

Graceful Maneuvering: Corporate Avoidance Of Liability Through Bankruptcy And Corporate Law

By John Heenan

"Corporations are essentially persons under the law. Clearly, this Court would not recognize an individual's attempt to shield himself from . . . liability for previous wrongful conduct simply because after committing the wrong and leaving the state, he had married, changed his name, or engaged in some other cosmetic alteration."^[1]

I. INTRODUCTION

The law treats a corporation as though it were a person, offering it nearly all of the same rights as a human being.^[2] Although a corporation has a legal existence, an important distinction between a corporation and a human being is that the corporation lacks a commensurate physical existence.^[3] The effect of this lack of a physical existence is that a corporation becomes a shape-shifter, able to change and discard legal personas with an ease that no human, no matter how clever, can match.

Because corporations are creatures of the law, the only thing that can prevent them from changing legal personas is the law. Yet, the law increasingly has turned its back to this responsibility. When corporations are faced with the prospect of substantial liabilities, they are able to use the law to avoid their duties through clever legal maneuvering. This article explores how corporations are able to manipulate the law in order to avoid liability for their actions. Specifically, Section II of this article examines the actions of one corporation- W.R. Grace & Co. ("Grace")- in an effort to understand just how corporations are using the law to avoid liability. Section III examines corporate law in a broader context, discussing the aspects of the law which have developed to protect creditors and the reasons why current legal protections are insufficient. Section IV provides a range of solutions to the current laws with an eye towards protecting involuntary creditors and assigning responsibility. These solutions include, among others, changes to the current laws regarding limited liability, corporate powers, and the "piercing the corporate veil" doctrine. Finally, Section V concludes with a vision of the law which burdens corporations with responsibilities commensurate with their rights.

II. W.R. GRACE IN LIBBY, MONTANA: THE ART OF AVOIDANCE

"Our first order of priority is to insure the safety of everyone who works for us and everyone who comes in contact with our products."^[4]

A. Libby and the Mine

Libby, Montana, is a town of roughly 3,000 people located in Northwest Montana. For more than a century, Libby was considered a "company town," as most of the town's residents drew their livelihoods from either the local sawmill or the vermiculite mine outside of town on Zonolite Mountain.^[5] The vermiculite mine at Zonolite Mountain was operated by a local company, Zonolite Co., from its opening in the early 1920's until 1963, when it was acquired by Grace.^[6] Even in the first half of the century, during Zonolite Co.'s tenure as owner of the mine, studies had been published firmly linking exposure to asbestos with severe lung diseases and indicating that tremolite (the type of asbestos found at Zonolite Mountain) was particularly dangerous.^[7] Although Zonolite Co. executives knew of the threat, they did nothing to reduce the risk.^[8] In 1955, an internal company memo discussed "the dangers of exposing our employees to asbestos."^[9] In 1959, Zonolite Co. ordered chest x-rays for 130 workers.^[10] The result: more than a third of the films were judged "abnormal," with many showing early signs of asbestosis.^[11] The affected employees were never told the results.^[12]

In April of 1963, Grace acquired Zonolite Co. and its Libby vermiculite operation. Pursuant to the transaction, Zonolite Co. shareholders acquired shares in Grace, Zonolite Co. was dissolved, and Grace assumed all of Zonolite Co.'s liabilities.[13] Unfortunately, Grace's care for the Libby miners was no better than its predecessors. From the time that Grace acquired the mill, it knew it had a problem. As one company official wrote in 1969:

Our recent experience at Libby . . . may well create for us a significant financial liability. We also should be concerned with the obligation to our employees; namely, permitting them to perform their services under working conditions which we have good reason to believe are hazardous.[14] Another internal memo dated Jan. 5, 1968 suggested as a method for dealing with these "exposed" employees, namely, that "[t]hese employees, as far as we know, are not presently disabled. If we minimize their exposure . . . chances are we may be able to keep them on the job until after they retire, thus precluding the high cost of total disability." Id. at 38. Thus, Grace's plan became to keep sick employees just well enough to continue working.

Despite the clear health threats which the mine posed to Grace's employees and the town of Libby- by Grace's own estimates, at least 5000 pounds of asbestos was released from the town's processing plant each day- the company did nothing. "Until the mid-1970's, the vermiculite mined in Libby was processed in the 'dry mill,' a place so dusty that workers couldn't see their hands on their brooms." [15] Despite the high amounts of dust to which the workers were exposed, Grace refused to provide showers on the premises, consequently, the workers brought the asbestos-laden dust home with them, exposing their families to the dangerous fibers as well.[16]

As knowledge of asbestos's dangers became more widespread, Grace worked to forestall the inevitable. For example, in 1980, OSHA officials announced they would conduct a health study on the Libby workers.[17] In response, Grace officials (in an internal memo) discussed whether it was best to "obstruct and block" the study, "be slow, review things extensively and contribute to delay," or "attempt to apply influence." [18] By the late 1980's, however, the writing was on the wall. With virtually no market demand for asbestos, Grace began to shut things down. This included not just the dismantling of the mine, mill, and processing building, but also the planning for how to deal with the town of Libby, where residents were dying in ever increasing numbers[19] and people were beginning to realize the extent of the environmental damage.[20] Grace, apparently, was just as forthcoming and cooperative with the EPA as it was with the other regulators or its Libby workers. As the EPA's lead field coordinator in Libby later opined, "[t]hey lied to us, interfered with us, and have never acknowledged what they did here to the people of Libby. Grace is the most evil company I've ever dealt with. They are Satan in corporate clothes." Id.

During the 1990's, with asbestos suits on the rise nationwide, Grace began to circle its wagons and formulate a plan for how to deal with those who had become sick or died because of the company's actions in Libby. What emerged was a two-pronged approach by Grace. The first prong was to deal with current litigation. To that end, Grace settled cases where an acceptable figure could be reached with the victims and vigorously defended those where such a figure could not be reached.[21] The second, proactive prong was to insulate the company and its shareholders from an ever-growing list of involuntary creditors through a complicated series of corporate maneuvers designed to separate Grace from its assets.

B. Graceful Maneuvering: Prelude to a Bankruptcy

As Grace became aware of its potential liability for the illnesses and deaths of more and more people, it began to formulate a methodical plan for protecting its assets. As early as the late 1970's, the company was searching for a way to avoid liability for its actions. For example, on May 24, 1977, a W.R. Grace employee sent an internal memo which provided in part:

Considering the large potential liability that results from the sale of products that contain even a small amount of contaminate defined by the government as carcinogen [tremolite asbestos], it is reasonable to question whether there are alternatives to the proposed action. Our exposure to lawsuits cannot be ignored . . . [An] obvious alternative would be to seek divestment of the business . . . [22]

A 1985 Grace memo was more explicit, discussing the possibility of "setting business up as a subsidiary or in some other legal form to distance from Grace assets."^[23]

1. 1988 Reorganization

Beginning in 1988, Grace's plans were put into action. Prior to that year, the company known as "W.R. Grace & Co." had been a single, shareholder-owned corporation for almost a century.^[24] Within a decade, however, the company would be a shell of its former self, divested of almost three-quarters of its assets by its shareholders and various "Grace" subsidiaries. The first step came in March of 1988, Grace created "W.R. Grace and Co.-New York," a New York corporation, and "Grace Merger Corp.," a Connecticut corporation.^[25] Grace Merger Corp. was a wholly owned subsidiary of W.R. Grace and Co.-New York, which in turn was a wholly owned subsidiary of W.R. Grace and Co.^[26] In May of 1988, Grace Merger Corp. and W.R. Grace and Co. merged, after which the surviving corporation changed its name to W.R. Grace and Co.-Conn.^[27] At the same time, W.R. Grace and Co.-New York changed its name to W.R. Grace and Co. and succeeded the historical W.R. Grace as the primary, publicly-traded Grace corporation.^[28] The result of the various 1988 transactions was that W.R. Grace and Co.-Conn. became a wholly owned subsidiary of the new W.R. Grace and Co., with W.R. Grace and Co. continuing to own all of the same assets and the shareholders of the old W.R. Grace and Co. being the same shareholders of the new W.R. Grace and Co.^[29]

| 1988 Pre-Reorganization: | 1988 Post-Reorganization: |
|-----------------------------------|---|
| Grace Shareholders (100%) | Grace Shareholders (100%) |
| - | - |
| W.R. Grace & Co. (Conn. corp.) | W.R. Grace & Co. (NY parent corp.) |
| - | - |
| Spec. Chem. Packaging Med. Supply | W.R. Grace & Co.-Conn. (former W.R. Grace & Co.) |
| | - |
| | Spec. Chem. Packaging Med. Supply |

2. 1996 Reorganization

Between 1988 and 1996, the parent W.R. Grace and Co. operated as a New York corporation and owned the subsidiary, W.R. Grace and Co.-Conn., through which W.R. Grace and Co. conducted its medical products, packaging, and specialty chemical businesses.^[30] At the time, one of W.R. Grace and Co.'s largest subsidiaries was National Medical Care, Inc. ("NMC"), a Delaware corporation involved in the health care industry.^[31] In September of 1996, Grace instituted another reorganization. Grace first created another corporation, "Grace Holding, Inc.," based this time in Delaware.^[32] Then, NMC, the W.R. Grace and Co.-Conn. subsidiary, was transferred to W.R. Grace and Co.^[33] Next, W.R. Grace and Co. transferred ownership of W.R. Grace and Co.-Conn. to Grace Holding, Inc.^[34] Finally, W.R. Grace and Co. merged with a German medical corporation, Fresenius AG, and changed its name to Fresenius National Medical Care, Inc.^[35] After the merger was complete, shareholders of the previous W.R. Grace and Co. owned approximately 45% of the new Fresenius National Medical Care, Inc. as well as all of the new Grace Holding, Inc.^[36] Pursuant to the terms of the Grace Holding, Inc., merger, Grace Holding, Inc., ceased to be a subsidiary of W.R. Grace and Co.^[37] Grace Holding, Inc., then changed its name to W.R. Grace and Co. and became the next of the Grace entities to be the publicly-held parent corporation of W.R. Grace and Co.-Conn.^[38] The result of the 1996 transfers was that neither the new W.R. Grace and Co. nor W.R. Grace and Co.-Conn. maintained any affiliation with NMC or Fresenius National

Medical Care, Inc., and all asbestos liability was placed in W.R. Grace and Co.-Conn.[39] Furthermore, all of the directors and officers of the old W.R. Grace and Co. remained as directors and officers of the new W.R. Grace and Co.[40]

| Pre-NMC Spinoff: | Post-NMC Spinoff: |
|--|---|
| Fresenius Shareholders (100%) | Fresenius Shareholders (55%) Grace Shareholders (45%) |
| - | - |
| Fresenius AG (German corp.) | Fresenius NMC |
| Grace Shareholders (100%) | (NY parent corp. and former W.R. Grace & Co. NY) \$3.5 billion |
| - | - |
| W.R. Grace & Co. (NY parent corp.) \$5.8 billion | Fresenius sub. NMC |
| - | Grace Shareholders (100%) |
| - | - |
| W.R. Grace & Co.-Conn. (former W.R. Grace & Co.) | W.R. Grace & Co. (Del. parent corp.) \$3.7 billion |
| - | - |
| Spec. Chem. Packaging Med. Supply | - |
| | W.R. Grace & Co.-Conn. (former W.R. Grace & Co.) |
| | - |
| | Spec. Chem. Packaging |

3. 1998 Reorganization

1998 brought with it a new round of corporate reorganization by W.R. Grace and Co. First, W.R. Grace and Co.-Conn. transferred all of its packaging operations to a single, wholly-owned subsidiary named "W.R. Grace and Co.-Conn. (Cryovac)."[41] W.R. Grace and Co.-Conn. then transferred W.R. Grace and Co.-Conn. (Cryovac) to W.R. Grace and Co.[42] The result of the transfer was to extract all of the packaging operations from W.R. Grace and Co.-Conn., leaving only the specialty chemicals operations vested in that corporation.[43] W.R. Grace and Co. then transferred all shares of W.R. Grace and Co.-Conn. to a wholly-owned subsidiary named Grace Specialty Chemicals, Inc.[44]

After having spun-off W.R. Grace and Co.-Conn., W.R. Grace and Co. was comprised of only a packaging operation. It then merged with Sealed Air Corp., a Delaware packaging corporation, with W.R. Grace and Co. being the surviving corporation.[45] W.R. Grace and Co. then changed its name to Sealed Air Corp., and Grace Specialty Chemicals, Inc., changed its name to W.R. Grace and Co., which became the newest of the publicly-traded corporations to be known as W.R. Grace and Co.[46] The result of the 1998 transactions was that all of the directors and officers of the pre-1998 W.R. Grace and Co. remained as the directors and officers of the post-1998 W.R. Grace and Co.[47] The other, more substantial result of the various transactions between 1996 and 1999 was that, in less than four years, W.R. Grace and Co. was able to turn a \$6 billion corporation into a \$1.5 billion corporation.[48] In the same time, W.R. Grace and Co. was able to vest itself of its asbestos liability by transferring it to W.R. Grace and Co.-Conn, a subsidiary which did not even exist at the time most asbestos victims were injured.[49]

| Pre-Sealed Air Spinoff: | Post-Sealed Air Spinoff: |
|--|--|
| Sealed Air Shareholders (100%) | Sealed Air Shareholders Grace Shareholders (37%) (63%) |
| - | - |
| Sealed Air Corp. (Del. corp.) | New Sealed Air Corp. (Del. parent corp. and former W.R. Grace & Co.) \$2.5 billion |
| Grace Shareholders (100%) | - |
| - | - |
| W.R. Grace & Co. (Del. parent corp.) \$3.5 billion | Old Sealed Air Cryovac (Del. sub.) (former Grace- Conn. sub.) |
| - | Grace Shareholders (100%) |
| - | - |
| W.R. Grace & Co.-Conn. (former W.R. Grace & Co.) | W.R. Grace & Co. (Del. parent corp. and former Grace Specialty Chem.) \$1.5 billion |
| - | - |
| Spec. Chem. Packaging | - |
| Grace Shareholders (45%) | - |
| - | W.R. Grace & Co.-Conn. (former W.R. Grace & Co.) |
| - | - |
| Fresenius NMC (NY parent corp.) \$3.5 billion | Spec. Chem. |
| - | Grace Shareholders (45%) |
| - | - |
| - | Fresenius NMC (NY parent corp.) \$3.5 billion |

C. Bankruptcy: The Final Phase

While Grace was moving its assets out the back door, it was putting on a good front for its former workers. On December 7, 1998, in response to the release of the film *A Civil Action*, Grace CEO Paul J. Norris issued a letter to Grace's workers and retirees.^[50] In the letter, Norris stated:

Looking back, we realize we made mistakes in how we addressed the concerns of the Woburn community and the government agencies regarding our past waste disposal practices Every manufacturer has to deal with environmental issues from the past; we take these responsibilities very seriously and work proactively within the communities where we operate to do the right thing.

...

I am proud to work for W.R. Grace and I know that we . . . [use] the best practices we know to protect the environment and the health and safety of our employees and the communities where we reside."^[51]

In Libby, Grace was also pledging to "do the right thing" for those who had been made ill because of Grace, including pledging \$250,000 a year to the Libby hospital for treatment of those stricken with asbestosis.[52] Grace's good works would prove short-lived, however. By early 2001, with its assets reduced to roughly a quarter of its previous total and with over 120 pending asbestos suits from Libby victims and thousands more nationwide, it was heavily speculated that Grace was on its way to bankruptcy court.[53] Against such speculations, Grace officials publicly stated on March 22, 2001, "[w]e're not speculating. To speculate sometimes determines the conclusion." [54]

Less than two weeks later, however, the new W.R. Grace and Co. filed for Chapter 11 bankruptcy protection in the Delaware Bankruptcy Court, listing total assets of \$2.509 billion and total liabilities of \$2.574 billion.[55] Grace's Chapter 11 filing included 60 of Grace's 76 domestic subsidiaries and affiliates. Absent from the filing were Grace's now legally independent international subsidiaries and affiliates.[56]

By its own admission, Grace sought Chapter 11 protection due to its potential liability arising from asbestos-related tort claims.[57] As Grace CEO Paul Norris stated:

We believe that the state court system for dealing with asbestos claims is broken, and that Grace cannot effectively defend itself against unmeritorious claims. The best forum available to Grace to achieve predictability and fairness in the claims settlement process is through a federal court-supervised Chapter 11 filing.[58]

Norris also added that:

Grace is a fundamentally sound company with strong cash flow. We have a clear leadership position in all of our major markets Over the past several years, the senior management and employees together have led the Company to many significant achievements, including streamlining the Company's operations We are confident that . . . the company can leverage its inherent value and strong cash flow to emerge from reorganization as a strong, financially sound enterprise.[59]

By filing for Chapter 11 protection, Grace was able to immediately place all of its assets and liabilities under the exclusive jurisdiction of the Bankruptcy Court for the District of Delaware. Thus, the only way that creditors, including the hundreds of Libby victims, could seek recovery was now through the Bankruptcy Court.

The reaction of Libby victims to the Chapter 11 filing was less than enthusiastic. As one Libby resident commented: "They've pulled the ultimate punch. They are going to get out of the responsibility for paying for the town they destroyed. If they are allowed to go bankrupt, somebody's going to have to clean this town up, and it's going to be the state or federal government." [60] The spat of blame placed on "trial lawyers" for "clogging up the legal system" was in fact part of a well-financed effort by Grace and other asbestos manufacturers to refocus the blame for the asbestos fallout. BOWKER, *supra* note 7, at 271. Such a strategy was conducted, according to Bowker, because the asbestos victims themselves "don't usually make effective promotable villains." *Id.* Thus, the industry turned to trial lawyers, seeking to cast them as the parties inhibiting just and speedy resolution of claims. *Id.* The "clogging up the courts argument" is repeatedly made despite the fact that, according to the Association of Trial Lawyers of America, an average of fewer than seventy asbestos-related lawsuits actually go to trial annually in state and federal courts. *Id.*

Another poignant summation of Grace's filing came from a local newspaper editor, who noted that "[t]he infinite harm suffered by people exposed to [Grace's] asbestos will be transformed into a finite and affordable amount of money." [61]

D. Creditor Reaction: Fraudulent Transfer Claims Against Grace

It did not take long for Grace's creditors, including the government and the hundreds of asbestos

victims, to realize the extent of Grace's decade-long process and what it meant to them. Realizing that they would receive pennies on the dollar under Grace's Chapter 11 Bankruptcy Plan, tort creditors^[62] sought to invalidate the company's previous transfers, including its divestiture of the lucrative National Medical Care, Inc. and Cryovac subsidiaries. In 2002, the Official Committee of Asbestos Personal Injury Claimants and the Official Committee of Asbestos Property Damage Claimants brought suit in the Delaware bankruptcy court to invalidate Grace's previous transfers.^[63] The United States, through the Department of Justice, subsequently filed a motion to intervene in bankruptcy litigation against W.R. Grace and Co. in an effort to recover funds that had been diverted to spinoff companies prior to Grace's bankruptcy filing.^[64]

Not surprisingly, neither Grace nor the companies which received the benefit of its transfers, Sealed Air and Fresenius (both of which were owned in large part by Grace shareholders), agreed that there was anything improper about the transfers.^[65] Sealed Air, for example, issued the following statement: "The 1998 transaction by which the Cryovac business of Grace was combined with Sealed Air was an arm's length transaction negotiated in good faith between two independent companies after considering all relevant issues including Grace's solvency under applicable law."^[66]

By November of 2002, however, with millions of dollars spent on litigation^[67] and no end in sight, both Sealed Air Corporation and Fresenius Medical Care AG announced that they each had reached agreements in principle with representatives of the asbestos creditors committees to settle claims of fraudulent transfer in the Chapter 11 proceedings of W. R. Grace & Co.^[68] Under the terms of the agreement, fraudulent conveyance and other claims raised on behalf of asbestos claimants were dismissed and both Fresenius and Sealed Air received protection against all existing and potential future asbestos-related claims upon confirmation of the W.R. Grace & Co. bankruptcy reorganization plan.^[69] In turn, Fresenius and Sealed Air agreed to pay \$115 million^[70] and \$583 million,^[71] respectively, to the W.R. Grace bankruptcy estate upon plan confirmation. To date, Grace's Bankruptcy Plan has yet to be confirmed.

E. Aftermath

Although one might take the Fresenius and Sealed Air settlements as a sign that current corporate law does, in fact, work, the reality is quite the opposite. Under Grace's Chapter 11 filing, its liabilities exceeded its assets by some \$500 million.^[72] This half-billion dollars in excess liabilities did not even take into account asbestos-related claims, 61,000 of which had been filed against Grace by the time the bankruptcy proceedings were instituted.^[73] Given the fact that (1) treatment for the average asbestos-related disease can cost tens or even hundreds of thousands of dollars^[74] and (2) the number of claims filed before 2001 does not even approach the ultimate number of asbestos victims to whom Grace is responsible,^[75] it is inconceivable that Grace's current Chapter 11 plan will be able to fully compensate all personal injury tort creditors.^[76]

Even had Grace not proceeded through a decade of company divestment, it is unlikely that Grace would have been able to fully compensate its numerous victims. However, Grace's handlers were able to successfully divest the company of over \$4 billion dollars in assets. By the time the dust had settled in the creditors' lawsuits, less than 20% (\$698 million) of that \$4 billion dollars had been recovered. In effect, Grace was able to successfully divert more than \$3 billion dollars from potential creditors. Thus, there can be no dispute that no matter how Grace's Chapter 11 plan is resolved, the indisputable losers will be the thousands of people whom Grace is responsible for injuring, who will go with little (or no) financial compensation.

III. THE "GRACE METHOD": HOW CORPORATIONS AVOID LIABILITY THROUGH CORPORATE RESTRUCTURING AND BANKRUPTCY LAW

Grace is by no means alone its attempts to avoid liability through a combination of asset divestiture and bankruptcy filing. Indeed, the concept of a debtor attempting to avoid payment is anything but new.^[77] Because it is a given that people (and corporations) will sometimes attempt to avoid paying what they owe, the law has developed a series of restraints in an effort to prevent debtors from hiding assets from creditors. These restraints come in the form of fraudulent conveyance law, successor

liability law, and the corporate veil piercing doctrine.[78] Unfortunately, while these laws prevent the most simplistic and flagrant abuses, they are by no means flawless. Several loopholes allow debtors like Grace to protect assets and shield themselves from liability. Furthermore, increasingly savvy corporate lawyers have been able to help corporations avoid liability while acting in complete compliance with the law.

A. Protecting Creditors in the Law: Fraudulent Conveyances, Successor Liability and the Corporate Veil Piercing Doctrine

There are three legal doctrines which have evolved in order to protect creditors in their interactions with debtor corporations. The first doctrine, fraudulent conveyance law, allows a creditor to void a transaction because of its fraudulent purpose or effect. The second doctrine, successor liability, is similar to the law of fraudulent conveyances and allows the liability of a former corporation to extend to the new entity when a transaction is deemed fraudulent. The third doctrine, the corporate veil piercing doctrine, allows a creditor to disregard the corporate form and attach liability to the person or corporation which manipulates it. All three of these doctrines, while somewhat different, arise out of the same general purpose, namely, to protect creditors by preventing corporations from shielding themselves from liability.

1. Fraudulent Conveyance Law

Fraudulent conveyance law is embodied in both federal and state law. In the federal arena, it is the Bankruptcy Code which addresses fraudulent transfers and conveyances. Section 548 of the Code invalidates transfers that are fraudulently made and obligations that are fraudulently incurred.[79] Section 548, in turn, is based on the Uniform Fraudulent Conveyance Act (UFCA), which along with the Uniform Fraudulent Transfer Act (UFTA) provides the basis for state fraudulent conveyance law.[80] The UFCA and the UFTA are similar in both structure and approach, and both Acts consider a transfer "made or an obligation incurred with actual intent to hinder, delay or defraud creditors" to be "fraudulent." [81]

There are generally two types of fraudulent transfers under modern fraudulent conveyance law. The first type is a transfer which is actually fraudulent. Under both the Uniform Acts and the Bankruptcy Code, a transfer committed with the actual, subjective intent to defraud creditors is a fraudulent conveyance.[82] Because there is rarely direct evidence of a debtor's fraudulent intent, actual fraudulent intent is usually established through circumstantial evidence such as the relationship between the transferor and the transferee.[83]

The second type is a transfer which is constructively fraudulent. In dealing with constructively fraudulent conveyances, both the Code and the Acts provide for a two element test for determining whether a transfer is constructively fraudulent. The first element inquires into whether the debtor received "less than a reasonably equivalent value in the accused transaction." [84] The second element deals generally with the debtor's insolvency, inquiring into whether the debtor: (i) was "engaged in business or was about to engage in a business transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;" (ii) "intended to incur, or believed or reasonably should have believed that [it] would incur, debts beyond [its] ability to pay as they became due;" or (iii) "was insolvent at the [time of the transaction] or the debtor became insolvent as a result of the transfer or obligation." [85] Thus, under both the Acts and the Code, determining whether or not a conveyance is constructively fraudulent turns on the adequacy of consideration for the transfer and the financial position of the debtor rather than the actual, subjective intention of the transferor.[86]

One of the most crucial issues in a constructive fraud analysis is determining whether or not the debtor was left with unreasonably small capital after the transaction. As mentioned above, under both the Acts and the Code, a transfer is fraudulent when it leaves the debtor with an unreasonably small capital to carry on its business. Because a corporation's capital assets can, because of various factors, change quickly and be difficult to ascertain with accuracy, an important aspect of the capitalization inquiry is on what date the capital of the corporation should be quantified. The Courts have resolved this issue, determining:

Rather than focus on the specific date of the transaction, the transfer will be examined in the context of a reasonable period of time surrounding that date. Thus, the critical inquiry when considering whether a transfer or conveyance has left a company with unreasonably small capital is one that weighs raw financial data against both the nature of the enterprise itself and the extent of the enterprise's need for capital during the period in question; therefore, it avoids the risk of ascribing undue weight to the state of a company's balance sheet on a particular day.[87]

Such an approach thus correctly allows the Court to look at the full impact of the transaction on the corporation's financial viability.

A second issue which arises in the constructive fraud analysis, particularly in the mass torts context, is what constitutes "debts" for corporate solvency purposes.[88] The UFTA defines a debt as a "liability on a claim." [89] A claim, in turn, is broadly construed to mean "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, disputed, undisputed, legal, equitable, secured, or unsecured." [90] In determining whether and at what point a tort victim's injury constitutes a "claim" for liability purposes, the Courts have determined that tort victims have a right of payment and thus a claim for solvency purposes at the time the claimant suffers "identifiable, compensable injury." [91] Thus, an increasingly important aspect of modern fraudulent conveyance law is that Courts are willing to consider claims which, although not filed at the time of transfer, were compensable at that date.

2. Successor Liability

A doctrine which overlaps the law of fraudulent conveyances is that of successor liability. Under the doctrine of successor liability, the general rule is that a corporation does not assume the debts and liabilities of a corporation whose assets it acquires.[92] However, one of the four generally recognized exceptions to this rule exists when the transfer from the former corporation to the successor corporation is made for the fraudulent purpose of escaping liability.[93] Thus, where a transfer of a corporation's assets is made for a fraudulent purpose (as defined by fraudulent conveyance law), the successor corporation will be burdened with the liabilities of the corporation whose assets it acquires. The rule of successor liability becomes important when analyzing the modern corporate restructure. As Prof. Vulkovich describes:

A frequent stratagem employed by corporate insiders is to create a 'new' corporation to which the insolvent debtor corporation transfers, frequently through a maze of transactions, substantially all of its assets. The insiders own the stock of the new corporation and operate it as they did the old corporation. Meanwhile, the debtor corporation files bankruptcy and its creditors are left to battle over the funds that the debtor received in exchange for its assets.[94]

Grace's corporate maneuvering is not only a classic example of the "frequent stratagem" described by Prof. Vulkovich, but also a demonstration of the depths to which modern corporations are willing to go to shield assets from creditors.

3. Corporate Veil Piercing Doctrine

Under the corporate veil piercing doctrine, courts will "disregard the fiction of a separate legal entity when a corporation is the mere instrumentality or agent of another corporation or individual owning all or most of its stock." [95] The effect of a veil-piercing is that the Court refuses to recognize the corporate entity and instead imposes liability on individual shareholders for corporate debts.[96]

The almost universal rule is that mere stock dominance is not enough to warrant piercing, but rather the circumstances must be such that "the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a mere conduit for its principal." [97] Factors courts generally consider in determining whether to "pierce" the corporate veil include: (1) the degree of control by the shareholder, (2) undercapitalization, and (3) observance of corporate formalities.[98] Although courts differ greatly in their willingness to pierce the corporate veil, "even those with conservative approaches to piercing issues recognize that fraudulent conduct by insiders is per se a significant factor in favor

of piercing."^[99] Thus, establishing a fraudulent conveyance often allows the creditor to reach the assets of the corporate shareholder(s).

B. Working within the System: Avoiding Liability through Technical Compliance with the Law

Although the laws of fraudulent conveyances, successor liability, and corporate veil piercing all are variously formulated in an effort to protect creditors by voiding fraudulent conveyances by debtors, corporations are increasingly able to circumvent these laws through technical compliance. Grace is one of the best modern examples of a corporation taking deliberate steps to comply with the law while at the same time distancing creditors from corporate assets. Because Grace's corporate conveyances were so skillfully achieved,^[100] it was difficult for creditors to clearly establish the applicability of the laws of fraudulent conveyances or successor liability without enduring a costly legal struggle.^[101] Even if these laws did apply,^[102] however, the beneficiaries of Grace's lucrative asset divestitures (Grace shareholders) were still able to use the time, expense, and uncertainty of litigation to achieve a settlement of substantially less than the divested amount. As the dust continues to settle after the Grace bankruptcy fallout, two things are certain- (1) Grace shareholders will come out better than they should have and (2) the Libby victims will not be fully compensated. Thus, to the extent Grace sought to distance itself from its creditors to the benefit of its shareholders, it has succeeded.

The method employed by Grace and others is relatively simple.^[103] The manner in which corporations attempt to avoid liability is widely believed to differ according to industry. See, e.g., Lopucki, *supra*, note 77, at 45 ("In some industries, the costs of liability are clearly high enough to drive corporate strategy. In those kinds of industries, judgment proofing flourishes."); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Liability for Corporate Torts*, 100 *YALE L.J.* 1879, 1881 (1991) ("Increasing exposure to tort liability has led to the widespread reorganization of business firms to exploit limited liability to evade damage claims. The method of evasion differs by industry."). First, the corporation, through corporate legal maneuvers (e.g. the formation of subsidiary corporations and the compartmentalization of assets), systematically transfers its assets while retaining just enough assets to comply with the law. After divesting itself of assets, the corporation then is able to file for bankruptcy to fix its overall liability and force the creditors to "fight over the scraps." While theoretically simple, this two-step process creates a legally complex web through which a creditor must climb if she is to reach the assets of the company which harmed her. As corporations grow more savvy in their ability to abuse current law through technical compliance, it is clear that solutions to the current law must be implemented if creditors are going to be truly protected.

C. Factors Enabling Corporate Liability Avoidance: Limited Liability and Parent-Subsidiary Relationships

In order to understand how corporations like Grace are able to avoid legal liability, it is crucial to understand two interwoven facets of modern corporate law. The first is limited liability. The principle of limited liability is founded on the rule that corporate shareholders may not normally be called upon to "use their own assets not invested in the business to pay business debts."^[104] Using limited liability as a tool, then, corporations are able to insulate shareholders from any personal responsibility for the corporation's actions.

The second important aspect of modern corporate law is the parent-subsubsidiary relationship. The parent-subsubsidiary relationship is founded upon the power of corporations to be the sole shareholders of other corporations.^[105] Because corporations can own complete equity in other corporations, and because corporate shareholders are given the same rights as individual shareholders, the separation of each corporation within a particular group of corporations is respected by the courts.^[106] In the modern corporate arena, it has become the rule rather than the exception for large corporations to put their risky product lines (i.e. those most susceptible to causing injury, and thus, liability) in a subsidiary corporation "so that the limited liability of the subsidiary might shield the parent firm from mass tort liability."^[107] Prof. Roe notes that there are several reasons why corporations increasingly opt to do business through subsidiary corporations, namely, (1) the basic formalities of chartering a corporation are relatively simple and cheap; (2) there is a good chance that the subsidiary will limit the exposure of the parent corporation; and (3) because there are virtually no punitive aspects to modern veil piercing or

fraudulent conveyance laws, even if the parent is held liable, the corporation will be able to force a favorable settlement by wearing down tort claimants seeking to reach the parent.[108]

IV. FORCING RESPONSIBILITY IN THE LEGAL SYSTEM: SOLUTIONS

Given the actions undertaken by Grace and its progeny, it is clear that current corporate law fails to adequately (1) restrain corporations from attempting to avoid liability or (2) assure the protection of involuntary tort creditors. This failure is the result of the grant of limited liability to corporations coupled with the allowance of corporations to own complete equity in other corporations. This Section explores the range of possible solutions available to curb corporate liability avoidance and better protect tort creditors.

A. Remove the Dual Levels of Limited Liability Available to Parent-Subsidiary Corporations

One solution offered by numerous legal commentators is to remove the dual levels of limited liability available in the parent-subsubsidiary context.[109] As a general rule, two separate corporations are regarded as distinct legal entities even if the stock of one is owned wholly or partly by the other.[110] This means that in the context of parent-subsubsidiary relationships (i.e. when one corporation is owned in whole or in part by another corporation), there is a presumption of separateness that the plaintiff must overcome. To establish liability on the part of the parent corporation, a creditor must show that the parent is employing the subsidiary to perpetrate a fraud and that this was the proximate cause of the plaintiff's injury.[111] Absent such a showing, both the parent and the subsidiary corporation will be afforded limited liability.[112]

While it might seem that, because of their intimate legal relationship, it should be relatively easy for a creditor to pierce the veil of a subsidiary corporation, the reality is that courts only rarely pierce the veil to reach parent corporations.[113] This fact seems surprising in light of the lack of justifiable reasons for even extending limited liability to parent corporations in the first place. As Professors Ribstein and Letsou point out, limited liability in the parent-subsubsidiary context may not even be necessary.[114] The traditional limited liability policy considerations- ease of ownership transfer, reduced monitoring costs, and market efficiency- do not apply because subsidiary corporations are generally not publicly traded and are actively monitored by their parent.[115]

Furthermore, allowing limited liability at both the parent and the subsidiary level creates a situation whereby "parents may deliberately undercapitalize the subsidiaries, or move assets around in such a complicated way that creditors cannot determine the creditworthiness of each corporation." [116] The remedy to this problem is simple: revoke the limited liability privilege which is currently extended to subsidiary corporations.[117] The result of this revocation would be that, while the parent corporation (and thus its shareholders) would still be afforded limited liability, the subsidiary corporation would not. This would prevent corporations from shielding themselves through the use of subsidiary corporations. By extension, it would also enable creditors to more easily monitor the transfers of assets by the corporation.

B. Give Priority to Involuntary Tort Creditors over Secured Creditors in the Bankruptcy Priority Hierarchy

Under current bankruptcy law, secured creditors are given priority over unsecured involuntary creditors.[118] Prof. LoPucki argues that the reverse should be true and that involuntary creditors should take priority.[119] LoPucki makes this argument from an economic efficiency standpoint, explaining as follows:

The argument is simple. As the system currently operates, consensual creditors can contract for security. Once they have done so, they have priority over involuntary creditors. Knowing that they themselves will be paid in any event, the secured creditors have grossly inadequate incentives to limit the debtor's liability-generating activity. As a result of the encumbrance, equity holders may also have grossly inadequate incentives to limit the debtor's liability-generating activity. Given that there is no one else with adequate incentives, it should be apparent that firms whose assets are encumbered will tend to

generate too much liability. As a result, secured credit has become a fundamental building block of strategies for the defeat of liability to involuntary creditors. The immediate solution is to give involuntary creditors priority over consensual creditors, including secured creditors. That rule maximizes the probability that debtors will be forced to pay their involuntary creditors and thus be unable to externalize the risks of their business. Consensual creditors will not be prejudiced. Knowing that they will be subordinate, consensual creditors can protect themselves by selecting and monitoring their debtors and charging a premium for those risks that they cannot eliminate cost effectively.[120]

Prof. Lopucki's argument is a good one. Under the current system, secured creditors have little incentive to insure the debtor's solvency. If placed behind involuntary creditors in the pecking order, secured creditors would have good incentive to better monitor the actions of the corporate debtor. Proponents of the traditional hierarchy, in turn, might argue that the very purpose of allowing creditors to contract for security is fundamental to the capital model and that without such protection contract creditors would be unwilling to invest in risky ventures. This argument, in the face of the fallout in Libby, calls into question the policy of promoting such risky ventures in the first place. Rewarding risky behavior, in short, is a concept which may be outdated.

C. Enumerate Specific Instances When Limited Liability Should be Extended

The United States Supreme Court in *Anderson v. Abbott*[121] declared that "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." This rule applies even where the shareholder is simply a parent corporation exerting sole ownership and control over its subsidiary. While there are numerous policy reasons for the extension of limited liability in most circumstances,[122] there are certain instances in which limited liability does not make rational sense. As Justice Douglas noted in *Parker v. Bell Asbestos Mines, Ltd.*[123]:

A distinction may be drawn between (1) carrying out the everyday affairs of corporate business (e.g., the mining and sale of asbestos)-the sort of activity which traditionally merits the privilege of limitation of liability bestowed by the protective corporate form; and (2) carrying out legal maneuvers aimed at maximizing the limitation of liability to a point of near invulnerability to responsibility for injury to the public. In our view, the latter . . . constitutes an abuse of privilege which in an equitable analysis of competing public considerations must surely fail.

Justice Douglas's criticism is correct. The legal system needs to enumerate instances in which the privilege of limited liability should be extended and instances in which it should not. As Grace's actions demonstrate, the current state of corporate law, in the hands of sophisticated corporate lawyers, is one which allows corporations to insulate themselves to preposterous portions. This is not why the privilege of limited liability was created.[124] Thus, in order to preempt further abuses of the limited liability privilege, lawmakers should enumerate specific instances under which limited liability should be granted rather than providing a blanket liability limit to shareholders.

D. Require Corporations Engaged in Dangerous Activities to Post Bonds and/or Carry Mandatory Insurance

Richard Posner, a strong proponent of limited liability in the realm of contract creditors, has suggested that, in order to remedy the harsh effects of limited liability on tort victims, corporations engaging in dangerous activities should be required to post bonds equal to the highest likely tort damage.[125] Similarly, other scholars have argued that corporations engaged in dangerous activities should be required to carry liability insurance.[126] As Rachel Maizes points out in her critique of limited liability companies: "Some states already require professional LLCs to carry insurance. Do hazardous waste disposal companies, oil and gas companies, and the like, really pose fewer risks to society than professionals? Are those risks less worth insuring against?"[127] Such an analogy is hard to dismiss.

Both of these strategies, however, contain inherent problems. One such problem is that it is often difficult to gauge beforehand which activities are to be considered "dangerous" enough to warrant the posting of bonds and/or insurance. While many activities, such as Grace's Libby mine, now seem

intuitively dangerous, even two decades ago Grace was successfully arguing that there was nothing dangerous about its Libby mine or the asbestos exposure of its workers. Similarly, tobacco use now seems inherently dangerous, but only a few decades ago it was only the tobacco producers who knew of the health risks inherent in tobacco use. Thus, the very industries engaging in the activity would be asked to disclose the degree of danger which their product posed. This arrangement would create an obvious conflict of interests and open itself up to inherent systemic problems.

A second, related problem, is that corporations engaging in the risky behavior will inevitably attempt to downplay the degree of danger in order to secure the lowest bond and/or insurance premium.[128] For example, in Libby, Grace posted a reclamation bond on the mine which regulators felt would be adequate to reclaim the site.[129] Similarly, Grace carried liability insurance while the mine was in operation. But because Grace was able to argue publicly that the mine (and the mill) did not pose any serious danger, it was able to undercapitalize both the amount of its bond and the amount of insurance available to tort victims.[130]

E. Shift the Burden of Proof from the Tort Creditor to the Corporation when Applying the Veil-Piercing Doctrine to Parent/Subsidiary Corporations

Under current law, the creditor bears the burden of proof to show why the court ought to disregard the legal fiction of separate entities and pierce the corporate veil.[131] As Prof. Leebron notes, however:

It is unclear what justifies the legal presumption against veil piercing between related corporations on behalf of noncontractual creditors. The mere fact of such relation ought, in theory, to create the reverse presumption. Only where it can be shown that such veil piercing would result in disintegration of similar enterprises rather than liability should courts refrain from doing so.[132]

The primary reason for the presumption against corporate veil piercing appears to be the deference afforded to the corporate persona. However, in the case of involuntary tort creditors, Prof. Leebron makes a valid point. Unlike contractual creditors, tort victims do not know the often complicated corporate structure of their abusers. This is especially true given the fact that multilayered corporations (like Grace) often hold themselves out to the public as a single entity. Standing in the shoes of the involuntary tort creditor, then, the issue becomes why should these creditors be required to abide by corporate formalities which they had no idea even existed?

F. Pro Rata Shareholder Liability

Several legal scholars have argued that limited liability should be replaced with pro rata shareholder liability.[133] Pro rata liability is the theory that a shareholder should be liable for a corporation's liabilities in proportion to the percentage of the corporation which the shareholder owns (e.g., a shareholder with a 10% interest in a corporation would be personally liable for 10% of the corporation's liabilities).[134] The argument for the necessity of such a profound shift in the law of liability apportionment is relatively straightforward, namely, that the present limited liability system "leaves tort creditors uncompensated while shareholders are allowed to externalize the costs of doing business and reap great profits at society's expense." [135]

The pro rata argument is not without its difficulties, chief among them being the difficulty in recovering against individual shareholders.[136] Furthermore, the rationale for limited liability- reduced monitoring costs and fluidity of capital investment- are all greatly diminished under a pro rata system. While these problems cannot be avoided in the context of the individual investor, they disappear entirely when the issue becomes whether pro rata liability should be assessed to corporate shareholders which own complete (or almost complete) equity in the undercapitalized corporation. At this level, then, pro rata liability becomes virtually indistinguishable from the solution listed above (removing the multiple layers of liability in the parent-subsubsidiary context).

G. Prohibit Corporations from Owning other Corporations

Although today the concepts of corporate personhood, parent-subsubsidiary corporate relationships, and

intercorporate transactions are all fairly rooted, there was a time (not so long ago) in which the legal system and society as a whole were apprehensive about extending the powers of corporations too far.[137] Given the fear that existed, lawmakers were generally careful to severely restrict both corporate purposes and powers.[138] Over time, however, through a "race of laxity" among the states, the scope of permissible corporate powers was greatly broadened.[139] One of the "new" powers given to corporations was the ability to acquire shares in other corporations.[140] This power was expressly enumerated by Section 3.02 of the Revised Model Business Corporation Act ("MBCA"), which provides in part:

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, without limitation power:

...

(6) to purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity.

In broadening corporate power to accommodate the purchase and control of other corporations, the drafters of the Model Act did not have some specific purpose in mind. Rather, the allowance merely fell in line with the general philosophy of the Model Act, namely, "that corporations . . . should be automatically authorized to engage in all acts and have all powers that an individual may have." [141] Thus, in one fell swoop, the drafters of the Model Act had laid the foundation for all of the complicated corporate maneuvering which we see today, from Grace to Enron.[142] Allowing corporations to own other corporations led to subsidiary corporations, which led to invulnerable layers of limited liability and legally permissible corporate divestiture. It also helped to create a tangled and complex body of law in the area of fraudulent conveyances as creditors grappled with two simple questions: Who is liable and how can we make them pay?

Proponents of allowing corporations to own other corporations might well argue that corporations, being legal persons, should not be prohibited from engaging in activities which individuals are not. In the end, however, the problems inherent in allowing corporations to own other corporations far outweigh the benefits. For example, a renewed prohibition on corporate ownership of other corporations would immediately protect creditors by assuring simple and understandable answers to both of the above questions.[143] The simplicity such a prohibition would create is undisputable. Corporate formation would return to its most basically understood form, with the corporation being controlled by its (human) shareholders. Furthermore, resurrecting this prohibition would immediately eliminate the confusing loopholes available in fraudulent conveyance law. While perhaps the most simple solution offered in this Section, prohibiting corporations from owning other corporations would immediately create a system of simplicity and fairness.

V. CONCLUSION

What Grace did to the people of Libby is unacceptable. If a human being had systematically injured or killed the workers and residents of Libby, then that person would be in jail. Yet, because Grace is a corporate institution, it did not go to jail. What's more, it did not even fully compensate its victims. As the people of Libby grow sick and die, Grace lives on.

It would be too easy, however, to simply assign all the blame to Grace and consider it an enigma. The truth is, Grace is not the only responsible party. In fact, the entire legal system has failed the people of Libby. Their plight illustrates the grave injustices which are inherent in current corporate law. Today's current legal framework allows corporations to spinoff assets and almost completely insulate themselves from liability from creditors. While commentators can argue about what exactly can be done to better protect involuntary tort creditors, it is indisputable that the current system is imperfect. Corporations have striven for over 100 years to increase their powers and rights.[144] They have, by all accounts,

succeeded. But with privileges come responsibilities. Determining and imposing these responsibilities, although no doubt a difficult task, is one that must be undertaken with all of the zeal that corporations had in gathering their rights and powers. The future Libby's of the world demand it.

[1] Pl.'s Brief in Opp. to Def.'s Motion to Dismiss at 26, *Priest v. W.R. Grace & Co.*, No. DV-99-4, (Mont. 11th Dist. 1999) [hereinafter "Grace brief"].

[2] WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS* § 7 (perm. ed., rev. vol. 1999). See also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 638 (1810) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."). For an excellent survey of the history and modern interpretation of corporate rights, see generally Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 *DEL. J. CORP. L.* 283 (1990) and Carl J. Meyer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *HASTINGS L.J.* 577 (1990).

[3] *FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS* § 3 ("Much of the difficulty of formulating a definition of the word 'corporation' lies in the etymology of the word, which signifies a 'body,' primarily fleshy and tangible.").

[4] Paul J. Norris, Grace Chairman, President, and Chief Executive Officer, available at <http://www.grace.com/html/enviro.html>. Mr. Norris's statement is prominently featured on the company's website regarding Grace's "Commitment to Care(r)" program, a program which "lays out [Grace's] principles and practices to protect the health and safety of [its] employees and the communities [it] works in." *Id.*

[5] Maryanne Vollers & Andrea Barnett, *Libby's Deadly Grace*, *MOTHER JONES*, May/June 2000, available at http://www.motherjones.com/mother_jones/MJOO/libby.html. The mine was closed by Grace in 1990 and the sawmill closed in 2001.

[6] *Id.* By acquiring Zonolite Co., Grace incurred all of its liabilities.

[7] *Id.* ("Vermiculite itself is harmless: The problem is that the layers of indigenous rock where it is found almost always contain asbestos, exposure to which has definitively linked to several fatal lung diseases for more than 70 years. The vermiculite deposit outside Libby is particularly dangerous because it is laced with tremolite, the most toxic form of asbestos. Tremolite's long fibers are like fishhooks. They work their way into soft lung tissue, and they never come out.") See also MICHAEL BOWKER, *FATAL DECEPTION* (Rodale 2003) at 50 (noting that the asbestos manufacturing industry was well aware of the dangers of asbestos by at least the 1930's, and citing to an occupational disease report published in *National Underwriter* magazine which concluded that "any process involving asbestos are considered especially hazardous, for the asbestos fibers appear to be difficult to expel from the lungs." Thus, by even the early 1930's, many insurance companies had already begun refusing to insure asbestos workers.).

[8] Vollers & Barnett, *supra* note 5.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Grace brief at 3.

[14] Erica Schenck Smith, Residents Blame Libby Mine for Illnesses, *MISSOULIAN*, Oct. 14, 1999, available at <http://www.missoulian.com/specials/fallfromgrace>. Grace's knowledge of the worker's problems is evident in several other Grace documents as well. For example, a Nov. 25, 1967, letter from a Grace executive to the company's insurer states that a local radiologist had been conducting studies of the mine's workers and that "his studies most certainly indicate there to be present a great deal of lung abnormalities among the employees, far in excess of the percentage of the ordinary population," and thus Grace "did indeed have a severe problem, and that [Grace] might expect a good many claims involving asbestos." *BOWKER*, supra note 7, at 37.

[15] *Vollers & Barnett*, supra note 5.

[16] *Id.* In 1983, Grace decided not to spend \$373,000 on showers, uniforms and paid overtime. The following year, Grace finally issued coveralls to its mill employees. *Id.* Grace made this cost-cutting decision despite the fact that legal documents would show that by that time "coldly calculated actuarial tables were being developed [by Grace] to consider the deaths not only of employees but their families as well." *BOWKER*, supra note 7, at 41.

[17] *Vollers & Barnett*, supra note 5.

[18] *Id.*

[19] *Id.* By May of 2000, nearly 100 workers had died from asbestos-related illnesses. See also *BOWKER*, supra note 7, at 205 (noting that EPA tests conducted in 2000 revealed that nearly 20% of the residents of Libby had abnormal lung x-rays, meaning they had an asbestos-related disease. Among the former mine workers, the rate was almost 50%. As one former Grace employee noted, it turned out to be more dangerous for the men to work at the mine than it was for soldiers in WWII to land on Normandy Beach on D-Day.) Currently, over 1500 people in Libby and the surrounding area have asbestos damage to their lungs. *Id.* at 233.

[20] See generally *BOWKER*, supra note 7. The EPA arrived in Libby in 1999 after residents protested Grace's claims that the mine had been reclaimed and that the company should thus have their reclamation bond returned. *Id.* When EPA agents arrived in Libby and tried to assess the extent of the asbestos exposure in Libby, they learned that "the vermiculite had been used in gardens, attics, walls, on driveways, as fill around pipes and underground tanks, and as an ingredient in cookies." *Id.* at 195. Vermiculite was also donated by Grace for use on Libby baseball fields, tracks, and school playgrounds. The extent of the environmental damage in Libby is best summarized by the EPA's on-site environmental scientist, Dan Thornton, who noted that "[g]iven the housing costs in northwestern Montana, it would have been less expensive to demolish the town and cap and contain it that [it would be to] clean it up." *Id.* at 294.

[21] *Smith*, supra note 14. Almost every settlement between Grace and the affected workers included a confidentiality agreement precluding the victim from publicly discussing the incident or the terms of the settlement. *Id.* This kept media and public attention away from the mounting tragedy. *Id.* When defending against the suits, Grace's attorneys argued variously that the company did "what it was legally obligated to do in an era when regulations involving asbestos were evolving along with the knowledge about its dangers" and that the victims were "contributorily negligent." *Id.* "Children who played in piles of mine waste, people who used waste vermiculite in their gardens, workers who did not wear required respirators and smokers must all accept some blame," Grace attorneys contended. *Id.*

[22] Grace brief at Exhibit "A" (Affidavit of Professor Sally Weaver at ¶ 28) (citing May 24, 1977, Grace internal company memo).

[23] *Id.*

[24] See, e.g., Hoover's Online W.R. Grace & Co. company profile, available at www.hoovers.com (W.R. Grace & Co. grew from the businesses of Irishman William R. Grace, who, in 1854, left Ireland to charter

ships in Peru. By the 1880's, William R. Grace was the mayor of New York City. After William's death in 1904, W.R. Grace & Co. was managed by son Joseph until 1945, then by grandson Peter until 1993.) Grace's management by son Peter is a story in and of itself. Peter Grace was heavily involved in politics and foreign policy, gaining the ear of numerous Presidents and other influential political figures. See generally BOWKER, *supra* note 7.

[25] Grace brief at 3.

[26] *Id.* at 3-4.

[27] *Id.* at 4.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 5.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 7.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 9.

[49] *Id.*

[50] Letter from Paul J. Norris, Chairman, President, and CEO, Grace, to Grace employees (Dec. 7, 1998)

(on file with author). The film *A Civil Action* was based on a novel of the same name written by Jonathan Harr. Both tell the story of Grace's actions in Woburn, Massachusetts, where five children and one adult died of acute lymphocytic leukemia from exposure to chemicals in their drinking water. The History of W.R. Grace, SEATTLE P.I., Nov. 18, 1999, available at <http://seattlepi.nwsourc.com/uncivilaction/grac19.shtml>. Grace and another company were later found by the Environmental Protection Agency to be responsible for dumping the toxic chemicals that poisoned two of Woburn's wells. *Id.* Later, Grace was indicted by the Department of Justice on two counts of lying to the EPA in 1982 about the amount of hazardous chemicals it used at its Woburn plant. *Id.* In 1988, Grace pled guilty to one count and was fined the maximum -- \$10,000. *Id.* Today, the penalty for that charge is \$500,000. *Id.*

[51] Letter from Paul J. Norris, *supra* note 50.

[52] Grace's website characterizes this \$250,000 yearly allotment as a "sweeping health care program" in Libby which "not only provides the insurance coverage needed, but supports the medical werewithal (sic) to diagnose and treat residents through local institutions." See Grace website at <http://www.grace.com/html/enviro.html>. The effort is part of Grace's "Commitment to Care(r)" program. *Id.*

[53] Kathleen McLaughlin, Litigants Fear Possible Grace Bankruptcy, MISSOULIAN, March 22, 2001, available at <http://www.missoulia.com/archives/ind...tail&doc=/2001/March/22-451-news05.txt>.

[54] *Id.*

[55] Memorandum from Montana Atty. Gen. Mike McGrath, to Montana Governor Judy Martz (August 13, 2001) at | 16 (on file with author).

[56] *Id.* at | 15.

[57] Grace Files Chapter 11, Says Asbestos Claims System Broken, MISSOULIAN, April 2, 2001, available at <http://www.missoulia.com/archives/ind...tail&doc=/2001/April/02-128-z1.txt>. Mr. Norris did not comment on whether or not he considered any of the hundreds of claims brought by Libby workers and residents to be "unmeritorious." *Id.*

[58] *Id.*

[59] *Id.*

[60] Kathleen McLaughlin, Officials Push for Grace to Keep Obligations to People of Libby, MISSOULIAN, April 3, 2001, available at <http://www.missoulia.com/archives/ind...tail&doc=/2001/April/03-133-news10.txt>. Ironically, the reactions of Montana's politicians were more sympathetic. Montana's governor, Judy Martz, stated that "while I certainly understand and support W.R. Grace's efforts to remain solvent beneath the weight of claims against them by asbestos victims across the country, I want to make sure that Libby residents are not left holding the bag so that trial lawyers and others may benefit at their expense." *Id.* Montana Senator Conrad Burns also sought to refocus the blame, pointing the finger at "trial lawyers and frivolous lawsuits." *Id.*

[61] Editorial, Forget Accountability; It's Only Business, MISSOULIAN, April 4, 2001, available at <http://www.missoulia.com/archives/ind...tail&doc=/2001/April/04-118-opinion2.txt>.

[62] The list of creditors included not just Libby workers but also thousands of consumers exposed to asbestos by Grace's products. Additionally, the EPA was listed as a creditor because of the millions in clean-up expenses which it will incur to remediate the mine and the town of Libby.

[63] Feds Seek Return of Funds from W.R. Grace, DAILY INTERLAKE NEWSPAPER, May 27, 2002, available at <http://www.dailyinterlake.com/NewsEngine/SelectStory.tpl?command=search&db=news.txt>. 11 U.S.C. § 1102 directs the U.S. bankruptcy trustee to appoint a committee of unsecured creditors as soon as practicable after a Chapter 11 filing. 11 U.S.C. § 1123(a), in turn, requires that

claims be classified by the Chapter 11 plan and that the plan afford the same treatment to all members of a given class. The creation of separate committees to represent asbestos personal injury claimants and property damage claimants is a standard Chapter 11 device first employed during the 1982 bankruptcy of Johns-Manville, then the world's largest asbestos producer. Under this device, the committees are each to be recognized as entities independent from the company.

[64] *Id.*

[65] See, e.g., BOWKER, *supra* note 7, at 268 ("The Sealed Air Corporation and other defendants denied all charge and vowed to defend their interests 'vigorously.'").

[66] Sealed Air Corporation Comments on Ruling, CNN MONEY, July 30, 2002, available at wysiwyg:/272/http://money.cnn.com/services/tickerheadlines/bw/222112514.htm.

[67] See, e.g., *In re W.R. Grace & Co., et al.*, 285 B.R. 148, 153-54 (Del. 2002) ("parties' fees and expenses to date total in excess of \$16.7 million.").

[68] Sealed Air Posts Loss on Asbestos Charges, REUTERS, January 28, 2002, available at http://biz.yahoo.com/rb/030128/manufacturing_sealedair_earns_1.html.

[69] Press Release, Fresenius, Fresenius Medical Care Announces Definitive Agreement to Settle Fraudulent Conveyance and All Other W.R. Grace Bankruptcy Related Issues; The Company Confirms Adequate Accrued Reserve (February 12, 2003), available at <http://www.fmc-ag.com/int...ntpub.nsf/Content/February+12%2C+2003>.

[70] *Id.*

[71] Sealed Air Posts Loss on Asbestos Charges, *supra* note 64. On the day the settlement was announced, the company's stock rose 4% because of the company's "positive 2003 outlook." *Id.*

[72] *Infra* at 11.

[73] Memorandum from Montana Atty. Gen. Mike McGrath, *supra* note 55, at ¶¶ 84-5.

[74] See, e.g., BOWKER, *supra* note 7. For example, if the average asbestos claim were valued at \$50,000 (a conservative estimate), then the cost of treating 61,000 claimants would be \$3.05 billion dollars.

[75] *Id.* The dormancy period for asbestos-related diseases can be as much as forty or fifty years. Thus, it is inestimable just how many people will ultimately be found to be stricken with asbestos-related diseases as a direct result of Grace's activities. However, for the sake of pure speculation, assume that Grace is found to be liable for the asbestos-related diseases of 100,000 more people, than at \$50,000 per victim, Grace's liability will be \$5 billion dollars. All of these future damages, of course, will be discharged under Grace's Chapter 11 bankruptcy plan.

[76] This statement does not even take into account the millions of dollars in property damage which has occurred because of Grace's activities in Libby.

[77] Within the specific realm of mass toxic torts such as Grace's, see, e.g., Mark J. Roe, Corporate Strategic Reaction to Mass Tort, 72 VA. L. REV. 1 (1986) (discussing, amongst others, Mansville Corporation's 1982 bankruptcy filing); Lynn M. LoPucki, The Death of Liability, 106 YALE L.J. 1 (1996); and Lynn M. Lopucki, Virtual Judgment Proofing: A Rejoinder, 107 YALE L.J. 1413 (1998).

[78] 15A FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 7408 (The general principles of law and the statutes governing fraudulent conveyances are based on the principle that "corporations cannot, any more than individuals, relieve their property from the payment of debts . . .").

[79] 11 U.S.C. § 548.

[80] See 15A FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 7404 ("Most jurisdictions have statutes modeled after the UFTA," while "some have provisions based on the UFCA").

[81] *Id.* (citing UFCA § 7 and UFTA § 4(a)(1)).

[82] 11 U.S.C. § 548(a)(1)(A); UFCA § 7; UFTA § 4(a)(1).

[83] DAVID G. EPSTEIN, *BANKRUPTCY LAW IN A NUTSHELL* 220 (West 2002). See also 15A FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 7408 (citing, among others, *Harris v. Aimco, Inc.*, 383 N.E.2d 631 (Ill.) (transfer of property to children of sole director, officer, and majority shareholder of corporation fraudulent) and *U.S. Marketing Concepts, Inc. v. Don Jacobs Buick-Subaru, Inc.*, 547 N.E.2d 892 (Ind. App. 1989) (conveyance to sole shareholder fraudulent)).

[84] 11 U.S.C. § 548(a)(1)(B); UFCA §§ 4-7; UFTA §§ 4(a)(2) and 5.

[85] UFTA §§ 4(a)(2) and 5. The language of 11 U.S.C. § 548(a)(1)(B) is slightly different, inquiring into whether the debtor: "(i) was insolvent or became insolvent as a result of the transaction, or (ii) was engaged in business or was about to engage in a business transaction for which his remaining property was unreasonably small capital, or (iii) intended to incur or believed that he would incur debts beyond his ability to pay."

[86] EPSTEIN, *supra* note 83. See also *In re W.R. Grace & Co., et al.*, 281 B.R. 852, 857 (2002) ("[UFTA] Section 5 makes no mention of the debtors knowledge or reasonableness of estimation in relation to its own insolvency. As framed by the statute, the only question is whether the debtor was insolvent on the transfer date or became insolvent.>").

[87] 15A FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 7405 (citing *Barrett v. Continental Illinois Nat. Bank & Trust Co.*, 882 F.2d 1 (1st Cir. 1989)).

[88] This issue arises because creditors may not have filed a claim at the date of the transaction, or even know that they have a claim on that date. This is particularly true in the context of asbestos victims, given the fact that the asbestosis may lie dormant for 50 years or more.

[89] UFTA § 1(5).

[90] UFTA § 1(3).

[91] *In re W.R. Grace & Co., et al.*, 281 B.R. at 861-62.

[92] See, e.g., *Raytech Corp. v. White*, 54 F.3d 187 (3rd Cir. 1995).

[93] *Id.* (The four instances in which successor liability are imposed are where: (1) the purchaser expressly or implicitly agrees to assume liability; (2) the purchase is an actual or de facto consolidation or merger; (3) the purchaser is a mere continuation of the seller; or (4) the transfer is for the fraudulent purpose of escaping liability.).

[94] William T. Vukowich, *Civil Remedies in Bankruptcy for Corporate Fraud*, 6 AM. BANKR. INST. L. REV. 439, 456-57 (1998).

[95] *Zaist v. Olson*, 227 A.2d 552 (Conn. 1967).

[96] LARRY E. RIBSTEIN & PETER V. LETSOV, *BUSINESS ASSOCIATIONS* § 3.05 (3rd ed. 1998).

[97] *Id.*

[98] RIBSTEIN & LETSOV, *supra* note 96, at § 3.05.

[99] *Vulkovich*, *supra* note 94, at 457.

[100] See Section II *infra*. Properly understood, Grace was able to divest itself of two of its most lucrative businesses- medical products (through its National Medical Care, Inc. subsidiary) and packaging (through its Cryovac subsidiary) hybrid mergers/stock transfers. Both the Fresenius and Sealed Air deals allowed Grace shareholders to "trade-in" their liability-ridden Grace shares for "clean" (no-liability attached) shares in the asset recipients.

[101] The veil piercing doctrine did not squarely apply to Grace's maneuvers because Grace was able to quickly spinoff its lucrative subsidiaries, thus giving up any control over them. Because Fresenius and Sealed Air were not "controlled" by Grace, the doctrine was inapplicable.

[102] Because both Fresenius and Sealed Air have settled the fraudulent conveyance claims against them, we will never know how the Court would have resolved these claims.

[103] Another example of a corporation taking methodical steps to distance itself from tort creditors through corporate reorganization occurred with Raymark Industries (now Raytech Corp.)- another former asbestos producer. As the company's New York law firm advised the directors prior to the corporate restructuring:

It should be possible under existing case law for Raytech to acquire assets or businesses of Raymark without thereby subjecting Raytech or such acquired assets or businesses to liability for the asbestos-related claims against Raymark under the doctrines of successor liability, piercing the corporate veil or fraudulent conveyance

Schmoll v. ACandS, Inc., 703 F. Supp. 868, 873 (D.Or. 1988).

Beginning in 1982, through various restructuring similar to that undertaken by Grace, the corporation attempted to systematically insulate itself from creditors. *Id.* at 870-71. The complicated restructure, while distancing corporate assets from creditors, was designed to comply with the letter (if not the spirit) of the law in every way. *Id.* After nearly a decade, the transformation complete, the new Raytech Corp. claimed it owed no responsibility to the numerous asbestos-victim creditors, arguing instead that Raytech Corp. was a completely separate entity from the former Raymark Industries. *Id.* Fortunately, the Court found otherwise, ruling that "although the corporate restructuring meets the technical formalities of corporate form, it was designed with the improper purpose of escaping liabilities," and therefore, "Raytech is a successor in liability to Raymark Industries." *Id.* at 874-75.

[104] RIBSTEIN & LETSOU, *supra* note 96, at § 3.03.

[105] See Section IV(A)(i) *infra*.

[106] See generally David W. Leebron, Limited Liability, Tort Victims, and Creditors, 91 COLUM. L. REV. 1565 (1991).

[107] Roe, *supra* note 77, at 39. See also Jose Engracia Antunes, The Liability of Polycorporate Enterprises, 13 CONN. J. INT'L L. 197, 203 (1997), noting as follows:

[I]f one looks to the modern world economy, one concludes that enterprises have increasingly chosen to organize and conduct their business operations in the form of a cluster of various separate corporations, rather than as a single corporate entity. Instead of the initial atomistic corporate world living under a perfect competition and free market model, the present century assisted the rise of an economic order largely dominated by multinational and multicorporate groups. Therefore, the major enterprise has typically evolved as a complex, large-scale business network, where the different parts of a unitary business are allocated to a group of affiliated corporations (subsidiary corporations), global co-ordination is obtained through the submission of such legally independent parts to a common economic strategy, and management of the whole is exercised by headquarters (parent corporation). As a matter of fact, of the one hundred largest economic entities in the world, 50 are nations and 50 are multinational corporate groups.

[108] Roe, *supra* note 77, at 48-49. See also Lopucki, *supra* note 77, at 19-21 (noting that "the parent-subsidiary strategy has had a major effect in the bankruptcy reorganizations of large, publicly held companies. Its use in combination with a secured debt strategy can defeat a company's liability

entirely.") For a more expansive explanation of how a spinoff can serve the parent corporation even if piercing is assured, see Kevin M. Warsh, *Corporate Spinoffs and Mass Tort Liability*, 1995 COLUM. BUS. L. REV. 675, 711-18 (proving that the time period between the day of reckoning [e.g. successful veil-piercing] and the present provides corporate shareholders with real gains because of the extra time which the corporation is able to retain the disputed assets).

[109] The phrase "parent-subsiary" is also clearly a simplification under current corporate structuring. This is because there is virtually no limit to the layers of parent and subsidiary relationships which can be granted. For example, a parent corporation (P) can create a subsidiary (S1), which in turn creates another subsidiary (S2), which in turn creates another subsidiary (S3). The result, then, would be that S2 would be the subsidiary of S1, but the parent of S3.

[110] FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 43.

[111] *Id.*

[112] *Id.*

[113] RIBSTEIN & LETSOU, *supra* note 96, at § 3.05 (citing Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1066 (1991) (of the 1572 veil piercing cases which Prof. Thompson studied, only 226 were tort cases)).

[114] RIBSTEIN & LETSOU, *supra* note 96, at § 3.05. See also Leebron, *supra* note 106, at 1615 ("The argument for respecting the separateness of corporate entities is simply that no good is achieved by not respecting it. If limited liability for corporate subsidiaries were abolished, it would give an advantage to nonsubsidiary competitors, and, in the long run, would simply result in elimination of the subsidiary or conglomerate corporate form from that sector of the economy."); but see Erika Clarke Birg, Note, *Redefining "Owner or Operator" Under CERCLA to Preserve Traditional Notions of Corporate Law*, 43 EMORY L.J. 772, 778 (1994) (arguing that a potential advantage of limited liability in the parent-subsiary relationship is "to encourage corporate participation in beneficial albeit risky industries" by allowing firms to "compartmentaliz[e] the risk of liability through separate subsidiaries."); Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U.L. REV. 148, 175 (1992) ("[p]resumably those who profit by reducing the risk to the parent are the parent's shareholders, and, presumably, the more we reduce their risk and thereby raise the potential profit to them the more we will encourage their investment.").

[115] RIBSTEIN & LETSOU, *supra* note 96, at § 3.05.

[116] *Id.*

[117] Several commentators have put forward solutions arguing for the complete disregard of the parent-subsiary distinctions in the limited liability context because of their inapplicability to modern times. These commentators have characterized such a theory as extending liability to the enterprise rather than the entity. See, e.g., PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 22.03.2, at 431 (1983) (arguing that the boundary of the enterprise should be based "on the degree of economic integration within the group.") See also Antunes, *supra* note 107 (discussing the "polycorporate enigma" [e.g., that while the economic forms of enterprise organizations have grown exponentially complex, the legal forms of their organization remain stuck to a statutory model designed and conceived exclusively for the case of single corporate enterprises] and arguing for enterprise liability rather than entity liability); LoPucki, *supra* note 77, at 67 ("In its most more conservative version, enterprise liability is virtually indistinguishable from liberal piercing of the corporate veils within corporate groups. In its more radical version, it calls for the complete disregard of entities, leaving it to the courts to determine the scope of the enterprise.").

[118] 11 U.S.C. § 1123(a)(3) allows the debtor to specify the treatment of any claims and interests impaired under the Chapter 11 plan. In the words of Prof. Epstein, "[I]n bankruptcy, some creditors are clearly 'more equal' than others." EPSTEIN, *supra* note 83, at 309.

[119] LoPucki, *supra* note 77, at 61-2.

[120] *Id.*

[121] 321 U.S. 349, 362 (1944).

[122] See, e.g., *Id.* (listing policy reasons for limited liability including: (1) reduced costs of risk bearing, (2) reduced monitoring costs, (3) increased liquidity, and (4) market efficiency).

[123] 607 F. Supp. 1397, 1403 (D.Pa. 1985).

[124] See, e.g., William T. Allen, Ambiguity in Corporation Law, 22 DEL. J. CORP. L. 894, 895-96 (1997) ("Corporation law facilitates wealth creation principally by creating a legal structure that makes it substantially cheaper for investors to commit their capital to risky ventures. . . . This allows capital to subject itself to greater risk. It is the ability to increase the degree of risk that can be rationally accepted that provides the greatest source of the efficiency of the corporate form. Much of this utility depends upon investors allowing themselves to be safely passive.").

[125] Richard A. Posner, The Rights of Creditors of Affiliated Corporations, 43 U. CHI. L. REV. 499, 520 (1976).

[126] See Frank H. Easterbrook & Daniel R. Fishel, Limited Liability and the Corporation, 52 U. CHI. L. REV. 89, 101-3 (1985); Rachel Maizes, Note, Limited Liability Companies: A Critique, 70 ST. JOHN'S L. REV. 575, 602-8.

[127] Maizes, *supra* note 129, at 607.

[128] See, e.g., RIBSTEIN & LETSOU, *supra* note 96, at § 3.05.

[129] See BOWKER, *supra* note 7.

[130] *Id.*

[131] See, e.g., Leebron, *supra* note 106, at 1619.

[132] *Id.* See also Warsh, *supra* note 111, at 694 ("[t]he general rule is one of deference to restructuring by corporate managers acting in good faith.").

[133] Hansmann & Kraakman, *supra* note 103, at 1879; Leebron, *supra* note 106, at 1569.

[134] See generally Hansmann & Kraakman, *supra* note 103.

[135] William J. Rands, Domination of Subsidiary by Parent, 32 IND. L. REV. 421, 424-5 (discussing Hansmann & Kraakman, *supra* note 103).

[136] For example, assume ten percent of a corporation is owned by a mutual fund. If the corporation is unable to pay its creditors and pro rata liability is assessed, then the mutual fund would be ten percent liable. But how do we gauge which individual mutual fund investors should be held individually liable?

[137] See, e.g. *Liggett Co. v. Lee*, 288 U.S. 517, 548-49 (1933), summarizing the history of corporations as follows:

Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes. It was denied because of fear. Fear of encroachment on the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear

that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.

[138] *Id.*

[139] See, e.g., Michael J. Gaertner, Note, Reverse Piercing the Corporate Veil: Should Corporation Owners Have it Both Ways?, 30 WM AND MARY L. REV. 667, 671-2 (1989).

[140] *Id.* at 671-2, noting as follows: The crucial point in the evolution of the American corporation occurred in 1888 when New Jersey empowered a corporation to hold stock in another corporation. Other states adopted similar laws shortly thereafter. This step marked the birth of the modern corporation, a multilayered corporate structure. Consequently, in the development of the American corporation 'a corporation' no longer always represented the entire enterprise.

[141] Model Business Corporation Act Annotations, § 3.02 (2000).

[142] Enron Corporation, then one of the largest energy providers in the country, declared bankruptcy in 2001. In the wake of the bankruptcy filing, it was discovered that insiders had looted the corporation of millions of dollars in assets through the use of numerous subsidiary corporations distinct from the parent.

[143] By the same logic, shareholders would also be protected because corporate insiders would be unable to divert capital from the corporation to its subsidiaries (think Enron). This issue is beyond the scope of this article.

[144] See, e.g., Blumberg, *supra* note 2; Meyer, *supra* note 2.