that in light of Congress’ failure to address the subject, it is reasonable for the agency to construe the statutory scheme as providing for parent corporation liability whenever necessary to, in the judgment of the agency, achieve the remedial objectives of the statute. And, under *Chevron*, if it is reasonable, the courts must defer to it.

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181 *Id.* at 844-45.
Thus, while the public policy exception is not new to the scene, the rise of the modern regulatory state has created powerful regulatory institutions which have an inherent bias in favor of their narrow regulatory objectives without regard for the broader public interests at stake. Although the courts have, until recently, had the authority and the inclination to rein in the tendency of the agencies to disregard the corporate form in order to achieve their narrow remedial objectives, the Supreme Court’s *Chevron* decision has arguably stripped the courts of their authority to perform this vital function.

This is a phenomenon which is not unique to the minerals industry but affects all sectors of business and industry, and thus society at large. Unfortunately for the minerals industry, however, perhaps because it is so intensely regulated, it probably has been the most adversely affected segment of the economy to date. We may only hope that its adverse effects on the minerals industry will sound the alarm needed to alert society that its economic well-being stands in jeopardy unless this trend is reversed and the principle of limited liability is rescued from the best intentions of the modern regulatory state.