

**PIERCING THE CORPORATE VEIL:
A COMPARISON OF CONTRACT VERSUS TORT CLAIMANTS UNDER OREGON LAW**

Kyle D. Wuepper [FN1]

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One of the core principles of corporate law is limited liability for investors. [FN1] Liability, however, has never been absolutely limited. Courts occasionally have allowed contract or tort claimants to "pierce the corporate veil," holding the shareholders of a corporation personally responsible for claims that the corporation is unable to satisfy.

This Comment discusses piercing the corporate veil under Oregon law. In particular, it compares contract claimants with tort claimants and addresses whether the same test should be applied in tort piercing cases as is currently being applied in contract piercing cases. Part I provides an overview of the corporate form and the difference between tort claimants and contract claimants attempting to pierce the corporate veil. Part II addresses the current test Oregon courts apply to contract claimants attempting to pierce the corporate veil. Part III analyzes an Oregon case where a tort claimant pierced the corporate veil and the test the court applied in this situation. Part III further examines other states' approaches to tort claimants attempting to pierce the corporate veil. Finally, Part IV addresses the possible implications of having a more relaxed test for tort claimants.

I

The Corporate Form and Piercing the Corporate Veil

The United States Supreme Court has defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation *348 of law." [FN2] Of the three types of business organizations traditionally used (sole proprietorships, partnerships, or corporations), the corporation is distinct because a separate legal entity is created by adhering to the necessary requirements of the state statutes under which it is incorporated. [FN3] As a separate legal entity, the corporation is treated as a "person." A corporation pays taxes, enjoys constitutional privileges, and can both sue and be sued. [FN4] Because the corporation can be sued, limited liability for investors is a significant aspect of the corporate form. Limited liability provides that the investors in a corporation will not be held "liable for more than the amount that they invest." [FN5] Therefore, for example, an investor who buys stock for \$100 can be held liable for no more than the \$100 invested. [FN6]

At least one commentator has argued that the corporate form could not exist without limited liability. [FN7] Limited liability: (1) decreases the need for investors to monitor the corporation; (2) reduces the costs of monitoring other shareholders within the corporation; (3) gives managers incentives to act efficiently by promoting transferability of shares; (4) makes it possible for market prices to impound additional information about the value of firms; (5) allows more efficient diversification; and (6) facilitates optimal investment decisions. [FN8] As a result, "shareholders of a firm reap all of the benefits of risky activities but do not bear all *349 of the costs." [FN9] Contract creditors, who deal with the corporation on a voluntary basis through the extension of loans and financing, bear much of this risk; however, they are able to "adjust their credit terms to compensate for any risks that limited liability will impose on them." [FN10]

A. Piercing the Corporate Veil

While limited liability is the rule, [FN11] "piercing the corporate veil" is the exception. A veil piercing occurs when a court holds the shareholders of a corporation personally liable for the debts of the corporation. This usually occurs when: (1) the corporation does not have sufficient capital or insurance coverage; (2) the corporation was not properly incorporated; or (3) the owners of the corporation use the corporate form for their own personal interests. [FN12] In fact, "[p]iercing the corporate veil is the most litigated issue in corporate law." [FN13] However, a recent study has shown that "piercing occurs only in close corporations or within corporate groups; it does not occur

in public corporations." [FN14]

A close corporation is one in which: (1) there are only a few shareholders; (2) the shareholders live in the same geographical area, know each other, and are well acquainted with each other's business skills; (3) all or most of the shareholders are active in the business; and (4) there is not an established market for the corporation's stock. [FN15] Although this is a particularly popular form for many small-business owners, closely held corporations are often owned as subsidiaries of publicly traded corporations. [FN16]

***350** Courts have recognized that "a subsidiary corporation is simply a species of [a] one man corporation." [FN17] As a result, publicly traded corporations are allowed to separately operate close corporations as subsidiaries. However, as discussed in Part II and Part III, complete control over the corporation is one important factor that courts consider in deciding whether to pierce the corporate veil. Thus, because large publicly traded corporations are not completely controlled by a single shareholder, no court has allowed the corporate veil to be pierced.

B. Involuntary v. Voluntary Creditors

Courts have distinguished between involuntary and voluntary creditors in determining whether to pierce the corporate veil. A voluntary creditor (also referred to as a "contract creditor" or a "contract claimant") has a contractual relationship in which the creditor has chosen to work with the corporation, usually by extending loans. [FN18] Incorporated in such loan agreements are terms to compensate for the risk involved. [FN19] In determining who is an involuntary creditor (also referred to as a "tort claimant") courts ask "whether the victim can reasonably be understood to have contracted with the firm in substantial awareness of the risks of injury involved." [FN20]

It has been stated that "[c]ourts are more willing to disregard the corporate veil in tort than in contract cases." [FN21] However, a recent nationwide study of veil piercing cases found that courts ***351** have pierced the veil in forty-two percent of contract cases, and only thirty-one percent of the time in tort cases. [FN22] Although these statistics are against popular perception, the same study showed that only 226 cases were tort claims, while 779 cases involved contract claims, [FN23] thus indicating that many tort claims may have been settled out of court. [FN24]

II

Background Law in Oregon for Contract Claimants Piercing the Corporate Veil

Under Oregon law, "[a] purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued or specified in the subscription agreement." [FN25] This statute creates limited liability under Oregon law, and as a result, shareholders enjoy immunity from claims of creditors of the corporation in excess of the full consideration for which their shares were issued. In *Amfac Foods, Inc. v. International Systems & Controls Corp.*, [FN26] the Oregon Supreme Court interpreted this statute and established the exception for allowing contract claimants to pierce the corporate veil.

In *Amfac*, the plaintiff was a contract claimant seeking damages incurred as a result of the defendant's breach of contract for the construction of machinery used in the manufacturing of potato products. The plaintiff claimed that the machinery arrived in an unfinished and defective condition, and as a result of the subsequent repairs and delays, substantial damages were incurred. [FN27] The court framed the problem to be addressed as one in which "a corporation, alleged to be liable to a plaintiff, happens to be judgment-proof or nearly so, and the plaintiff seeks to have its ***352** claim satisfied out of the assets of a shareholder." [FN28]

The *Amfac* court started its analysis by first establishing how limited liability "was extended to corporate shareholders to encourage . . . investments." [FN29] The court then proceeded to state:

The corporate form was not intended to be a device by which persons could engage in business without obligation or risk. The privilege of limited liability of the shareholders of a business corporation carries with it the obligation to conduct business as a corporation, and abuse of the privilege may create personal liability for the act of the corporation. [FN30]

However, the court emphasized that piercing the corporate veil is an "extraordinary remedy" to be used as a last

resort. [FN31]

In establishing the exception to limited liability for contract claimants, the Amfac court first made clear that just because one person owns all of the stock in a corporation it is not enough to "breach the wall of immunity." [FN32] The court then stated:

When a plaintiff seeks to collect a corporate debt from a shareholder by virtue of the shareholder's control over the debtor corporation rather than on some other theory, the plaintiff must allege and prove not only that the debtor corporation was under the actual control of the shareholder but also that the plaintiff's inability to collect from the corporation resulted from some form of improper conduct on the part of the shareholder. [FN33]

The Amfac court further listed several examples of improper conduct, including inadequate capitalization, [FN34] milking, [FN35] misrepresentation, commingling and holding out, [FN36] and violation of statute. [*353 FN37] Additionally, after a showing of "improper conduct by the shareholder exercising control over the corporation, the plaintiff must also demonstrate a relationship between the misconduct and the plaintiff's injury." [FN38] Finally, the court stated that on remand, if the jury is convinced that the defendant had actual control over the corporation and that improper conduct occurred, the "jury should be instructed that the plaintiff can recover those damages which resulted from the improper conduct." [FN39]

Thus, a shareholder of a corporation may be held personally liable for the contractual debts of the corporation if the shareholder "(1) actually controlled the corporation and (2) engaged in improper conduct that (3) caused the corporation to default on the obligation in question." [FN40] However, in establishing the exception to limited liability, the Amfac court explicitly made reference to the different treatment of contract and tort claimants. [FN41] The court stated that "[w]hether there is a basis for different treatment of a creditor who voluntarily deals with or extends credit to a corporation and one who finds himself with a claim against the corporation which arose without his consent, [the court at this time] need not decide." [FN42] As a result, the Amfac court left the door open for the creation of a different test to be applied to a tort claimant.

III

Tort Claimants' Ability to Pierce the Corporate Veil

A. The Oregon Approach

After Amfac, in *Rice v. Oriental Fireworks Co.*, [FN43] the Oregon Court of Appeals addressed the issue of a tort claimant trying to pierce the corporate veil. The Rice court, however, applied the *354 exception to limited liability articulated in Amfac rather than articulating a new test for tort claimants. In *Rice*, the plaintiff brought suit against the corporation and its controlling shareholder for personal injuries suffered while discharging fireworks distributed by the corporation. [FN44] The plaintiff contended that the corporation was being operated as the "alter ego" of the shareholder because, while it grossed from \$230,000 to \$400,000 annually, its assets never exceeded \$13,182. [FN45] In addition, the corporation never carried liability insurance even though the controlling shareholder testified that "accidents do occur, and lawsuits arise 'as a general rule, right after July 4th.'" [FN46]

The Rice court held that the plaintiff demonstrated a prima facie case to disregard the corporate form of the defendant corporation and to hold the controlling shareholder responsible for the plaintiff's injuries. [FN47] Applying the Amfac test, the court found evidence that the shareholder actually controlled the corporation. [FN48] Additionally, there was evidence that the shareholder engaged in improper conduct in the exercise of control over the corporation by disregarding corporate roles and formalities, and in failing to adequately capitalize the corporation. [FN49] The Rice court also stated that there was no doubt that the shareholder's "failure adequately to capitalize or obtain insurance coverage for [the corporation] has caused plaintiff to have an inadequate remedy against the corporation." [FN50]

Although the Rice court recognized that in Amfac the "plaintiff was a contract creditor and the court specifically declined to decide whether the test it articulated would be applicable as well to tort claimants[.]" the Rice court applied the Amfac test rather than articulating a new exception to limited liability specifically applicable to tort claimants. [FN51] The Rice court stated that it used *355 the Amfac test because the issue had neither been litigated nor briefed and because "although it is as yet undetermined whether a separate test will ultimately be set forth for tort claimants who seek to 'pierce,' there is no doubt that, if so, it will be less onerous than the test for

contract claimants." [FN52] Therefore, the court held that applying the Amfac test was sufficient in this situation because the plaintiff was able to pierce the corporate veil under what is likely a stricter test. [FN53]

While Oregon courts have refrained from setting forth an explicit exception to limited liability for tort claimants, other jurisdictions have addressed this issue. Yet, as seen below, the resulting exceptions have been inconsistent.

B. The Texas Approach

In *Gentry v. Credit Plan Corp.*, [FN54] the Supreme Court of Texas addressed the issue of a tort claimant attempting to pierce the corporate veil to reach the assets of a corporation's shareholders. The plaintiff alleged that the tort of "unreasonable collection efforts" had occurred. [FN55] The issue before the Gentry court was whether the subsidiary corporation that caused the harm was operated as the alter ego of its parent corporation and, if so, was the trial court correct in allowing the plaintiff to reach the assets of the parent corporation to settle the tort claims of the subsidiary. [FN56]

The Gentry court started its analysis, as did the court in *Amfac*, by stating that merely owning all of the stock in a corporation is not enough to pierce the corporate veil. [FN57] However, the Gentry court went on to state that "where management and operations are assimilated to the extent that the subsidiary is simply a name or conduit through which the parent conducts its business, the corporate fiction may be disregarded to prevent fraud or injustice." [FN58] The Gentry court then distinguished between contract and tort claimants. First, the court stated that "[u]nlike in a suit for breach of contract, the plaintiff in a tort case does not have the burden of justifying a recovery against the parent when *356 he willingly contracted with the subsidiary." [FN59] Second, and more importantly, the court declared that the "problem in [a tort case] is essentially one of allocating the loss. It is not necessary to establish fraud, and the financial strength or weakness of the subsidiary is an important consideration." [FN60] Thus, the Gentry court held that the test for a tort claimant is one in which improper conduct is not an essential element; instead, merely the inability to satisfy tort claims is a sufficient reason to pierce the corporate veil. [FN61]

The Gentry court then proceeded to scrutinize the relationship between the parent and subsidiary corporation and found that the evidence showed that the subsidiary was used by the parent "not as a separate entity but simply as a name under which [the parent corporation] did its business." [FN62] As a result of the subsidiary being operated as the parent's alter ego, and the subsidiary's poor financial condition, the court held the parent corporation liable for the tort claims assessed against its subsidiary. [FN63] The court engaged in an equitable analysis and stated that the "purpose of the court in cases of this nature is to prevent use of the corporate entity as a cloak for fraud or illegality or to work an injustice, and that purpose should not be thwarted by adherence to any particular theory of liability." [FN64]

C. The Eighth Circuit Approach

The Eighth Circuit addressed the tort claimant issue in *Radaszewski*357 v. Telecom Corp.*, [FN65] but applied a different test than the Gentry court. In *Radaszewski*, the estate of the plaintiff brought suit against the parent corporation for personal injuries caused by an employee of its subsidiary corporation. Applying Missouri law, the court concluded that there was insufficient evidence to allow the plaintiff to pierce the corporate veil of the parent corporation. [FN66]

The *Radaszewski* court started its analysis by recognizing that under Missouri law the shareholders of a corporation enjoy the benefit of limited liability. [FN67] While the court acknowledged that this encourages businesses to incorporate, it results in "[s]ome injuries . . . going . . . unredressed because of the insolvency of the corporate defendant immediately involved, even when its shareholders have plenty of money." [FN68] However, the court recognized that an exception to this rule exists which allows an injured person to pierce the corporate veil, reaching the assets of the shareholders of the "corporation whose conduct has created liability." [FN69] The court applied a three part test developed under Missouri law which, if met, allows a plaintiff to pierce the corporate veil. Under this test the plaintiff must show:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. [FN70]

Applying this test to the facts, the Radaszewski court found that the first element of the test had been satisfied, that is, the parent corporation controlled the subsidiary. [FN71] However, the court held that there was "no showing of any genuine issue of *358 material fact with respect to the dishonesty or improper-conduct element" and, therefore, dismissed the case. [FN72] In making this determination, the court looked at whether the subsidiary was properly capitalized. While the court stated that being undercapitalized is not unlawful, "the creation of an undercapitalized subsidiary justifies an inference that the parent is either deliberately or recklessly creating a business that will not be able to pay its bills or satisfy judgments against it." [FN73]

Initially, the Radaszewski court found that in the "accounting sense" the subsidiary was undercapitalized. [FN74] The parent corporation had not paid for all of the stock that it had been issued, thereby creating a subsidiary corporation with insufficient equity invested. Instead, the corporation was funded by loans from the parent corporation alone. [FN75] However, although according to generally accepted accounting principles the subsidiary was inadequately capitalized, the subsidiary corporation had eleven million dollars in liability insurance available to satisfy judgments against it. [FN76] The court found this significant because "[t]he existence of insurance goes directly to the question of the subsidiary's financial responsibility. If a parent has established a financially responsible subsidiary, then that subsidiary is not 'undercapitalized' in the only sense that matters for present purposes." [FN77] Therefore, although the insurance company that had provided the coverage had become insolvent, the subsidiary would have been able to meet its obligations. The court found that the parent company neither deliberately nor recklessly attempted to avoid any obligations that they may have had. The Radaszewski court concluded that "[t]he doctrine of limited liability is intended precisely to protect a parent corporation whose subsidiary goes broke" and if this creates inequitable results, it is the responsibility of the legislature to make this change. [FN78]

*359 IV

Possible Tests that Could be Adopted to Allow a Tort Claimant to Pierce the Corporate Veil More Easily than a Contract Claimant Under Oregon Law

While the Rice court applied the same test set out in Amfac for a contract claimant, it strongly resembled the Eighth Circuit's test in Radaszewski for a tort claimant. This test requires actual control of the corporation, improper conduct, and that the defendant's control and improper conduct caused the plaintiff's injury. In contrast, the test set forth by the Supreme Court of Texas in Gentry is a more liberal approach, based upon obtaining equitable results. The Gentry court refrained from setting forth any particular theory of liability and stated that it is not necessary to show that improper conduct occurred on the part of the defendant to allow the plaintiff to pierce the corporate veil.

Eventually the Supreme Court of Oregon may be forced to formulate a test to apply when a tort claimant seeks to pierce the corporate veil. In making this decision, the court should consider that the primary purpose of a tort action is to "compensate [the injured party] for the damage suffered, at the expense of the wrongdoer." [FN79] Recognizing this, the court may choose to adopt a test similar to that set forth by the Gentry court, or adopt a hybrid of the Amfac test. [FN80]

Oregon's adoption of the Gentry test would allow tort claimants to pierce the corporate veil with greater ease because it would be based upon obtaining equitable results, not upon an actual showing of improper conduct. The Amfac court addressed this test in setting forth its exception to limited liability for contract claimants. The Amfac court stated that "courts have articulated the exception to the rule of shareholder immunity in terms of the result (using such terms as 'to defeat public convenience,' 'result in the perpetration of a fraud or injustice,' 'to achieve equity,' or 'to prevent a public wrong')." [FN81] The Amfac court then rejected this approach, reasoning that the test that it set forth for contract claimants would create more "consistent and predictable *360 results." [FN82] However, while this is sufficient for contract claimants, who voluntarily choose whether or not to deal with a corporation, a tort claimant is an involuntary victim and therefore the more liberal Gentry approach may be appropriate.

If Oregon chooses the Eighth Circuit's approach, and applies the Amfac test to tort claimants, in some cases, such as Rice, the plaintiff will be able to pierce the corporate veil. This approach would require that the plaintiff prove improper conduct by the defendant. Improper conduct, however, is often difficult to prove, and many tort claims will go unredressed. Yet, one benefit of the Amfac test is that it gives judges pre-determined factors to consider when deciding whether to pierce, whereas the Gentry test allows more judicial discretion in obtaining "equitable results." Thus, it is possible that Oregon could adopt the foundation of the Amfac test, but alter it to compensate for the fact that tort claimants are involuntary victims.

A. Two Possible Amfac Hybrid Approaches for Tort Victims

One possible adoption of the Amfac test for tort claimants would require that the first and third elements be proven by the plaintiff, but not the second. Thus, while the plaintiff must prove that the defendant actually controlled the company, and that this control "caused the corporation to default on the obligation in question[,]" [FN83] the plaintiff is not forced to prove improper conduct. Removing improper conduct as a barrier will greatly increase the plaintiff's chances of recovery. At the same time, this test will continue to require that the defendant had actual control over the corporation before a piercing is allowed. This will encourage shareholders who completely control a corporation to protect themselves by purchasing adequate liability insurance. [FN84]

***361** Another possible approach would require the plaintiff to prove the actual control and proximate cause elements. However, as to the second element, improper conduct, the defendant would have the burden of proving that the corporation did not engage in any improper conduct. This approach is attractive because the defendant is in a better position to establish what proper conduct is and to prove that they complied with this standard. This could be done through the use of custom evidence [FN85] to show that the corporation's conduct was in compliance with industry standards, or by establishing that the corporation did not violate any of the examples of improper conduct set forth by the Amfac court. This approach would not allow for tort claimants to pierce as often as the first suggested approach, but by shifting the burden of proof of the second element to the defendant, tort claimants would have a greater chance than contract claimants to pierce the corporate veil. Further, the trier of fact could determine not only if the corporation actually complied with the industry standards, but also if the industry standard itself is sufficient.

While it is true that the parent corporation, or the controlling shareholders, may not have been the actual "wrongdoer" in the tort action, the very nature of their complete control over the corporation should require the parent, or controlling shareholders, to be liable for many resulting tort claims. These two hybrid approaches would allow tort claimants to pierce the corporate veil more easily than contract claimants under Amfac. In addition, they will continue to set forth elements that judges will objectively be able to apply and reduce the amount of judicial discretion that is inherent in the Gentry equitable results test. Because the corporation is essentially a money-making vehicle, a shareholder's complete control over the corporation should require him/her to take steps toward engaging in proper conduct. Thus, by establishing an easier piercing test for tort claimants, proper conduct will be encouraged.

The controlling shareholder could prove proper conduct by purchasing and maintaining adequate liability insurance coverage for the corporation. This coverage would prevent tort claims ***362** from going unredressed, thus eliminating the chance of personal liability. While it is tough to determine what is "adequate," through the use of custom evidence it is possible to show that the corporation had sufficient insurance coverage for the particular industry in which the corporation is involved. In addition, the amount of insurance coverage that a corporation has is a more reliable figure in determining proper conduct than the amount of equity invested, because it is often difficult to determine how much equity the shareholders have invested in the corporation, or even what the proper amount of equity invested should be.

By applying the stricter Amfac or Radaszewski test in all cases that involve tort claimants, courts will be promoting excessively risky activities. [FN86] Corporations will be willing to risk engaging in profitable activities that could result in torts with the knowledge that they will be protected by limited liability. Although a shareholder with complete control has adopted the corporate structure, this should not alleviate him from liability when this control has subsequently, directly or indirectly, led to a tort victim's injury and that victim's claim going unredressed.

B. Oregon Legislative Action

The corporate form is one created by the legislative branch; thus, it is best controlled by the legislative branch. Oregon legislative action could regulate closely held corporations, and protect future tort victims, by setting forth requirements for liability insurance. This would eliminate the need to use custom evidence and give judges objective standards to use in deciding whether the corporation complied with set industry standards. However, the liability insurance requirements need not be set standards for all corporations. Instead, the amount of liability insurance required could vary depending upon the type of activities the corporation engages in and the amount of equity invested in the corporation by the shareholders. Further, while it is true that currently there are liability standards for some activities that a corporation engages in (for example, car insurance and worker's compensation), only by extending such standards to all areas in which the corporation is involved, will limited liability work as it was intended.

*363 Conclusion

Limited liability is necessary to maintain the corporate form because it encourages investment and reduces monitoring costs. Further, limited liability makes sense for contract claimants who voluntarily deal with a corporation. However, for those claimants who involuntarily come into contact with a corporation, and have subsequently been injured, the justification for limited liability is questionable. The Oregon Legislature could set forth liability insurance standards for closely held corporations and make compliance with these standards a necessary requirement before a corporation is entitled to limited liability from tort claims. As a result, the shareholders of a corporation, by purchasing the predetermined amount of liability insurance, will control whether the corporate veil is pierced. Thus, the legislature, who created the corporate form, will eliminate many tort claims from going unredressed by requiring liability insurance before a corporation is entitled to limited liability.

If the legislature refrains from setting forth liability insurance standards, either of the two suggested hybrid approaches to the Amfac test, or the Gentry test, will provide the tort claimant a better chance of piercing the corporate veil. This will prevent shareholders, who own and control the corporation, from using it as a front to relieve them of subsequent liability. As a result, those shareholders who are in control of the corporation will be held responsible when appropriate, and tort claims will not go unredressed.

[FN1]. The four primary characteristics of a corporation are: "[L]imited liability for investors, free transferability of shares, perpetual life, and centralized management." Roberta Romano, *Foundations of Corporate Law: Interdisciplinary Readers in Law* 63 (1993).

[FN2]. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

[FN3]. John C. Howell, *Forming Corporations and Partnerships* 4-6 (1986). In addition to the traditional business forms (corporations, sole proprietorships, and partnerships), "a new limited liability business form, the 'limited liability company' (LLC)" is increasingly used. Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 Wash. U. L.Q. 417, 417 (1992). The LLC "lets firms adopt limited liability without many of the tax and other costs that once attended limited liability." *Id.* Further, LLCs provide "limited liability for all members without regard to their participation in control, recognition of LLCs formed in other jurisdictions, and freedom from other restrictions on form of governance." *Id.* at 425-26. However, while LLCs allow for limited liability for investors, the piercing rules established for corporations generally apply to LLCs. Lewis D. Solomon et al., *Corporations: Law and Policy* 133 (4th ed. 1998).

[FN4]. Carolyn M. Vella & John J. McGonagle, Jr., *Incorporating: A Guide for Small-Business Owners* 15 (1984).

[FN5]. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 90 (1985).

[FN6]. *Id.*

[FN7]. Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259, 262 (1967).

[FN8]. Easterbrook & Fischel, *supra* note 5, at 94-97.

[FN9]. *Id.* at 104.

[FN10]. Henry Hansmann & Reinier Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, 100 Yale L.J. 1879, 1919 (1991).

[FN11]. *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.").

[FN12]. *Vella & McGonagle*, supra note 4, at 149.

[FN13]. Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, 76 Cornell L. Rev. 1036, 1036 (1991).

[FN14]. *Id.* at 1039.

[FN15]. 1 F. Hodge O'Neal, *Close Corporations* 13 (1958).

[FN16]. Although limited liability is one motivation why parent corporations separately operate subsidiary corporations, other reasons include:

The increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complications involved in the purchase of physical assets; the retention of the good will of an established business unit; the avoidance of taxation; [and] the avoidance of cumbersome management structures.

William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193 (1929).

[FN17]. Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 Cal. L. Rev. 12, 20-21 (1925).

[FN18]. For example, suppose: "XYZ Corporation, a closely held corporation with shareholders X, Y and Z, contracts with A. The issue, upon default by the corporation, is whether the court will pierce the corporate veil and hold X, Y and Z individually liable for the duty owed A by the corporation." David H. Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 381 (1981).

[FN19]. Hansmann & Kraakman, supra note 10, at 1919.

[FN20]. *Id.* at 1921. For example, suppose:

XYZ Corporation, which is closely held by X, Y and Z, hires employee B. While driving a vehicle owned by the corporation and acting within the scope of employment, B hits A, causing extensive personal injuries. The issue, upon failure of the corporation to satisfy A's claim for negligence, is whether the court will pierce the corporate veil and hold X, Y and Z individually liable for the duty owed to A under tort liability of XYZ Corporation.

Barber, supra note 18, at 380.

[FN21]. *Easterbrook & Fischel*, supra note 5, at 112.

[FN22]. *Thompson*, supra note 13, at 1058.

[FN23]. *Id.* at 1058.

[FN24]. Trying to explain these statistics, one commentator questioned whether there is a problem of selection bias because the data relied only upon reported cases, "which are only a fraction of all claims because many claims are settled or dropped prior to trial." Romano, supra note 1, at 83.

[FN25]. Or. Rev. Stat. § 60.151(1) (1997); see also *id.* § 60.151(2) ("A shareholder of a corporation is not personally liable for the acts or debts of the corporation merely by reason of being a shareholder.").

[FN26]. 294 Or. 94, 654 P.2d 1092 (1982).

[FN27]. *Id.* at 97, 654 P.2d at 1095.

[FN28]. Id. at 100, 654 P.2d at 1096.

[FN29]. Id. at 100, 654 P.2d at 1097.

[FN30]. Id. at 101, 654 P.2d at 1097 (citing *F. Powell, Parent and Subsidiary Corporations 2* (1931)).

[FN31]. Id. at 103, 654 P.2d at 1098.

[FN32]. Id. at 107, 654 P.2d at 1100.

[FN33]. Id. at 108, 654 P.2d at 1101.

[FN34]. Id. at 109, 654 P.2d at 1102 ("It has been held that gross undercapitalization of the debtor corporation, by itself, may suffice to hold the shareholder liable to a creditor who is unable to collect against the corporation because it was inadequately capitalized.").

[FN35]. Id. ("Shareholders have been held liable for a corporation's debt because they have milked a corporation by payment of excessive dividends, by the sale of products to the shareholders at a reduced price, or by exacting unreasonable management charges.") (citations omitted).

[FN36]. Id. at 110, 654 P.2d at 1102 ("In some number of cases, shareholders have been held liable for corporate debts because of misrepresentations by the shareholder to the creditor, confusion or commingling of assets, or because the respective enterprises were not held out to the public as separate enterprises.") (citations omitted).

[FN37]. Id. ("In a number of cases involving regulations, courts have enjoined conduct of parent corporations which, in order to evade federal or state regulation, were doing business by means of wholly-owned subsidiaries.").

[FN38]. Id. at 111, 654 P.2d at 1103.

[FN39]. Id. at 112, 654 P.2d at 1103-04.

[FN40]. *Klokke Corp. v. Classic Exposition, Inc.*, 139 Or. App. 399, 405, 912 P.2d 929, 932, (interpreting the Amfac test for contract claimants), rev. denied, 323 Or. 690, 920 P.2d 549 (1996).

[FN41]. *Amfac*, 294 Or. at 109 n.15, 654 P.2d at 1102 n.15.

[FN42]. Id.

[FN43]. 75 Or. App. 627, 707 P.2d 1250 (1985), rev. denied, 300 Or. 546, 715 P.2d 93 (1986).

[FN44]. Id. at 629, 707 P.2d at 1253.

[FN45]. Id. at 630, 707 P.2d at 1253.

[FN46]. Id.

[FN47]. Id. at 633, 707 P.2d at 1255.

[FN48]. Id.

[FN49]. Id. at 633-34, 707 P.2d at 1255-56 (The shareholder "disregarded corporate roles and formalities which serve to protect the rights and define the responsibilities of owners, directors, officers, employes [sic], creditors, government entities and the public at large" and the corporation was inadequately capitalized because its "assets are insufficient to cover its potential liabilities, which [were] reasonably foreseeable from the nature of the corporation's business.").

[FN50]. Id. at 634, 707 P.2d at 1256.

[FN51]. Id. at 633 n.3, 707 P.2d at 1255 n.3.

[FN52]. Id.

[FN53]. Id.

[FN54]. 528 S.W.2d 571 (Tex. 1975).

[FN55]. Id. at 572.

[FN56]. Id.

[FN57]. Id. at 573.

[FN58]. Id.

[FN59]. Id.

[FN60]. Id.

[FN61]. In *Edwards Co., Inc. v. Monogram Indus., Inc.*, 730 F.2d 977, 982 n.10 (5th Cir. 1984), the court stated:

Subsequent Texas Supreme Court cases have adhered to the requirement that fraud or injustice must be present in order to pierce the corporate veil in a contract case. In *Torregrossa v. Szelc*, 603 S.W.2d 803 (Tex. 1980), the plaintiff sought to hold a stockholder liable for breach of an implied warranty of title of a used car he purchased from H.E.D. Sales, Inc. The supreme court, in reversing judgment for the plaintiff, found that H.E.D. Sales, Inc. had observed the requisite corporate formalities and that the plaintiff had not been misled into believing that he was dealing with an individual rather than a corporate entity. Although H.E.D. Sales, Inc. had the minimum capitalization allowed by law, the court noted that "there is no showing that this was an unfair device designed to achieve an inequitable result."

[FN62]. 528 S.W.2d at 575.

[FN63]. Id.

[FN64]. Id.

[FN65]. 981 F.2d 305 (8th Cir. 1992).

[FN66]. Id. at 311.

[FN67]. Id. at 306.

[FN68]. Id.

[FN69]. Id.

[FN70]. Id. (citing *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. Ct. App. 1986)).

[FN71]. Id. at 307.

[FN72]. Id. at 311.

[FN73]. Id. at 308.

[FN74]. Id.

[FN75]. Id.

[FN76]. Id.

[FN77]. Id. at 310.

[FN78]. Id. at 311.

[FN79]. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 2, at 7 (W. Page Keeton ed., 5th ed. 1984).

[FN80]. See *infra* Part IV.A which provides "Two Possible Amfac Hybrid Approaches for Tort Victims."

[FN81]. 294 Or. 94, 108, 654 P.2d 1092, 1101 (1982).

[FN82]. Id.

[FN83]. *Klokke Corp. v. Classic Exposition, Inc.*, 139 Or. App. 399, 405, 912 P.2d 929, 932, rev. denied, 323 Or. 690, 920 P.2d 549 (1996).

[FN84].

To the extent that the firm can obtain third-party insurance against tort liability, unlimited liability simply forces the personally liable members of the firm to cause the firm to buy such insurance. On the other hand, limited liability lets even fully insurable firms choose not to bear the cost of insurance and thereby transfer tort risks to victims. If assets and insurance are insufficient to cover tort risks, owners may make decisions on investments in assets, projects, or precautions that, while privately optimal for the owners, are socially suboptimal. Involuntary creditors, by definition, are not compensated for bearing these increased risks. Ribstein, *supra* note 3, at 439-40 (footnotes omitted).

[FN85]. When the community standard is used, "evidence of the usual and customary conduct of others under similar circumstances is normally relevant and admissible, as an indication of what the community regards as proper, and a composite judgement as to the risks of the situation and the precautions required to meet them." Keeton et al., *supra* note 79, § 33, at 193 (footnotes omitted).

[FN86]. Easterbrook & Fischel, *supra* note 5, at 104.

[FN1]. Third-year law student, University of Oregon School of Law. Executive Editor, *Oregon Law Review*, 1998-1999.