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A COMPARISON OF THE DOCTRINE OF PIERCING THE CORPORATE VEIL IN THE UNITED STATES AND IN SOUTH KOREA

*Sung Bae Kim**

I. INTRODUCTION

The principle of limited liability for shareholders of the corporate entity exists in nearly every developed legal system in the world.¹ "Limited liability is probably the most attractive feature of the corporation although it has come to be recognized primarily during the 19th century."² The effect of limited liability is to protect the shareholder from a loss greater than that of what was invested, and "to shift a substantial portion of the risk of business failure to creditors and away from shareholders."³

"While strong arguments can be made favoring the limited liability principle, a line exists where the costs of limited liability outweigh the public benefits."⁴ When disaster strikes the corporation, and its assets are insufficient to cover its liabilities, creditors and tort claimants will clamor to disregard the corporate form. Exactly where the line is

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1. LEWIS D. SOLOMON ET AL., *CORPORATION LAW AND POLICY* 241 (2nd ed. 1988).

2. HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 130 (3rd ed. 1983).

3. SOLOMON, *supra* note 1, at 242.

4. Peter French, *Parent Corporation Liability: An Evaluation of the Corporate Veil Doctrine and Its Application to the Toxic Tort Arena*, 5 TUL. ENVTL. L.J. 605, 607 (1992).

crossed from limited liability to some form of personal liability is unclear, but every jurisdiction in the United States espouses the view that limited liability is not absolute.⁵

In South Korea, a civil law country, Art. 171(1) of the Commercial Code provides for the corporate entity and Art. 331 provides for limited liability for shareholders.⁶ As limited liability is extensively discussed in schools, arguments concerning the doctrine of disregarding the corporate entity are centered around one man corporations and closed corporations. Because it is possible to correct abuse of the corporate entity through legislation, the Commercial Code was established in 1962.⁷ There have been two cases dealing with the doctrine of disregarding the corporate entity. It is one of the strong points in the civil law system that the courts can make uniform application of law through well-established statutes and thus, more effectively accomplish legislative policies.

This paper, in part II, gives an overview of the common law and statutory doctrine of piercing the corporate veil in the United States. Part III discusses the evolution of the doctrine of disregarding the corporate entity in South Korea. The final part concludes with some policy recommendations concerning the expansion of limited liability doctrine in the United States and in South Korea. The paper will analyze the cases set forth by courts under the second theory for imposing liability upon corporate parents or shareholders for the action of their subsidiaries.

II. PIERCING THE CORPORATE VEIL DOCTRINE IN THE UNITED STATES

A. *Traditional Common Law*

Under traditional corporate law doctrine, a court can pierce the corporate veil of the subsidiary to hold the parent liable for the acts of the subsidiary. This can occur when the subsidiary is formed to perpetrate a fraud.⁸ In the alternative, the court will pierce the veil where the parent actively controls or dominates the subsidiary, such that the subsidiary is the parent's "mere instrumentality" or "alter ego."⁹

5. *Id.* at 609.

6. SANGBUP (Commercial Code), Law No. 1000 of 1962, arts. 171(1), 331.

7. SANGBUP (Commercial Code), Law No. 1000 of 1962.

8. Lynda J. Oswald, *Corporate Parent Responsibility for Environmental Liability of the Subsidiary*, in PROTECTING THE CORPORATE PARENT 122, 123 (Practicing Law Institute 1992).

9. *Id.*

1. State Common Law

Corporate formation in the United States is purely a matter of state law.¹⁰ The limited liability principle is stringently upheld under state law.¹¹ State courts generally employ a two-pronged test when deciding whether to pierce the corporate veil.¹² The first prong requires "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist."¹³ The second prong seeks to decide whether the acts are treated as those of the corporation alone, for then an inequitable result will follow.¹⁴ Some courts also require that retaining the corporate fiction will work an injustice on the injured party, but this third prong seems to be inherently answered under the second prong of the test, and thus may be superfluous.¹⁵

In a classic corporate veil piercing case, *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*,¹⁶ the plaintiff sought, "by piercing the corporate veil under the law of South Carolina, to impose individual liability on the president of the indebted corporation individually."¹⁷ At the outset, "the court recognized that a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholder."¹⁸ This is expressed in the presumption that the corporation and its stockholders are separate and distinct.¹⁹ But this concept of separate entity is merely a legal theory, "introduced for purposes of convenience and to subserve the ends of justice,"²⁰ and the courts "decline to recognize it whenever recognition of the corporate form would extend the principle of incorporation beyond its legitimate purposes and would produce injustice or inequitable consequences."²¹ Accordingly, "in an appro-

10. HENN & ALEXANDER, *supra* note 2, at 266.

11. Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 835, 855 (1982) [hereinafter *Piercing the Corporate Veil*].

12. *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 179 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982).

13. *Automotriz Del Golfo de Cal. S.A. v. Resnick*, 306 P.2d 1, 3 (1957); *accord* *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 421 (5th Cir. 1980).

14. *Automotriz*, 306 P.2d at 3.

15. French, *supra* note 4, at 611.

16. 540 F.2d 681, 683 (4th Cir. 1976).

17. *Id.* at 683.

18. *Id.*

19. *Fishman v. State*, 197 S.E.2d 467, 473 (Ga. Ct. App. 1973).

20. Ferdinand S. Tinio, Annotation, *Stockholder's Personal Conduct of Operations or Management of Assets as Factor Justifying Disregard of Corporate Entity*, 46 A.L.R.3d 430 (1972).

21. *Krivo Indus. Supply Co. v. National Distill & Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973), *modified factually*, 490 F.2d 916 (5th Cir. 1974); *Sell v. United States*, 127 F.2d 284, 288-89 (10th Cir. 1964), *cert. denied*, 317 U.S. 635 (1942); *Jennings v. Automobile*

appropriate case and in furtherance of the ends of justice," the corporate veil will be pierced and the corporation and its stockholders "will be treated as identical."²² This power to pierce the corporate veil, though, is to be exercised "reluctantly,"²³ and "cautiously,"²⁴ with the burden of corporate fiction resting on the party asserting such claim.²⁵

The circumstances that have been considered significant by the courts in actions to disregard the corporate fiction have been "rarely articulated with any clarity."²⁶ Perhaps this is because the circumstances "necessarily vary according to the circumstances of each case,"²⁷ and every case where the issue is raised is to be regarded as "*sui generis* and must be decided in accordance with its own underlying facts."²⁸

The court in *DeWitt Truck Brokers* enumerated major factors that, when addressed, shed light on the propensity of a court in equity to pierce the corporate veil.²⁹ One significant factor, which all the authorities consider significant in the inquiry, and particularly in the cases of one-man or closely-held corporations, is whether the corporation is grossly undercapitalized for the purposes of the corporate.³⁰ The obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter during the corporation's operations.³¹ The other factors that are emphasized in the application of the doctrine are failure to observe corporate formalities,³² non-payment of

Sales Co., 93 S.E. 188 (1917).

22. 18 AM. JUR. 2D *Corporations* §43 (1985).

23. *Pardo v. Wilson Line of Wash., Inc.*, 414 F.2d 1145, 1149 (D.C. Cir. 1963).

24. *Country Maid, Inc. v. Haseotes*, 299 F. Supp. 633, 637 (E.D. Pa. 1969).

25. *Coryll v. Phipps*, 128 F.2d 702, 704 (5th Cir. 1942), *aff'd.*, 317 U.S. 406 (1943); *Aamco Automatic Transmissions, Inc. v. Tayloe*, 368 F. Supp. 1283, 1299 (E.D. Pa. 1973); *Haynes v. Champagne Tile Corp.*, 228 F. Supp. 157, 159 (E.D. La. 1964).

26. *Swanson v. Levy*, 509 F.2d 859, 861-62 (9th Cir. 1975).

27. *Auer v. Frank*, 38 Cal. Rptr. 684 (1964); *Aetna Casualty and Sur. Co. v. Stover*, 327 F.2d 288, 291 (8th Cir. 1964).

28. *Brown Bros. Equip. Co. v. State*, 215 N.W.2d 591, 593 (Mich. Ct. App. 1974).

29. *DeWitt Truck Brokers, Inc.*, 540 F.2d at 685-87.

30. *Id.*

31. James R. Gillespie, *The Thin Corporate Line: Loss of Limited Liability Protection*, 45 N.D. L. REV. 366, 377-78 (1969); Maurice J. Dix, *Adequate Risk Capital: The Consideration for the Benefits of Separate Incorporation*, NW. U. L. REV. 478, 495 (1958).

32. *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 66-67 (5th Cir. 1972); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 638 (8th Cir. 1975); *Dudley v. Smith*, 504 F.2d 979, 982 (5th Cir. 1974); *TSS Sportswear, Ltd. v. Swank Shop (Guam), Inc.*, 380 F.2d 512, 516 (9th Cir. 1967); *Arnold v. Browne*, 103 Cal. Rptr. 775 (1972); *Harris v. Wagshal*, 343 A.2d 287 (D.C. 1975). While disregard of corporate formalities is a circumstance to be considered, it is generally held to be insufficient in itself, without some other facts, to support a piercing of the corporate veil. *Heating and Supply Co. v. Scherb*, 432 P.2d 237, 239 (Colo. 1967); *Revere Press, Inc. v.*

dividends,³³ insolvency of the debtor corporation at the time,³⁴ siphoning off funds of the corporation by the dominant stockholder,³⁵ non-functioning of other officers or directors,³⁶ absence of corporate records,³⁷ and "the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders."³⁸

The conclusion to disregard the corporate entity may not, however, rest on a single factor, whether undercapitalization, disregard of corporation's formalities, or any other single factor, but must involve a number of such factors. In addition, it must present an element of injustice or fundamental unfairness.³⁹ "But undercapitalization, coupled with disregard of corporate formalities, lack of participation on the part of the other stockholders, and the failure to pay dividends while paying substantial sums, whether by way of salary or otherwise, to the dominant stockholder, all fitting into a picture of basic unfairness, has been regarded fairly uniformly to constitute a basis for an imposition of individual liability under the doctrine."⁴⁰ "Though some states apply the corporate veil piercing analysis more strictly than others, the willingness of a court to pierce the corporate veil, and the weight given to the above-mentioned factors depends, in part, on the type of claim before the court."⁴¹

2. Federal Common Law

Federal courts are permitted to formulate federal common law in cases arising under federal statutes.⁴² However, much of the corporate veil piercing law suggests that the problems courts face are the same whether the cause of action arises under state law or federal law.⁴³ Because "federal law is not always applicable to cases in which there is a question of whether or not to pierce the corporate veil, . . . sometimes state law applies."⁴⁴ But when federal interests are involved and

Blumberg, 246 A.2d 407, 411 (Pa. 1968); *North Arlington Medical Bldg., Inc. v. Sanchez Const. Co.*, 471 P.2d 243 (Nev. 1970).

33. *Schoenberg v. Benner*, 59 Cal. Rptr. 395 (1967).

34. *TSS Sportswear*, 380 F.2d at 516.

35. *Chatterley v. Omnico, Inc.*, 485 P.2d 667, 670 (Utah 1971).

36. *Financial Counsellors, Inc. v. SEC*, 339 F.2d 196, 197 (2d Cir. 1964).

37. *Lakota Girl Scout Council Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 638 (8th Cir. 1975).

38. *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 687 (4th Cir. 1976).

39. *Id.* at 687.

40. *Id.*; *Delchamps, Inc. v. Borkin*, 429 F.2d 417, 418 (5th Cir. 1970).

41. French, *supra* note 4, at 614.

42. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979).

43. STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 3.01 (1991).

44. French, *supra* note 4, at 617.

state interests are not especially strong, the "internal affairs" doctrine of corporation law dictates that a federal court may be the proper forum.⁴⁵

"One reason the corporate veil piercing standard is more uncertain under federal common law than state common law is that the Supreme Court has not explicitly set a standard in this area."⁴⁶ The Supreme Court first addressed the desirability of developing and implementing a looser federal common law standard for corporate veil piercing in *Anderson v. Abbott*.⁴⁷ The majority in *Anderson* gave approval to such a standard when the goals and purposes of federal legislative policy would otherwise be avoided or undermined.⁴⁸

The second Supreme Court case, *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,⁴⁹ represents a more cautious approach to piercing the corporate veil. The court stated that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other."⁵⁰ In addition, the court stated, "Our cases have long recognized the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice."⁵¹

Accordingly, the "lower federal courts have indicated different degrees of willingness to pierce the corporate veil."⁵² The various levels of willingness include: the conservative standard espoused in *Board of Trustees of the Mill Cabinet Pension Trust Fund for Northern California v. Valley Cabinet & Manufacturing Co.*,⁵³ the middle-of-the-road standard represented by *United States v. Jon-T Chemicals, Inc.*,⁵⁴ and the liberal standard promoted by *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch*.⁵⁵

The Ninth Circuit refused to pierce the corporate veil in *Board of Trustees of the Mill Cabinet Pension Trust Fund for Northern California* using three factors: "the amount of respect given to the separate

45. *Anderson v. Abbott*, 321 U.S. 349, 365 (1944); *Piercing the Corporate Veil*, *supra* note 11, at 862-63.

46. French, *supra* note 4, at 617.

47. 321 U.S. 349 (1944).

48. *Id.* at 362-63.

49. 462 U.S. 611 (1983).

50. *Id.* at 629.

51. *Id.*

52. French, *supra* note 4, at 619.

53. 877 F.2d 769 (9th Cir. 1989).

54. 768 F.2d 686 (5th Cir. 1985).

55. 757 F.2d 184 (8th Cir. 1985).

identity of the corporation by its shareholders, the degree of injustice visited on the litigants by the recognition of the corporate entity, and the fraudulent intent of the incorporators."⁵⁶ After examining these factors, the court concluded that, where federal jurisprudence was lacking, it would "look to state law for guidance" in determining whether to disregard the corporate form."⁵⁷ Under that standard, the court refused to pierce the corporate veil even though the decedent stockholder had commingled Valley Cabinet's assets with his personal assets.⁵⁸ The court found the plaintiffs had not shown the requisite fraudulent intent by showing post incorporation misuse of the corporate form.⁵⁹ The district court also found that the degree of injustice that the litigants may suffer does not justify piercing the corporate veil of Valley Cabinet. The "inability to collect [from an insolvent defendant] does not, by itself, constitute an inequitable result."⁶⁰

The Fifth Circuit represents a "middle-of-the-road" approach to federal corporate veil piercing.⁶¹ The court in *Jon-T Chemicals* developed a laundry list of factors to be used in determining whether a subsidiary is the alter ego of its parent.⁶² These include whether: (1) the parent and the subsidiary have common stock ownership; (2) the parent and the subsidiary have common directors or officers; (3) the parent and the subsidiary have common business departments; (4) the parent and the subsidiary file consolidated financial statements and tax returns; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operates with grossly inadequate capital; (8) the parent pays the salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given to it by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; and (12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.⁶³ Additional factors that are sometimes mentioned include: (1) "[w]hether the directors and officers of [the subsidiary] act independently in the interest of that company, or whether they take their orders from the [parent] and act in the [parent's] interest[.]" and (2) the "connection of [the] parent's employee, officer or director to [the] subsidiary's tort or contract giving rise

56. 877 F.2d 769, 772 (9th Cir. 1989).

57. *Id.* at 772.

58. *Id.* at 773.

59. *Id.* at 774.

60. *Id.*

61. French, *supra* note 4, at 620.

62. 768 F.2d 686, 691 (5th Cir. 1985).

63. *Id.* at 691-92.

to [the] suit."⁶⁴

The court in *Jon-T Chemicals* found that the parent had given the subsidiary millions of dollars in funds, the subsidiary was undercapitalized, and the parent and the subsidiary had used the subsidiary's property jointly.⁶⁵ The court also noted that "in applying the 'instrumentality' or 'alter ego' doctrine, the courts are concerned with reality and not form, with how the corporation operated and the individual defendant's relationship to that operation."⁶⁶ Therefore, the district court pierced the corporate veil and held the parent corporation personally liable, even though the subsidiary had followed all the relevant corporate formalities.⁶⁷ The court, however, did not require a finding of fraud in tort cases, while holding that fraud is an essential element of an alter ego finding in contract cases.⁶⁸ "It thus appears that whether the claim sounds in tort or in contract fraud is not essential to hold a parent corporation liable for the acts of its subsidiary".⁶⁹

The Eighth Circuit, in *Hroch*,⁷⁰ took the broadest and most liberal position in applying a corporate veil piercing standard.⁷¹ In *Hroch*, the trustees brought an action against the employer seeking specific enforcement of an agreement for allegedly delinquent contributions. Plaintiff sought to pierce the corporate veil and hold defendant corporation's president liable for the delinquent payments.⁷² At the outset, the parties agreed that because the case arose under section 301(a) of the Labor Management Relations Act,⁷³ federal substantive law applied, although the courts might look to state law for guidance.⁷⁴

In determining whether the corporate entity should be disregarded, the court in *Hroch* approved the elements of the test established in *Seymour v. Hull & Moreland Engineering*.⁷⁵ These elements are: "(1) the amount of respect given to the separate entity of the corporation by its shareholders; (2) the degree of injustice visited on the litigants by recognition of the corporate entity; and (3) the fraudulent intent of the

64. *Id.* at 692.

65. *Id.* at 694-95.

66. 768 F.2d at 693.

67. *Id.*

68. *Id.* at 692.

69. French, *supra* note 4, at 622.

70. *Hroch*, 757 F.2d 184 (8th Cir. 1985).

71. French, *supra* note 4, at 622.

72. *Hroch*, 757 F.2d at 190.

73. 29 U.S.C. § 185(a) (1988).

74. *Id.*

75. 605 F.2d 1105 (9th Cir. 1979).

incorporators."⁷⁶

The court in *Hroch* found that: (1) the corporation had been dissolved for failure to pay occupational taxes; (2) the corporate record keeping was inadequate; and (3) the corporation had failed to observe various necessary formalities.⁷⁷ The court also noted that Mr. Hroch's deposition suggested that "he ha[d] used the corporate form in an inequitable fashion to avoid its obligations and that unless judgment [was] entered against him individually, the contributions to the Trusts [would] never be made, resulting in a fraud on the Trusts."⁷⁸ In applying the test, the court stated that, "[b]roadly speaking, the courts will disregard the corporate form whenever necessary to prevent fraud or to achieve equity."⁷⁹ Moreover, the court emphasized its duty under the federal standard to consider congressional policy demonstrated in sections 306(a) and 306(b) of the Multiemployer Pension Plan Amendments Act of 1980, and held defendant president of the corporation personally liable.⁸⁰

Even though *Valley Cabinet*, *Jon-T Chemicals*, and *Hroch* all indicate that the federal law regarding corporate veil piercing is in a state of flux, varying from jurisdiction to jurisdiction, all of these cases are valuable because they indicate the need for a uniform federal common law standard for piercing the corporate veil in order to promote federal policies and legislation.⁸¹ As the following section of this paper will demonstrate, the cases determining the parent corporation liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)⁸² serve as one of the means that can be used to formulate a uniform federal standard in cases involving federal statutory laws.

B. Piercing the Corporate Veil under CERCLA

"CERCLA was enacted both to provide rapid responses to the nationwide threats posed by the 30,000 to 50,000 improperly managed hazardous waste sites in the United States, as well as to induce voluntary responses to those sites."⁸³ CERCLA was enacted by Congress in 1980.⁸⁴ CERCLA was revised⁸⁵ by the Superfund Amendments and

76. *Hroch*, 757 F.2d at 190.

77. *See generally id.* at 190-91.

78. *Id.* at 191.

79. *Id.* at 190.

80. *Id.* at 191.

81. French, *supra* note 4, at 623-24.

82. 42 U.S.C. §§ 9601-56 (1980).

83. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983).

84. 42 U.S.C. §§ 9601-56 (1980).

85. 42 U.S.C. §§ 9601-75 (1988).

Reauthorization Act of 1986 (SARA).⁸⁶ Section 107 of CERCLA imposes liability, in relevant part, for hazardous substance releases upon "the owner and operator" or "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"⁸⁷

Several courts have addressed CERCLA liability for parent corporations and their subsidiaries.⁸⁸ The courts have broadly applied two theories for "imposing liability for hazardous substance releases on parent corporations or individual shareholders."⁸⁹ "First, courts have imposed liability where they found that the corporate parent was 'directly liable' under CERCLA because the level of its control and involvement in the management of the responsible subsidiary is so pervasive as to render the parent a constructive 'operator' of that facility under section 107 of CERCLA."⁹⁰ "The second theory requires the court, within its equity jurisdiction, to apply doctrines of alter ego liability to determine whether the facts warrant piercing the corporate veil to impose CERCLA liability on parent corporations or individual shareholders."⁹¹

Under the first theory, courts have found that such entities can be held directly liable under CERCLA because of the level of their involvement in the immediately responsible corporation or in operations at the facility itself.⁹² "Under these circumstances, entities have been found liable as present or former 'owner[s] or operator[s]' of the facility under section 107(a)(1) and 107(a)(2) of CERCLA, or as persons 'who . . . arranged for the disposal or treatment . . . of hazardous substances . . . ' (i.e., generators) under section 107(a)(3) of CERCLA."⁹³ However, "if liability cannot be imposed on an owner via operator liability, the only remaining avenue through which a plain-

86. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

87. 42 U.S.C. § 9607 (1988).

88. *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); *Colorado v. Idarado Mining Co.*, 916 F.2d 1486 (10th Cir. 1990); *Mobay Corp. v. Allied Signal Inc.*, 761 F. Supp. 345 (D.N.J. 1991); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989); *United States v. N.E. Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

89. Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, in *PROTECTING THE CORPORATE PARENT* 77 (Practicing Law Institute 1991).

90. John S.G. Worden, *CERCLA Liability of Parent Corporations for the Acts of Their Subsidiaries*, 30 *IDAHO L. REV.* 74 (1993).

91. Aronovsky & Fuller, *supra* note 89, at 77.

92. *See generally*, *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986).

93. Aronovsky & Fuller, *supra* note 89, at 77.

tiff may reach the parent is by convincing the court to exercise its equitable powers to pierce the corporate veil of the subsidiary."⁹⁴

Since CERCLA and its legislative history offer no clear guidance as to applicable rules of veil-piercing, several federal courts have examined whether federal or state veil-piercing standards should prevail in the CERCLA context.⁹⁵ Even though the purpose of selecting federal common law as the rule of decision is to promote national uniformity in the administration of justice under federal statutes, experience under other statutes has revealed that federal courts have had difficulty adopting uniform rules for veil-piercing.⁹⁶ The following cases in this section will examine the articulated standards and the ostensibly operative facts as to piercing the corporate veil in the CERCLA context. In the first two cases, the courts ruled that the veil-piercing remedy is unavailable, but in the remaining three cases found imposition of the remedy appropriate.

1. Cases Finding Veil-Piercing Unwarranted

The district court in *In re Acushnet River & New Bedford Harbor Proceedings*⁹⁷ considered the veil-piercing issue for purposes of asserting personal jurisdiction over a foreign parent corporation.⁹⁸ Noting that the federal common law emerged from the general principle that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity,"⁹⁹ the court articulated more specifically a variety of factors: "(1) inadequate capitalization in light of the purposes for which the corporation was organized, (2) extensive or pervasive control by the shareholder or shareholders, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning off funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers or directors."¹⁰⁰ The court also recognized that the policies underlying the statute in question would allow an emphasis on the various factors examined when deciding whether to pierce the corporate veil.

The court looked closely for "suggestions of pervasive control" by the parent over its subsidiary's hazardous waste disposal policies, or an indication that the parent treated the subsidiary as a "mere instrumen-

94. Worden, *supra* note 90, at 81.

95. Aronovsky & Fuller, *supra* note 89, at 91.

96. *Piercing the Corporate Veil*, *supra* note 11, at 859-61.

97. 675 F. Supp. 22 (D. Mass. 1987).

98. Aronovsky & Fuller, *supra* note 89, at 94.

99. *In re Acushnet River*, 675 F. Supp at 33.

100. *Id.*

tality" with regard to the hazardous waste of the parent.¹⁰¹ In rejecting the plaintiffs' argument that the parent formed the subsidiary "with an eye toward" limiting its own liability for environmental contamination, "the court stated that the plaintiffs'" argument was rather remarkable because it converted the very purpose for which the law enabled investors to incorporate into an impermissible evil."¹⁰² The court found most important the absence of evidence that the parent exploited the subsidiary to "shield itself from potential CERCLA¹⁰³ liability" arising from hazardous waste activities other than those of the subsidiary.¹⁰⁴ The court ruled that there were not enough factors "to justify disregarding the corporate separateness" of its subsidiary, thus veil-piercing was unwarranted.¹⁰⁵

The district court in *Joslyn Corp. v. T.L. James & Co.*¹⁰⁶ found "no need to determine whether a uniform federal alter ego rule was required, since the federal and state alter ego tests were essentially the same."¹⁰⁷ Therefore, the court examined the "laundry list" of traditional common law factors developed by the Fifth Circuit for adjudicating veil-piercing issues.¹⁰⁸ Finding the separateness in two entities, the court concluded that there was an insufficient basis for applying the alter ego theory to pierce the corporate veil.¹⁰⁹

2. Cases Finding Veil-Piercing Appropriate

In *United States v. Mottolo*,¹¹⁰ the court articulated two distinct federal common law standards for piercing the corporate veil: a broad and flexible standard applicable to achieve federal legislative policies if the interests of convenience to the public, as well as the doctrines of fairness, and equity so demand,¹¹¹ and a federal alter ego doctrine if there is a "substantial identity in terms of corporate ownership, management, business purpose, operation, equipment, customers, and supervision."¹¹² The court noted that Mottolo had admitted that he incorporated Service Pumping and Drain Co., Inc. to escape potential personal liability by using the corporate entity as a shield.

101. *Id.* at 33-34.

102. *Id.* at 34.

103. 42 U.S.C. § 9601-75 (1988).

104. *In re Acushnet River*, 675 F. Supp. at 35.

105. *Id.*

106. 696 F. Supp. 222 (W.D. La. 1988).

107. *Id.* at 226.

108. *Id.* at 227; *United States v. Jon-T Chemicals*, 768 F.2d 686, 691 (5th Cir. 1985).

109. *Joslyn Corp.*, 696 F. Supp. at 230-31.

110. 695 F. Supp. 615 (D.N.H. 1988).

111. *Id.* at 624.

112. *Id.*

The court further noted that Mottolo and his wife, owned one hundred percent of the corporation's stock, both were at all times the sole owners of the business, the Mottolos made no personnel changes even though a vast majority of Service's assets were transferred to the new corporation, existing accounts were organized in the same manner, they used the original equipment, and operated out of the same truck transfer station as the original entity.¹¹³ Examining these facts, the court held, "as a matter of law that the difference in legal entities may be disregarded insofar as CERCLA § 107 liability is concerned."¹¹⁴

The district court in *United States v. Kayser-Roth Corp.*¹¹⁵ noted Congress' intent that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal, and that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they create.¹¹⁶ The court found relevant many of the same factors as those imposing CERCLA¹¹⁷ liability on the parent as an operator including: the parent's control over environmental matters; its policy of approving all capital expenditures of greater than \$5,000; its stranglehold on income and expenses; its practice of placing the parent personnel in the subsidiary's director positions, thereby precluding other subsidiary executives from significant daily decision-making; and its overwhelming control over the subsidiary's financial and operational structure, which adds flesh to the skeletal proposition.¹¹⁸ Finally, the court ruled that the subsidiary's veil should be pierced to hold the parent liable, not only because public convenience, fairness, and equity dictate such a result, but also due to the all-encompassing control that the parent had over the subsidiary as an owner.¹¹⁹

The district court in *United States v. Nicolet, Inc.*¹²⁰ noted "the general principle that the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime."¹²¹ The court found that: the subsidiary formerly owned and operated the waste disposal site; the parent held first a majority, and then all of the

113. *Id.*

114. *Id.*

115. 724 F. Supp. 15 (D.R.I. 1989).

116. *Id.* at 23.

117. 42 U.S.C. §§ 9601-75 (1988).

118. *Kayser-Roth Corp.*, 724 F. Supp. at 24.

119. *Id.*

120. 712 F. Supp. 1193 (E.D. Pa. 1989).

121. *Id.* at 1202.

subsidiary's stock; the parent actively participated in the management of the subsidiary's operation at the site while a hazardous substance was being disposed of there; and the parent was familiar with the subsidiary's waste disposal practices and had the capacity to control the disposal and resultant releases and abate damages from the subsidiary's waste disposal practices.¹²² The court concluded that the parent "was an owner or operator for purposes of CERCLA liability."¹²³

The courts in the preceding cases applied different standards for piercing the corporate veil in the CERCLA¹²⁴ context. However, the courts pierced the corporate veil where necessary to further legislative policies in CERCLA.¹²⁵ In these cases, rather than holding plaintiffs to stringent traditional veil-piercing doctrines, courts emphasized hazardous waste-related factors rather than traditional fiscal control factors.¹²⁶ However, as long as courts require proof that the subsidiary is a sham or is used to perpetrate a fraud, the standard for veil-piercing will be more stringent than for imposing operator liability under CERCLA.¹²⁷

III. DISREGARDING THE CORPORATE ENTITY DOCTRINE IN SOUTH KOREA

A. Definition

As Article 171(1) of the Commercial Code provides for the corporate entity,¹²⁸ it endows a corporation with a separate legal entity different from its shareholders. The Article recognizes the existence of an artificial entity as a separate legal entity and gives life to the artificial entity as a "person."¹²⁹

However, even though the fundamental notion of a corporate entity is useful to modern society under capitalism, it sometimes can be used by one-man corporations, family corporations, or parent-subsidiary corporations, to avoid a legal duty, a contractual obligation, or to attain any other unjust objective. For example, enterprising natural persons have often used the artificial entity as a shield to protect their assets from claims of persons who have dealt with the artificial entity. Thus, if we are excessively attached to this legal formality under the civil law system, it may lead to an unexpected, unwanted injustice and inequity when we treat a corporate entity and its shareholders strictly as a sepa-

122. *Id.*

123. *Id.*

124. 42 U.S.C. §§ 9601-75 (1988).

125. *Nicolet, Inc.*, 712 F. Supp. at 1202.

126. Aronovsky & Fuller, *supra* note 89, at 98.

127. *Id.*

128. SANGBUP [Commercial Code], Law No. 1000 of 1962.

129. *Id.* art. 171(1).

rate subject of law under special circumstances. Therefore, if we interpret Article 171(1) as recognizing the existence of the corporate entity, it will clear up this legal deficiency and protect against abusive exercise of legal rights. At the same time, this interpretation of Article 171(1) will allow courts to identify, in certain situations, the true nature of corporate activity or identity, thus enabling courts to disregard the corporate entity to accomplish legislative policies.

The majority of schools of legal thought are of the opinion that the doctrine of disregarding the corporate entity is a legal theory. To these scholars, this theory may legally allow, under the interpretation of Article 171(1) of the Commercial Code, the courts to identify a shareholder(s) behind the corporate veil with the corporate entity, not by wholly denying the existence of a corporation's legal entity, but by repudiating the function of the corporate entity in special cases.¹³⁰ The majority opinion's interpretation of Article 171(1) is based on either Article 2(1) of the Civil Code,¹³¹ which provides for fiduciary duty and good faith both in exercising rights and in performing duties, or Article 2(2) of the Civil Code,¹³² which prohibits abusive exercises of rights.¹³³

However, because the doctrine of disregarding the corporate entity is an exceptional legal theory to limited liability and the nature of the corporate legal entity, the doctrine should be applied only to the problems that can not be solved by the existing statutes or pre-established legal theories or interpretations. In applying the doctrine, the majority regards the following factors to be operative in practical cases: (1) whether a debtor incorporates in order to evade execution by making investment in kind of his entire property; (2) whether the person who has a contractual duty of nonperformance incorporates in order to act in the name of the corporation; (3) whether the purpose of incorporation is to avoid a covenant not to compete; and (4) whether a new corporation having the same personnel and internal business structure as the old corporation is used to escape punishment from the old

130. HONG KOO WOO, HYESABUP [CORPORATION] 20-21 (Seoul, Jinmyoungmoonhwa-Sa 1981); DON KAG SHU, SANGBUPKANGYEE (SANG) [COMMERCIAL LAW (1)] 265-66 (Seoul, Bupmoon-Sa 1985); BYUNG TAE LEE, SANGBUP (SANG) [COMMERCIAL LAW (1)] 388-97 (Seoul, Bupwon-Sa 1988); HEE CHUL JUNG, SANGBUPHAK (SANG) [COMMERCIAL LAW (1)] 281-83 (Seoul, Bakyong-Sa 1989); EE SIK CHAE, SANGBUPKANGYEE (SANG) [COMMERCIAL LAW (1)] 346-51 (Seoul, Bakyong-Sa 1992); KEE SOO LEE, HYESABUP [CORPORATION] 91-102 (Seoul, Bakyong-Sa 1993); JOO CHAN SOHN, SANGBUP (SANG) [COMMERCIAL LAW (1)] 397-401 (Seoul, Bakyong-Sa 1993); DOHNG YOUN JUNG, HYESABUP [CORPORATION] 22-33 (Seoul, Bupmoon-Sa 1993); TAE RO LEE, HYESABUPKANGYEE [CORPORATION] 34-47 (Seoul, Bakyong-Sa 1994).

131. MINBUP [Civil Code], Law No. 471 of 1958.

132. *Id.*

133. *See supra* note 130.

corporation's violation of law.¹³⁴

B. Effect

Once the corporate entity is disregarded, the corporation is treated as if it does not have the legal entity in its materialized and specified legal relation.¹³⁵ However, without any effect to the substantive corporate existence, the limited liability doctrine is restricted only temporarily and partially to that relation. The effect of applying the doctrine of disregarding the corporate entity is, in this respect, different from the winding up or the termination of the legal entity that occurs in a merger of corporations.¹³⁶ Because the effect of applying this doctrine is limited to the concerned material and its judgment, and thus is not absolute to the world, plaintiff can make claims both disregarding and assuming the corporate entity.¹³⁷ As a result of the limited effect of the judgment, even though the corporate entity is substantively disregarded, the standing of the corporation under the procedural law is not affected by application of the doctrine.¹³⁸ Therefore, the corporate entity is not "disregarded" as to other parties in their legal relation with that same corporation.¹³⁹

C. Cases

In South Korea, the Commercial Code was established in 1962. Only two Supreme Court judgments have dealt with disregarding the corporate entity doctrine since this code was established.

134. See *supra* note 130; Seung Kyu Yang, *Pyongsuk [Annotation]*, BUPRYOULSINMOON [LEGAL NEWSPAPER], Mar. 13, 1978, No. 1243; Dohng Youn Jung, *Joosikhyesau Buphyoungtaeui Namyoungui Kyujewa Bupinkyukbooinui Bupri [Regulation of Corporate Legal Form and Doctrine of Disregarding the Corporate Entity]*, 72 JUSTICE 152; HEE CHUL JUNG, SANGBUPHAKWONRON (SANG) [COMMERCIAL LAW (1)] 260 (Seoul, Bakyoung-Sa 1980); Ryeo Jin Kim, *Bupinkyukbooinui Bupri [Disregarding the Corporate Entity Doctrine]*, 65 BUPJUNG 50; Byung Tae Lee, *Bupinkyukbooinui Bupri [Disregarding the Corporate Entity Doctrine]*, 71 SAEBUPJUNG 43.

135. See *supra* note 130; Tae Joo Kim and Yu Kyoung Ko, *Hyesabupinkyukbooinui Bupri [Doctrine of Disregarding the Corporate Entity]*, in 7 BUPHAKNONCHONG 215 (Kyungbook University, Daekoo, South Korea, 1991); CHANG HYUNG JUNG, HYESAUI BUPINKYUKBOOIN [DISREGARDING THE CORPORATE ENTITY] 58-59 (Kosikye, 1990).

136. JUNG, *supra* note 130, at 283.

137. KIM & KO, *supra* note 135, at 215.

138. Chong Kwae Kang, *Bupinkyukui Booin [Disregarding the Corporate Entity]*, in HYESABUPUI JAEMOONJE (SANG) [THE PROBLEMS OF CORPORATIONS (1)] 33 (Bupwonhangjungchu [Office of Court Administration], 1987).

139. *Id.*; KIM & KO, *supra* note 135, at 215.

1. Judgment of September 13, 1977, 74-Da-954¹⁴⁰

In the case Judgment of September 13, 1977, the defendant incorporated X corporation, which was a one-man corporation in substance, and took office as the chief director. X corporation owed the plaintiff a great deal of money, but was insolvent. However, the defendant held enough property to repay X corporation's debts to the plaintiff. Therefore, the plaintiff instituted a lawsuit against the defendant seeking to collect his money.

The Seoul High Court found that the defendant illegally and wrongfully followed the procedures in running the corporation, and that the defendant held 100% of the shares of X corporation.¹⁴¹ Noting that X corporation was just an alter ego of the defendant, allowing the legal entity of X corporation to be disregarded, the Seoul High Court recognized the defendant's obligation of reimbursement.¹⁴² The defendant appealed this decision to the Supreme Court.

The Supreme Court overruled the Seoul High Court judgment and held that the High Court erred in finding that X corporation was just an alter ego of the defendant and erred in disregarding X corporation's legal entity.¹⁴³ Declaring that X corporation's procedures in running the corporation was not illegal and wrongful in formality,¹⁴⁴ the Supreme Court also noted that the fact that one man held 100% of the shares of a corporation did not require dissolution under the relevant Articles of Commercial Code.¹⁴⁵

However, there have been several critical arguments against this Supreme Court judgment. First, the Supreme Court simply reversed the High Court judgment and did not explain any standard for the application of disregarding the corporate entity doctrine, and it did not show the elements of disregarding the corporate entity.¹⁴⁶ Second, the Supreme Court's notion that X corporation's procedures were not illegal or wrongful in formality is not relevant to the doctrine. The policy of this doctrine is to accomplish true justice in cases where, even though the court has difficulty in finding a fault in corporate formalities, the court can find that one man substantially ran a corpora-

140. Judgment of Sept. 13, 1977, Supreme Court, 74-Da-954 (South Korea).

141. Judgment of May 8, 1974, Seoul High Court, 72-Na-2582 (South Korea).

142. *Id.*

143. Judgment of September 13, 1977, Supreme Court, 74-Da-954 (South Korea).

144. *Id.*

145. *Id.*

146. Chan Hyung Jung, *Bupinkyukbooinron [Theory of Disregarding the Corporate Entity]* in HYUNDAIMINSANGBUPUI YUNKOO [RESEARCH OF MODERN CIVIL AND COMMERCIAL LAW] 408-09 (1984); Kyo Chang Kim, *Bupinkyukbooinui Bupri (Doctrine of Disregarding the Corporate Entity)*, in HYESABUPUI JEMOONJE [THE LEGAL ISSUES OF CORPORATION] 187 (1982).

tion transacting business in the name of the corporation.¹⁴⁷

Finally, the Supreme Court's consideration that the recognition of the one-man corporation does not mean the Supreme Court adopts the doctrine of disregarding the corporate entity can not be any basis for refusing the doctrine. If the Court does not recognize the one-man corporation, the corporate entity no longer exists. By doing so, no further discussion about disregarding the corporate entity would be necessary. However, if the Court recognizes the one-man corporation, as the Seoul High Court did in the instant case, there should be discussion about the doctrine. Most cases of one man corporations are involved with commingled property between the corporation and the single shareholder.¹⁴⁸ This commingled property problem is, in fact, one of the starting points used in applying the doctrine of disregarding the corporate entity. Not applying the doctrine in the instant case, the Supreme Court should have presented the basis for its arguments in a more concrete and detailed fashion.

2. Judgment of November 22, 1988, 87-Daka-1671¹⁴⁹

In the case Judgment of November 22, 1988, C corporation of Hong Kong, the owner of a ship, incorporated X corporation in Liberia, Africa, in order to register the ship as a Liberian vessel. C corporation ordered the captain of the ship to get the ship repaired at Y corporation in South Korea. As the captain gave an entrance notice, he recorded C corporation as the owner of the ship. When the chief of C corporation's Tokyo branch in Japan signed the repair contract with Y corporation, he also recorded C corporation as the owner of the ship. Assuming C corporation was the owner of the ship, Y corporation repaired the ship and billed C corporation for the cost of the repairs. When C corporation refused to pay the bill, Y corporation put the ship under temporary attachment. X corporation, asserting its ownership of the ship, brought a third party complaint against the temporary attachment.

The Daekoo High Court, under original jurisdiction, found that X corporation was incorporated by C corporation only to register the vessel under the Liberian flag. The Court also found that X corporation's complaint against the temporary attachment was intended to avoid the contractual obligation under the repair agreement. The Court recognized Y corporation's allegation that the ship's ownership was an attempt to accomplish an unjust result. Additionally, the Court held that Y corporation could temporarily attach the ship under Art.

147. See generally *supra* note 146.

148. JUNG, *supra* note 130, at 63.

149. Judgement of Nov. 22, 1988, Supreme Court, 87-Daka-1671 (South Korea).

861(1)5 of the Commercial Code, which provides for creditors' rights to an obligee in ship repair contracts.¹⁵⁰ X corporation appealed.

Finding that C corporation and X corporation have common directors and officers in the same office, the Supreme Court held that X corporation's complaint was an attempt to avoid the application of the law. Furthermore, the Supreme Court held that X corporation's complaint was an attempt to release X corporation of any responsibilities arising from the ship repair contract and was an abuse of the corporate entity.¹⁵¹ However, the Supreme Court refused to recognize the Daekoo High Court's holding that Y corporation could temporarily attach the ship. Citing precedent,¹⁵² the Supreme Court noted that the Daekoo High Court did not have to recognize the temporary attachment because Y corporation already had priority on the ship and thus it could preserve the obligation without temporary attachment.¹⁵³ Noting that the Daekoo High Court judgment as to the temporary attachment did not affect the decision of the instant case, the Supreme Court did not put this in the holding.¹⁵⁴

As to this Supreme Court judgment, one opinion stated that the Judgment of November 22, 1988, was the apparent result from applying the doctrine of disregarding the corporate entity.¹⁵⁵ However, there have been arguments against the judgment. First, because both C corporation, founded under Hong Kong law, and X corporation, founded under Liberian law, are foreign corporations, it is not clear whether C corporation and X corporation should be recognized as legal entities in South Korea. Furthermore, it is not clear whether C corporation is the officer of X corporation.¹⁵⁶ Second, because C corporation's incorporating X corporation to register the ship in Liberia is approved by the commercial convention concerning marine enterprising, the incorporation of X corporation should not lead the Court to conclude that the purpose of incorporation was to avoid the obligation.¹⁵⁷ Third, if this judgment is the result of the Supreme Court's application of disre-

150. Judgment of June 4, 1987, Daekoo High Court, 86-Na-1100 (South Korea).

151. Judgment of Nov. 22, 1988, Supreme Court, 87-Daka-1671 (South Korea).

152. Judgment of July 13, 1982, Supreme Court, 80-Da-2318 (South Korea).

153. Judgment of Nov. 22, 1988, Supreme Court, 87-Daka-1671 (South Korea).

154. *Id.*

155. Dohng Youn Jung, *Bupinkyukbooineronui Jukyongkwa Kuenku (Applying the Doctrine of Disregarding the Corporate Entity)*, 11 BUPRYOULSINMOON [LEGAL NEWSPAPER], May 22, 1989, No. 1845.

156. We Do Kang, *Bupinkyukbooinui Bupriui Jukyongbumwewa Jukyongyokun (Applying the Doctrine of Disregarding the Corporate Entity)*, 223 PANRYEWALBO (MONTHLY REP.) 58, 58-65 (Apr. 1989); Dohng Youn Jung, *Bupinkyukbooinron (The Doctrine of Disregarding the Corporate Entity)*, 226 PANRYEWALBO (MONTHLY REP.) 35, 35-36 (Apr. 1989).

157. *Id.*

garding the corporate entity doctrine on a foreign corporation, the Court seems to undertake a biased approach in applying the same doctrine. As evidenced in the Judgment of September 13, 1977, the Court refused to apply the doctrine to a domestic corporation.¹⁵⁸

IV. CONCLUSION

In the United States, the debate continues over the future of the doctrine of limited liability. Professors Henry Hansmann and Reinier Kraakman have proposed that "if the case for limited liability turned exclusively on questions of corporate structure or finance, . . . this rule ought to be abandoned in favor of the basic policy goals of the tort system."¹⁵⁹ They, as proponents of pro rata shareholder liability, have also examined several arguments.¹⁶⁰ First, shareholders, no less than other potential tort defendants, may attempt to evade tort liability by hiding assets or by exploiting the limitations on personal liability offered by bankruptcy law. Second, without careful attention to extra-territorial enforcement, it would not be easy to implement unlimited liability in one jurisdiction while other jurisdictions retained a limited liability rule. The third non-corporate argument on behalf of limited liability is one that is seldom made explicitly but is widely credited nonetheless. "This is the claim that limited liability is a necessary check on the expansionist tendencies of the courts in deploying liability rules."¹⁶¹

However, Professor Janet Alexander of Stanford Law School argues that the proponents of proportionate shareholder liability "have not discussed whether it is feasible to change to a regime of unlimited liability or how such a change could be accomplished."¹⁶² Professor Alexander also argues that the proponents of proportionate liability do not consider the possibility that no state could actually implement their proposal, and that disregarding procedural issues leads to bad substantive law.¹⁶³ Focusing on the procedural issues, Professor Alexander first argues "that if law is to be used for social change, . . . procedure needs to be in on the ground floor."¹⁶⁴ "Second, it is important to take procedure into account because procedural rules embody important values — so important, in some cases, that the rules have constitutional

158. *Id.*

159. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1933 (1991).

160. *Id.*

161. *Id.*

162. Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 388 (1992).

163. *Id.* at 388-89.

164. *Id.* at 444.

stature."¹⁶⁵ Third, our world will never be an ideal world, "and one of the tasks of procedure is to find ways to get closer to achieving justice in our non-ideal world."¹⁶⁶

Furthermore, Professor Joseph Grundfest, from a different point of view, has stressed that capital markets can easily arbitrage around shareholders' liabilities resulting from corporate conduct and can synthesize limited liability pricing in a proportionate liability world.¹⁶⁷ Professor Grundfest has also proposed that policy makers must look elsewhere for solutions to the problems purportedly created by limited liability.¹⁶⁸

The basis of the arguments concerning limited liability in South Korea stems from statutory interpretation. Article 171 (1) of the Commercial Code provides for the corporate entity, and Art. 331 provides for limited shareholder liability.¹⁶⁹ Several relevant statutes have been established to promote legislative policies of these Articles. Thus, there have been few situations calling for the courts to disregard the corporate entity in South Korea.

In contrast to the United States, where the courts have applied piercing the corporate veil doctrine in many cases, South Korea, as a civil law country, has established relevant statutes for such cases, and, therefore, ambiguous situations occur less often in South Korea. The abusive exercise of the corporate entity in South Korea can be corrected by statutes and through legislation.

Although the limited liability doctrine does, in effect, shift some of the cost of doing business to disappointed creditors, and thus away from shareholders, the availability of limited liability through the corporate form is the primary advantage of doing business in capitalism. Limited liability in the corporate form can also be used in the interests of economic expansion and democracy.

In the United States, the deficiencies of the doctrine of piercing the corporate veil, as an exception to the limited liability doctrine, can be covered by more relevant and detailed legislation, similar to that proposed for South Korea. Several federal cases indicate the need for a uniform federal common law standard for piercing the corporate veil and other cases involving federal statutes in order to promote federal policies and legislation. Based on existing federal and state common law related to piercing the corporate veil, the prospective statutes can

165. *Id.*

166. *Id.*

167. See generally, Joseph A. Grundfest, *The Limited Future of Unlimited Liability: A Capital Markets Perspective*, 102 YALE L.J. 387 (1992).

168. *Id.*

169. SANGBUP (Commercial Code), Law No. 1000 of 1962.

work for the issues of piercing the corporate veil while preserving deeply rooted legal traditions in the United States. Increasing public criticism against the corporation in modern society will be also balanced by these statutes.