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FORSYTHE V. CLARK USA, INC.: CONTRADICTIONS IN PARENT CORPORATION LIABILITY IN ILLINOIS

INTRODUCTION

In 2007, the Illinois Supreme Court created a new avenue of recovery for employees injured on the job.¹ By statute, employees in Illinois may not pursue common law causes of action against their employers for injuries sustained during the course of their employment.² Instead, employees or their estates are required to seek compensation under the Illinois Workers’ Compensation Act (the Act).³ The Act is intended to balance the interests of injured employees and the financial interests of employers. To protect employees, the Act presumes liability on the part of employers and forces employers to bear the cost of employee injuries regardless of the requirements of common law causes of action.⁴ To protect employers, the Act limits the amount that an employee can recover, depending on the specific characteristics of the injury, and serves “as the employee’s exclusive remedy if he sustains a compensable injury.”⁵

In Forsythe v. Clark USA, Inc., the Illinois Supreme Court opened a backdoor that allows plaintiffs to obtain compensation through direct participant liability, in addition to recovery under the Act.⁶ Direct

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¹ See Forsythe v. Clark USA, Inc., 864 N.E.2d 227 (Ill. 2007).
² The relevant part of the statute reads:

No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.


³ See id.
⁴ Forsythe, 864 N.E.2d at 240 (citing Gannon v. Chi., Milwaukee, St. Paul & Pac. Ry., 150 N.E.2d 141 (Ill. 1958)).
⁵ See id. at 241 (quoting McCormick v. Caterpillar Tractor Co., 423 N.E.2d 876 (Ill. 1981)).
participant liability exists where stock ownership gives a parent corporation the power to perform direct actions through a subsidiary. A parent corporation is subject to liability when there is a nexus between the harm and the parent corporation's actions that makes liability direct, not vicarious. Direct participant liability is an exception to the general rule that a parent company is not liable for the torts of its subsidiaries because it enables injured employees of a subsidiary corporation to recover from a parent corporation.

Other courts have recognized direct participant liability as a valid theory of tort liability. However, in joining those jurisdictions, the Forsythe court overlooked two key related points in its decision. First, the court failed to recognize that the facts before it presented a weak case for direct participant liability. Other courts, faced with similar facts, chose to avoid ruling on the theory's validity. Instead, those courts held that a parent corporation's acts of budgetary control over a subsidiary cannot form the sole basis for liability. Second, accepting a budget-based theory as the basis for direct liability blurred the difference between direct and vicarious liability for corporations and compounded confusion in an already confusing area of corporate law.

7. The Forsythe court consistently used this term to describe the plaintiffs' theory of liability. 864 N.E.2d at 232. A survey of some of the authorities cited in Forsythe reveals that the terminology the courts use varies slightly. See Bestfoods, 524 U.S. at 65 ("It is this direct liability that is properly seen as being at issue here."); Esmark, Inc. v. NLRB, 887 F.2d 739, 757 (7th Cir. 1989) ("[H]olding a parent corporation liable for 'directly participating' in its subsidiary's decisionmaking is fundamentally different from holding an unrelated third party liable for acting in concert with, or aiding and abetting, the subsidiary's misconduct."); Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 559 (Ind. 2001) (holding that a corporate officer could be individually liable "as a direct participant under general legal principles"); Estate of Countryman v. Farmers Co-op. Ass'n, 679 N.W.2d 598, 604 (Iowa 2004) (recognizing liability for a corporate manager under a "participation in tortious conduct standard").
8. Douglas & Shanks, supra note 6, at 209.
9. Id.
10. Bestfoods, 524 U.S. at 61–62 ("Thus it is hornbook law that 'the exercise of control which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary.'" (citing Douglas & Shanks, supra note 6, at 196)).
11. See id. at 65; Esmark, 887 F.2d at 757; Estate of Countryman, 679 N.W.2d at 604; RLG, 755 N.E.2d at 559.
15. See Douglas & Shanks, supra note 6, at 195 ("The statement that the insulation will be broken down when the subsidiary is an 'agency,' 'adjunct,' 'instrumentality,' 'alter ego,' 'tool,' 'corporate double,' or 'dummy' of the parent is not helpful. These concepts themselves need defining. At best they merely state results."); Cindy A. Schipani, The Changing Face of Parent
In light of these errors, the more prudent course would have been to require a subsidiary employee to "pierce the corporate veil" as a prerequisite to recovery from a parent corporation.\textsuperscript{16} An examination of the Illinois rules for direct participant liability and piercing the corporate veil reveals that they seek to accomplish similar goals.\textsuperscript{17} But, as an equitable remedy, veil piercing provides courts a greater degree of latitude. Additionally, courts will have even more flexibility in veil piercing cases if Illinois relaxes the standard for veil piercing against parent corporations as some commentators have suggested.\textsuperscript{18} This approach preserves a plaintiff's ability to recover from a parent corporation and clarifies the level of exposure for parent corporations that face lawsuits from employees of their subsidiaries.

This Note analyzes the Illinois Supreme Court's decision in Forsythe and addresses potential issues that courts and practitioners face as a result. Part II provides a general background of corporate liability law, focusing on how the law affects the relationship between parent and subsidiary corporations.\textsuperscript{19} Part III includes an overview of the Forsythe case.\textsuperscript{20} Part IV analyzes the court's decision to recognize direct participant liability in a case where the plaintiffs primarily alleged budgetary mismanagement, and Part IV then analyzes the court's concept of direct participant liability in relation to the already complex area of corporate liability.\textsuperscript{21} Finally, Part V addresses the impact of the Forsythe decision on future cases of its kind and the liability of parent corporations in Illinois for torts against employees of subsidiary corporations.\textsuperscript{22} This Note demonstrates that Forsythe was the wrong case to recognize direct participant liability. This Note also ar-
gues that the court's concept of direct participant liability creates uncertainty in corporate liability law and that the court should have applied the doctrine of piercing the corporate veil.

II. CORPORATE LIABILITY CONTEXT

Section A discusses the relationship between subsidiary and parent corporations in order to better understand Clark USA's relationship to its subsidiary. Next, Section B discusses the benefits of limited liability for corporations and situations in which parent corporations have been vicariously and directly liable for actions of their subsidiaries. Section C provides an overview of direct participant liability and the doctrine of piercing the corporate veil. Section D concludes with an analysis of two cases that were factually similar to Forsythe where the courts declined to apply direct participant liability.

A. Parent-Subsidiary Corporate Structure

A subsidiary corporation is a corporation "in which another corporation, a parent corporation, owns a majority of the shares of its stock." Because some parent companies exist for the sole purpose of owning controlling shares in subsidiary corporations, the term "holding company" is sometimes used interchangeably with parent corporation. A benefit of complete or majority stock ownership is that it allows the parent corporation to wield a large degree of control over the subsidiary. The parent-subsidiary structure became commonplace over the course of the twentieth century, which allowed corporations to expand in a way that led one commentator to compare the largest corporations to economic "nation states."
B. Limited Liability and Its Boundaries

A number of factors motivate businesses to utilize the parent-subsidiary corporate structure, such as "retention of the good will of an established business unit" and "increased facility in financing."32 Additionally, the corporate structure allows parent corporations to limit potential tort and contract liability by performing some operations through a subsidiary corporation.33 But limited liability has not always been the rule. During the early nineteenth century, state legislatures exposed shareholders to unlimited liability.34 However, the states quickly decided that limited liability encouraged investment and led to greater economic expansion.35 Contrary to the pejorative depiction of limited liability as a shield for large corporations, late-nineteenth- and early-twentieth-century state legislators viewed limited liability as a means of lowering the costs of market entry for small businesses, which were less able to absorb the risks of unlimited liability than the industrial titans of that era.36 Modern commentators rely on the similar argument that limited liability facilitates investment by reducing costs and risks for shareholders.37

A parent corporation, as shareholder, has limited liability for the actions of its subsidiary in the same manner as an individual shareholder who owns shares of the subsidiary.38 In certain instances, how-
ever, courts will hold a parent corporation liable for the acts of a subsidiary. Professor Robert Thompson identified nine characteristics of parent corporation action (or inaction) that courts use to hold parent corporations vicariously liable: "(1) undercapitalization; (2) failure to follow corporate formalities; (3) overlap of corporate records, functions or personnel; (4) shareholder domination; (5) intertwining; (6) lack of substantive separation; (7) agency; (8) fraud or misrepresentation; and (9) general conclusory terms such as instrumentality or alter ego."39 Thus, parent corporations may face derivative liability in a variety of scenarios, and parent corporations are wise to follow traditional corporate formalities to avoid liability for the acts of their subsidiaries.40

C. Theories of Liability: Direct Participant and Piercing the Corporate Veil

Courts have long recognized direct participant liability as a theory for holding parent corporations, shareholders, corporate officers, or others similarly situated liable for acts for which the corporation or subsidiary is ostensibly responsible.41 Many federal42 and state courts


39. Robert B. Thompson, Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors, 13 CONN. J. INT'L L. 379, 387 (1999) (presenting the results of a study of factors present in cases where courts have to decide whether to pierce the corporate veil).

40. Douglas & Shanks, supra note 6, at 196-97 (recommending the following four guidelines to "keep the business units from being treated as assimilated": (1) set up a separate financial unit; (2) separate the day to day business of the parent and the subsidiary; (3) maintain formal barriers between the management structures; and (4) do not represent the two units as one); Thompson, supra note 39, at 387.

41. See, e.g., United States v. Bestfoods, 524 U.S. 51, 65 (1998) (holding that a parent corporation could be directly liable for its actions that violate the Comprehensive Environmental Response, Compensation and Liability Act of 1980); Esmark, Inc. v. NLRB, 887 F.2d 739, 757 (7th Cir. 1989) (holding that, in proceedings before the National Labor Relations Board, a parent corporation could be held directly liable for participating in the unlawful conduct of its subsidiary); Estate of Countryman v. Farmers Co-op. Ass'n, 679 N.W.2d 598, 604 (Iowa 2004) (holding that managers of limited liability companies in Iowa could be personally liable when they directly participated in the wrongdoing of the company); Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 559 (Ind. 2001) (holding that officers and shareholders in Indiana could be directly liable for the company's actions under the responsible corporate officer doctrine).

42. It is worth noting that federal courts apply direct participant liability not only in suits where they exercise diversity jurisdiction, but also in instances where federal statutory or administrative law is at issue. See Bestfoods, 524 U.S. 51; Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1038 (7th Cir. 2000); Rodney B. Griffith & Thomas M. Goutman, A Hiccup in Federal Common Law Jurisprudence: Sosa, Bestfoods and the Supreme Court's Restraints on Development of Federal Rules of Corporate Liability, 14 U. MIAMI BUS. L. REV. 359, 390-408 (2006) (discussing the use of federal common law in interpreting federal statutes). See generally Schipani, supra note 15 (discussing the effect of veil piercing and direct liability theories on the Comprehensive Environmental Response, Compensation and
accept direct participant liability, or a theory similar to it. The United States Supreme Court approved the use of direct participant liability in a case where it interpreted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which imposes liability on the "operator" of a facility that violates environmental laws. The Court held that a parent company could be liable as a direct participant under CERCLA because the term "operator" indicates that anyone who was responsible for running a violating facility faces liability for environmental violations. In Esmark, Inc. v. NLRB, the Seventh Circuit held that direct participant liability is applicable where the parent company exercised control over the situation that caused the litigation. Direct participant liability also appears in cases involving corporate officers. The Indiana Supreme Court applied direct participant liability in a case where it held that a corporate officer could be liable for violating state environmental laws because of his "active involvement" in the violations.

The Illinois Supreme Court first confronted direct participant liability in Forsythe v. Clark USA, Inc. Previously, piercing the corporate veil was the most common means of recovering from a parent corporation in an Illinois tort action. From a plaintiff's perspective, piercing the corporate veil is an unattractive option when attempting to reach the deep pockets of a parent corporation because courts are often reluctant to allow veil piercing. Consequently, parent corpora-

Liability Act of 1980 (CERCLA) and the Employee Retirement Income Security Act of 1974 (ERISA)).

43. Bestfoods, 524 U.S. at 65; Esmark, 887 F.2d at 757; Estate of Countryman, 679 N.W.2d at 604; RLG, 755 N.E.2d at 559.
44. Bestfoods, 524 U.S. at 66.
45. Id. at 65 ("If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability.").
46. 887 F.2d at 757 ("It is solely where a parent disregards the separate legal personality of its subsidiary (and the subsidiary's own decisionmaking 'paraphernalia'), and exercises direct control over a specific transaction, that derivative liability for the subsidiary's unfair labor practices will be imposed.").
47. See Estate of Countryman, 679 N.W.2d at 604; RLG, 755 N.E.2d at 559.
48. RLG, 755 N.E.2d at 563 ("A corporate officer may, however, be held personally liable if he was actively involved in the activity that violates the statute." (citing United States v. Conservation Chem. Co., 733 F. Supp. 1215, 1221 (N.D. Ind. 1989))).
49. 864 N.E.2d 227, 232 (Ill. 2007) ([T]he theory of direct participant liability presented here has not previously been addressed in Illinois. It has been addressed in other states and throughout the federal courts, however.").
50. See 13 ILL. LAW & PRACTICE Corporations §§ 9–11 (2000); see also Forsythe, 864 N.E.2d at 233 ("Defendant contends that unless the standards for piercing the corporate veil are met, a parent company cannot be held liable for the negligence of its subsidiary.").
51. 13 ILL. LAW & PRACTICE Corporations § 9 (2000); see also Schipani, supra note 15, at 700 ("A veil piercing claim requires rather egregious circumstances to prevail.").
tions in Illinois face a larger pool of potentially successful tort plaintiffs after Forsythe.\textsuperscript{52}

Courts pierce the corporate veil as an equitable remedy when shareholders or management personnel should, in the interests of equity, bear responsibility for a corporation’s obligations.\textsuperscript{53} Veil piercing involving a parent corporation is an exceptional remedy because "in general, a parent corporation may not be held to account for the liabilities of a subsidiary unless the legal separateness of parent and subsidiary has been disregarded in a wide range of corporate matters."\textsuperscript{54} Where no separation exists between the parent and the subsidiary, courts often label the subsidiary corporation an "alter-ego" or "instrumentality" of the parent corporation.\textsuperscript{55} Accordingly, piercing the corporate veil against a parent corporation is appropriate when the parent corporation is actually running the subsidiary and it is unjust for the parent corporation to hide behind the corporate form to escape liability.\textsuperscript{56}

D. The Proper Path: Waste Management and Coastal Corp.

This Section outlines the decisions in Waste Management Inc. v. Superior Court of San Diego County\textsuperscript{57} and Coastal Corp. v. Torres.\textsuperscript{58} Waste Management and Coastal Corp. illustrate the alternative path available to the Illinois Supreme Court in Forsythe.\textsuperscript{59} Waste Management and Coastal Corp. are factually similar to Forsythe, and the holdings set a clear limit on parent corporations’ liability for exercising budgetary control over subsidiaries.

In Waste Management, the dispute arose from the death of an employee of Waste Management of California, Inc. (WMCI), a subsidiary of Waste Management, Inc. and USA Waste of California (collectively WMI).\textsuperscript{60} The employee’s family sued the parent company for negli-
gence, alleging that WMI prevented the subsidiary from replacing outdated garbage trucks—including the one that killed WMCI's employee—through its budgetary control over the subsidiary. The complaint alleged that WMI wanted to reduce its expenses and restricted WMCI's budget so that WMCI could not replace the defective truck, which led to the employee's death.

The Waste Management court began its analysis by noting that a valid negligence claim required the parent company to have owed a duty to the subsidiary's employee. The court, however, placed the burden of providing for the safety of the subsidiary's employees solely on the subsidiary corporation. Consequently, the parent company owed no duty to employees of the subsidiary to provide a safe working environment. Additionally, the court viewed the plaintiff's attempts to recover from the parent corporation as an attempt to circumvent "the purpose of the Workers' Compensation Act and the exclusive remedy provision." Similar to the defendant's argument in Forsythe, the court expressed concern that the plaintiff's argument would "create presumptive misfeasance by any parent corporation that approves a subsidiary's budget whenever an employee of the subsidiary is injured due to poorly maintained equipment." The Waste Management court acknowledged that the plaintiff could have recovered on a direct liability theory, but held that budgetary control was not sufficient to impose direct liability on the parent corporation.

In Coastal Corp., the lawsuit arose from an explosion at a Corpus Christi, Texas oil refinery. The explosion occurred at an offshore refinery operated by Coastal Refining & Marketing, Inc. (Coastal Refining), the subsidiary corporation. The defendant parent company, The Coastal Corporation, owned stock in corporations that owned stock in Coastal Refining. The plaintiffs brought a negligence claim against the parent company, alleging that the parent controlled "main-

61. Id.
62. Id. at 912–13.
63. Id. at 914.
64. Id. at 914–15 ("WMI's duty was to WMCI as its subsidiary, not to WMCI's employees.").
65. See id.
66. Waste Mgmt., 13 Cal. Rptr. 3d at 916. At the time of the court's decision, the employee's family was receiving workers' compensation benefits as a result of the accident, and any recovery in the negligence action would have been in addition to the workers' compensation benefits. See id. at 912 n.1.
67. Id. at 916; see infra notes 119–122 and accompanying text.
68. Id. at 916–17.
70. Id.
71. Id. at 777 n.1.
tenance, turnaround, and inspection matters at the plant" because it managed the subsidiary’s budget. Specifically, the plaintiffs alleged that Coastal Corporation restricted the subsidiary’s access to funds and refused to fund inspectors and maintenance operations.

The parent corporation’s budgetary control was relevant to two issues in the case: (1) whether a valid cause of action existed based on a parent company’s negligent control of a subsidiary’s budget; and (2) whether the parent company’s budgetary control was affirmative conduct, requiring the parent company to exercise reasonable care. On the first issue, the court stated that a parent corporation is liable "when there is specific control over the activity that caused the accident." The court did not view budgetary management as specific control, but rather as "remote conduct" that barred a control-based negligence claim. On the second issue, the court again noted that budgetary control is not an affirmative action that can be said to have caused an accident. Similar to Waste Management, the Coastal Corp. court held that "a parent company’s refusal or failure to budget" is not "affirmative conduct akin to an affirmative undertaking pursued for the benefit of the injured person." Waste Management and Coastal Corp. show that the Illinois Supreme Court failed to recognize

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72. *Id.* The fire occurred when a pressure vessel at the refinery ruptured as a result of corrosion, causing a flammable substance to leak out and explode upon coming into contact with an ignition source. *Id.*

73. *Id.* at 778.

74. See *id.* at 778–81. The elements of an affirmative conduct claim are characterized as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324(A) (1965); see also Nicole Rosenkrantz, Note, *The Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Directly Liable for Their Negligence*, 37 B.C. L. Rev. 1061, 1062 (1996).

75. Coastal Corp., 133 S.W.3d at 779. Note that the quoted language, without using the exact words, refers to the theory that the Forsythe court terms direct participant liability. See Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 237 (Ill. 2007) ("The key elements to the application of direct participant liability, then, are a parent’s specific direction or authorization of the manner in which an activity is undertaken and foreseeability." (emphasis added)).

76. Coastal Corp., 133 S.W.3d at 779.

77. *Id.* at 780.

78. *Id.* at 781; see also Rosenkrantz, *supra* note 74, at 1061–62.
that the facts in Forsythe only required the court to hold that budgetary control alone is not a basis for direct participant liability.\footnote{Forsythe, 864 N.E.2d at 237.}

III. SUBJECT OPINION: Forsythe v. Clark USA, Inc.

This Part provides an overview of the Forsythe decision. Section A presents the facts of the case and grounds for the plaintiffs' appeal.\footnote{See infra notes 83–97 and accompanying text.} Section B provides a summary of the majority and dissenting opinions in the intermediate appellate court opinion.\footnote{See infra notes 98–118 and accompanying text.} Finally, Section C presents the parties' arguments, the majority opinion, and the concurring opinion.\footnote{See infra notes 119–149 and accompanying text.}

A. Facts of the Case

In Forsythe, the defendant, Clark USA, was the sole shareholder of its subsidiary, Clark Refining & Marketing, Inc. (Clark Refining).\footnote{Forsythe, 864 N.E.2d at 231; Forsythe v. Clark USA, Inc., 836 N.E.2d 850, 852 (Ill. App. Ct. 2005), aff'd, 864 N.E.2d 227 (Ill. 2007).} Clark Refining was in the oil refinery business, and the case arose out of a tragic incident that occurred at its Blue Island, Illinois facility.\footnote{Forsythe, 864 N.E.2d at 231.} In 1995, two maintenance mechanics at the Blue Island facility, Michael Forsythe and Gary Szabla, were eating lunch.\footnote{Id. at 230–31.} In a separate part of the facility, workers were attempting to replace a pipe valve.\footnote{Id. at 231.} These workers failed to depressurize flammable materials within the pipe, which caused a swiftly moving fire to break out, killing Forsythe and Szabla.\footnote{Id.}

The estates of Forsythe and Szabla received payment under the Workers' Compensation Act because the employees were killed while acting within the scope of their employment.\footnote{Id. at 230 (citing 820 ILL. COMP. STAT. 305/1 to 305/18 (2002)).} But Forsythe and Szabla's estates also filed a wrongful death suit against Clark Refining and others, adding Clark USA as a defendant.\footnote{Forsythe's and Szabla's widows brought the suit as administrators of their husbands' estates. Id.} Clark USA was not Forsythe and Szabla's employer under the Act, and thus the Act did not bar the plaintiffs from seeking additional compensation from Clark USA through a wrongful death claim.\footnote{Forsythe, 864 N.E.2d at 240–42.}
The plaintiffs’ theory of liability was based on Clark USA’s “overall budgetary strategy.”91 This theory rested on the argument that Clark USA was liable for the deaths of Forsythe and Szabla because it failed to exercise reasonable care under traditional tort principles.92 Clark USA’s alleged negligent actions included the use of unqualified, untrained employees to replace the pipe valve, which, the plaintiffs argued, constituted proximate cause.93 According to the plaintiffs, the employees responsible for replacing the valve “were not maintenance mechanics and not trained or qualified” to work on that piece of equipment.94

In opposing summary judgment, the plaintiffs cited Clark USA’s ambitions to reduce “capital spending to minimum sustainable levels” through the institution of a ‘survival mode’ business plan.”95 The business plan, plaintiffs argued, “resulted in a series of cutbacks at the Blue Island refinery that undermined safety, training, and maintenance there and, in turn, created an unreasonable risk of harm to others including employees of Clark Refining.”96 The plaintiffs also introduced evidence that Clark Refining and Clark USA had intermingled operations in an effort to demonstrate that the parent corporation was directly responsible for the deaths of Forsythe and Szabla.97

91. Id. at 231.
92. The court summarized the plaintiffs’ theory of the case as follows:
   Specifically, plaintiffs allege that defendant breached a duty to use reasonable care in imposing its business strategy on Clark Refining by (1) “requiring [Clark Refining] to minimize operating costs including costs for training, maintenance, supervision and safety,” (2) “requiring [Clark Refining] to limit capital investments to those which would generate cash for the refinery thereby preventing [Clark Refining] from adequately reinforcing the walls of the lunchroom or relocating the lunchroom to a safe position within the refinery,” and (3) “failing to adequately evaluate the safety and training procedures in place at the Blue Island Refinery.” Moreover, plaintiffs allege that defendant’s strategy of capital cutbacks forced Clark Refining to have unqualified employees act as maintenance mechanics which, in turn, led to the fire that killed the decedents.
   Id.
93. Id.
95. Forsythe, 864 N.E.2d at 231.
96. Forsythe, 826 N.E.2d at 853.
97. Forsythe, 864 N.E.2d at 231 (discussing plaintiffs’ evidence that the boards of directors of Clark Refining and Clark USA held simultaneous meetings and the influence of Paul Melnuk, CEO of Clark Refining and president of Clark USA).
B. The Illinois Appellate Court's Opinion

The trial court granted summary judgment without opinion in Clark USA's favor. In a two-to-one opinion, the court reversed the trial court. In deciding the negligence issue, the appellate court majority relied heavily on Esmark and Bestfoods. The court concluded that direct participant liability is a valid theory of recovery against a parent corporation in Illinois. The court recognized that "[u]nder Illinois law, a corporation is deemed a distinct legal entity, separate from other corporations with which it may be affiliated." As a result, the corporate veil typically acts to protect parent corporations from their subsidiaries' liabilities. But where the theory of liability is "'transaction-specific' and thus limited to those instances where [the parent corporation's] meddling is directly tied to the resultant harmful or tortious conduct of the subsidiary," the corporate veil's protection is unavailable. Based on the facts before the court, the majority held that the plaintiffs had put forth enough evidence to warrant a jury trial on the issue of direct participant liability.

Justice McNulty dissented from the majority opinion and argued that, as a matter of law, direct participant liability did not apply. The dissent focused on a portion of the U.S. Supreme Court's opinion in Bestfoods, arguing that although the majority cited Bestfoods in support of direct participant liability, it ignored the applicable portion of the Court's opinion. In the dissent's view, the key evidence was

98. Id.
100. Id. at 861. The Illinois Appellate Court and the Illinois Supreme Court dealt not only with the issue of direct participant liability, but also with the issue of whether the Illinois Workers' Compensation Act shields Clark USA from a common law action. Both courts rejected Clark USA's attempt to use the Act to its benefit, refusing to allow Clark USA to simultaneously claim separation from Clark Refining to avoid liability and claim to be the same entity for purposes of gaining protection under the Act. Forsythe, 864 N.E.2d at 240–42; Forsythe, 836 N.E.2d at 858–61.
102. Id. at 854 ("There is, however, a well-established though seldom employed exception to 'the general rule that the corporate veil will not be pierced in the absence of large-scale disregard of the separate existence of a subsidiary corporation'; that exception being 'direct participant' liability." (citing Esmark, Inc. v. NLRB, 887 F.2d 739, 755 (7th Cir. 1989))).
104. Id. (citing Esmark, 887 F.2d at 753).
105. Id. at 857 (quoting Esmark, 887 F.2d at 756).
106. The First District's recitation of the facts was slightly more detailed than the Illinois Supreme Court's summary. See id. at 852–53.
107. Forsythe, 836 N.E.2d at 858.
108. Id. at 861 (McNulty, J., dissenting).
109. Id.
that Clark USA officers who also served as directors of Clark Refining knew the effect that budget cuts would have on Clark Refining's maintenance problems. Focusing on that element as the key to the plaintiffs' claim, the dissent analyzed the facts under Bestfoods.

As the dissent described, it is common for directors and officers to hold positions with the parent and subsidiary and to "change hats," or act as an officer of the subsidiary in one instance and an officer of the parent in another. However, when one person wears two hats, there is a presumption that "directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary." In Bestfoods, the Court held that the plaintiff had the burden of rebutting the presumption that the officers and directors were acting for the subsidiary when they committed the acts that gave rise to the case. Because the plaintiffs in Forsythe presented "no evidence of separate acts, attributable solely to defendant," the dissent found that the plaintiffs failed to rebut the subsidiary hat presumption from Bestfoods. The dissent argued that the evidence gave rise only to an inference that the directors of Clark Refining were acting in their capacity as directors of Clark USA in mandating the budget policies that allegedly caused the fire. That inference favored the defendant's argument that it could be liable only through a theory of derivative liability and only if the plaintiffs were able to pierce the corporate veil. Despite this analysis, Justice McNulty's argument did not persuade the other members of the panel, and Clark USA appealed to the Illinois Supreme Court.

C. The Illinois Supreme Court's Opinion

Clark USA urged the Illinois Supreme Court to follow the "fundamental rule" that required the plaintiffs to pierce the corporate veil to hold Clark USA liable for what it viewed as the negligence of Clark

110. Id. at 862.
111. Id. at 862–63.
112. Id. at 862 (citing Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 779 (5th Cir. 1997)).
114. Id. (citing United States v. Bestfoods, 524 U.S. 51, 68–70 (1998)).
115. Id. at 863.
116. Id.
117. Id.
118. The other defendants were Universal Oil Products and JBF Associates. Universal Oil Products settled and JBF Associates won its summary judgment motion at the trial level. Neither of those parties was part of the appeal from the trial court's ruling. Id. at 852 n.1.
As Clark USA argued, "A necessary corollary of that fundamental rule is that a parent company does not owe any duty to third parties to supervise or control the conduct of its subsidiary to ensure that the subsidiary acts with reasonable care." Clark USA further claimed that it owed no duty to the employees of Clark Refining and therefore faced no liability for setting "financial goals for its subsidiary" and adopting "an 'overall strategy' as to how those goals should be achieved." Clark USA also argued that from a public policy perspective, to impose "the Appellate Court's novel implication of a duty of care to the employees of a subsidiary to supervise the subsidiary's implementation of strategic business decisions . . . would eviscerate the concept of limited liability on which investors in Illinois and throughout the Nation have historically relied."

The court began its analysis with a brief discussion of fundamental principles of tort law. A defendant in Illinois is liable for negligence where it owed the plaintiff a duty of care, breached that duty, and proximately caused the plaintiff's injury. The plaintiffs' direct participant theory allowed them to prove that Clark USA owed a duty to maintain safe working conditions at Clark Refining.

Initially, the court noted that as a theory of liability, direct participant liability was new territory for Illinois courts. Unlike the appellate court, which primarily sought guidance from Esmark, the Illinois Supreme Court relied heavily on the U.S. Supreme Court's decision in Bestfoods and the Court's references to the article by Justice Douglas.

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119. Opening Brief of Defendant-Appellant Clark USA, Inc. at 13, Forsythe v. Clark USA, Inc., 864 N.E.2d 227 (Ill. 2007) (No. 101570). The plaintiffs continued to argue the validity of the theory of direct participant liability before the Illinois Supreme Court:

The essence of Plaintiffs' Complaints is that Clark USA, despite having knowledge that its overall business strategy in reducing training and maintenance was adversely affecting safety at [Clark Refining], demanded [Clark Refining] to operate the refinery pursuant to Clark USA's overall business strategy. Actions taken by Clark USA in the form of its 1995 Economic Imperatives directly created the unsafe conditions in which the fire occurred. The connection between the two fatalities and Clark USA's interference was so intimate as to make the resulting liability to Clark USA direct and not vicarious.

121. Id.
122. Id. at 14.
123. Forsythe, 864 N.E.2d at 232.
124. Id. (citing Espinoza v. Elgin, Joliet & E. Ry., 649 N.E.2d 1323 (Ill. 1995)).
125. Id. ("As we have recently stated, the 'touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.'" (internal citation omitted)).
126. Id.
and Carrol Shanks in that opinion. The Illinois Supreme Court quoted Bestfoods to distinguish normal parent direction of a subsidiary from direction that exposes it to liability:

"the acts of direct operation that give rise to parental liability must necessarily be distinguished from the interference that stems from the normal relationship between parent and subsidiary," and "[t]he critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility."

The court also cited a host of cases that approved direct participant liability to illustrate the theory's wide acceptance.

The evidence in Forsythe showed that the plaintiff's negligence theory relied heavily on Clark USA's alleged manipulation of Clark Refining's budget. This budget-backed theory forced the court to address Waste Management and Coastal Corp., which supported Clark USA's position. The court distinguished Waste Management and Coastal Corp. on the ground that those cases stand for the idea that a "direct participant theory cannot rest solely upon budgetary mismanagement, but budgetary mismanagement can make up one part of a viable claim."

Having recognized direct participant liability as a valid theory, the court stated the rule for direct participant liability in Illinois:

Where there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy and carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability. The key elements to the application of direct participant liability, then, are a parent's specific direction or author-

127. Id. at 233–34. The court referenced Esmark to describe, in abstract terms, when direct participant liability is appropriate. See id. at 234. In Bestfoods the Court consistently refers to Justice Douglas as the author. Justice Douglas authored the first two parts, which are the portions to which the Court cited, and Shanks authored the third part, which the Court did not reference. 524 U.S. 51, 64 n.11 (1998).


129. See Forsythe, 864 N.E.2d at 234–36.

130. Id. at 231.

131. Id. at 236–37 (citing Coastal Corp. v. Torres, 133 S.W.3d 776 (Tex. App. 2004); Waste Mgmt. Inc. v. Super. Ct., 13 Cal. Rptr. 3d 910 (Cal. Ct. App. 2004)).

132. Id. at 237. It is clear that budgetary mismanagement, with nothing else, is insufficient to implicate direct participant liability in Illinois. Id. With this in mind, it appears that the Forsythe plaintiffs might have a problem winning at trial on the facts present in this case.
Through this rule, the court sought to tie direct participant liability back to its original premise that a duty must exist before a court will impose liability under traditional tort principles.134

The court stated that, in Illinois, courts use "four policy-based factors...to determine whether a duty exists": "(1) the reasonable foreseeability of injury, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden upon the defendant."135 First, the court held that the injury was foreseeable because of the possibility that "severe cutbacks in staffing, safety, maintenance, and training...could lead...to the injury of others."136 Second, based on the nature of the cutbacks, the court held that there was a likelihood of injury.137 Third, the court reasoned that placing the burden on a parent company to prevent foreseeable injuries does not prevent them from prescribing "overall business and budgetary strategies" as long as they do not interfere in such a way "that the subsidiaries are no longer free to utilize their own expertise."138 Fourth, the court held that because parent corporations have a limited role with their subsidiaries, exercising due care was not an undue burden.139

In the final step of its analysis, the court applied direct participant liability to the facts and found that genuine issues of fact existed to preclude summary judgment for the defendant.140 In denying summary judgment for Clark USA, the court looked closely at the role of Paul Melnuk, as CEO of Clark Refining and as president of Clark USA.141 Based on company memoranda and business agendas, the court concluded that a genuine issue of material fact existed as to which "hat" Melnuk wore when he directed the budget cuts at Clark Refining.142 The court held that it was unclear whether Melnuk, acting for Clark USA, directed the budget cuts with the knowledge that

133. Id.
134. Id. at 232.
136. Id. at 238.
137. Id.
138. Id.
139. Id.
140. Id. at 238–40.
141. Forsythe, 864 N.E.2d at 238–39.
142. Id. at 240. The dissent from the intermediate appellate court discussed the hat issue at length in arguing that the court erred in ruling for the plaintiffs. Id. at 231; Forsythe v. Clark USA, Inc., 836 N.E.2d 850, 852 (Ill. App. Ct. 2005), aff'd, 864 N.E.2d 227 (Ill. 2007).
the cuts would adversely affect employee safety at Clark Refining.\textsuperscript{143} If Melnuk directed the budget cuts knowing that it would reduce employee safety to the detriment of Clark Refining and to the benefit of Clark USA, the plaintiffs could prevail on their negligence claim using a direct participant liability theory.\textsuperscript{144} In light of the ambiguity surrounding Melnuk's role and the summary judgment standard favoring the non-movant, the court affirmed the denial of summary judgment.\textsuperscript{145}

In his concurring opinion, Justice Freeman explained the limits of the direct participant exception to "the bedrock principle of limited liability for corporate shareholders."\textsuperscript{146} The concurrence attempted to quell fears that Illinois courts would use the Forsythe opinion as a license to hold parent corporations liable for acts that are commonplace in a parent-subsidiary relationship.\textsuperscript{147} Despite the fact that "rarely will a parent company...step outside the proper role of a parent...[such] that it can be viewed as directly inflicting harm on the subsidiary's employees or third parties doing business with the subsidiary," the concurring justices agreed that the plaintiffs put forth sufficient evidence to survive summary judgment.\textsuperscript{148} In an effort to further elucidate the narrow exception to limited liability, the concurrence noted that summary judgment review required the court to make all inferences favorable to the plaintiff and that "[t]he decision today should not be interpreted as indicating or telegraphing whether plaintiffs will ultimately succeed on the merits of this cause of action."\textsuperscript{149}

IV. Analysis

This Part identifies two related aspects of the court's opinion that could lead to confusion and incorrect judgments in future cases. Sec-

\textsuperscript{143} Forsythe, 864 N.E.2d at 240.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 244.
\textsuperscript{147} The concurrence provides this edification:
Throughout these proceedings, defendant has voiced the valid concern that the direct participation liability theory of recovery must not be stretched to such an extent that it encompasses routine and proper exercises of shareholder control, lest the exception swallows the general rule and serves to spawn a flood of lawsuits against parent companies. I agree with defendant on this point, and our opinion today preserves the proper balance between the general rule and this narrow exception. Id. at 244-45 (Freeman, J., concurring).
\textsuperscript{148} Id. at 245-48. The concurring opinion discusses a number of facts not included in the majority opinion and discusses some facts with greater specificity. Id.
\textsuperscript{149} Forsythe, 864 N.E.2d at 249.
A. Budgetary Control

Despite the court’s insistence otherwise, a thoughtful look at the facts in Forsythe reveals that the plaintiffs’ theory of liability was based on Clark USA’s budgetary control over Clark Refining. Instead of relying on the role of Paul Melnuk, president of Clark USA and

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150. See infra notes 156–168 and accompanying text.

151. Waste Mgmt. Inc. v. Super. Ct., 13 Cal. Rptr. 3d 910, 915 (Cal. Ct. App. 2004) (“Negligently controlling or intentionally mismanaging a subsidiary’s budget does not create a duty on the part of the parent corporation to ensure safety or prevent injuries to the subsidiary’s employees.”); Coastal Corp. v. Torres, 133 S.W.3d 776, 779 (Tex. App. 2004) (“Because appellees have provided us with no authority, and we find none, where a Texas court has imposed liability against a parent company, under mainstream principles of tort law, for negligent control of such remote conduct as budgeting activities, we conclude appellees’ control-based negligence theory of recovery fails.”).

152. See infra notes 169–209 and accompanying text.

153. See Franklin A. Gevurtz, Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil, 76 OR. L. REV. 853, 871 (1997) (“Still, the end result should be the same whether one labels the defendant’s liability as the result of piercing or as direct liability for the defendant’s own tort or contract.”).

154. Forsythe, 864 N.E.2d at 244–45 (Freeman, J., concurring) (“[O]ur opinion today preserves the proper balance between the general rule and this narrow exception.”).

155. Numerous commentators have recognized the uncertainty in corporate liability law and veil piercing jurisprudence. See Gevurtz, supra note 153, at 853 (citing Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, 76 CORNELL L. REV. 1036 (1991), for the proposition that not only is piercing the corporate veil a confusing area of corporate law, but it is also the most litigated).

156. Forsythe, 864 N.E.2d at 238 (“[W]e must resolve whether there exists a question of material fact such that . . . defendant’s overall business and budgetary strategy involved the negligent direction or authorization of the manner in which Clark Refining conducted its business.”).
CEO of Clark Refining, in finding that a genuine issue of fact existed as to whether Clark USA was a direct participant in causing the fire that killed Forsythe and Szabla.\textsuperscript{157} The court cited Melnuk's "1995 Economic Imperatives" memorandum, which included statements about operating the business in "survival mode" and reducing spending and expenses to "minimum sustainable levels."\textsuperscript{158} As further support, the court noted that Melnuk knew that any cost-cutting would come from areas that were related to the accident, such as "education, training, repairs, and equipment maintenance."\textsuperscript{159} Ultimately, the court framed the key issue as whether Melnuk acted negligently in controlling "the manner in which the budget cuts [in this case] were taken."\textsuperscript{160} It is difficult to reconcile these facts with the court's claim that "a viable claim of liability under the direct participant theory cannot rest solely upon budgetary mismanagement."\textsuperscript{161}

The Illinois Supreme Court's admonition that direct participant liability cannot rest on budgetary control alone directly contradicts its denial of summary judgment in Forsythe.\textsuperscript{162} In an effort to make its decision appear consistent with Waste Management and Coastal Corp., the Forsythe court focused on the language in those decisions indicating that direct participant liability is a valid theory of liability.\textsuperscript{163} The Illinois court then stretched the meaning of Waste Management and Coastal Corp., asserting that those cases stand for the proposition that a direct participant liability claim cannot rely "solely upon budgetary mismanagement, but budgetary mismanagement can make up one part of a viable claim, in conjunction with the direction or authorization of the manner in which an activity is undertaken."\textsuperscript{164} Waste Management and Coastal Corp. do little to elucidate what would constitute a successful direct participant claim. Instead, the courts in those cases adopted the narrower holding that excludes budgetary mismanagement as a basis for parental liability.\textsuperscript{165}

Even accepting the Forsythe court's broad readings of Waste Management and Coastal Corp., it is difficult to reconcile those interpreta-

\textsuperscript{157} Id. at 238-40.
\textsuperscript{158} Id. at 239. The plaintiffs pointed to the fact that Melnuk composed the memorandum on Clark USA letterhead as evidence of direct participation. Id.
\textsuperscript{159} Id. at 240.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 237.
\textsuperscript{162} See supra notes 156-161 and accompanying text.
\textsuperscript{163} Forsythe, 864 N.E.2d at 237.
\textsuperscript{164} Id. ("[W]e conclude that budgetary mismanagement, accompanied by the parent's negligent direction or authorization of the manner in which the subsidiary accomplishes that budget, can lead to a valid cause of action under the direct participant theory of liability.").
\textsuperscript{165} See supra notes 57-79 and accompanying text.
tions with the denial of summary judgment on the facts of Forsythe.\textsuperscript{166} The court stated that control beyond budgetary mismanagement must exist to establish negligence on the part of a parent corporation under a direct participant liability theory.\textsuperscript{167} But, unlike the Waste Management and Coastal Corp. courts, the Illinois court failed to follow its own rule, allowing the plaintiffs to survive summary judgment by arguing only budgetary mismanagement.\textsuperscript{168}

\section*{B. Confusion in the Area of Corporate Liability}

This Section first briefly examines the complexities of corporate liability law.\textsuperscript{169} Next, this Section discusses the concept of direct participant liability in Forsythe and reveals that the Illinois court did not meaningfully distinguish it from the Illinois law on piercing the corporate veil.\textsuperscript{170} Although the distinction between direct and vicarious liability is not critical to the outcome of every case, this Section argues that Forsythe renders any distinction meaningless under Illinois law, adding to the existing confusion in corporate liability law.\textsuperscript{171} The final portion of this Section argues that to alleviate confusion and preserve subsidiary employees' ability to recover from parent corporations, Illinois courts should force plaintiffs to pierce the corporate veil, but relax standards for piercing the corporate veil where a parent corporation is the defendant.\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{166} See \textit{supra} notes 83--97 and accompanying text. Clark USA urged the court to follow the Waste Management and Coastal Corp. decisions in deciding Forsythe. Opening Brief of Defendant-Appellant Clark USA, Inc., \textit{supra} note 119, at 22 ("The same analysis should apply here. Plaintiffs' claim is not that Clark USA negligently operated the refinery; rather, it is that it negligently set financial goals that caused [Clark Refining] to negligently manage the refinery.").
\item \textsuperscript{167} The plaintiffs' claim rested largely on Clark USA's budgetary control:

The essence of Plaintiffs' Complaints is that Clark USA, despite having knowledge that its overall business strategy in reducing training and maintenance was adversely affecting safety at [Clark Refining], demanded [Clark Refining] to operate the refinery pursuant to Clark USA's overall business strategy. Actions taken by Clark USA in the form of its 1995 Economic Imperatives directly created the unsafe conditions in which the fire occurred.

Brief and Argument of Plaintiffs-Appellees, \textit{supra} note 119, at 7.
\item \textsuperscript{168} See id.
\item \textsuperscript{169} See \textit{infra} notes 173--180 and accompanying text.
\item \textsuperscript{170} See \textit{infra} notes 181--197 and accompanying text.
\item \textsuperscript{171} See \textit{infra} notes 181--197 and accompanying text.
\item \textsuperscript{172} See \textit{infra} notes 198--209 and accompanying text.
\end{itemize}
1. A Study in Uncertainty: Corporate Liability

The Forsythe court added a layer of complexity to an already complex area of the law. Corporate liability, particularly the liability of a parent corporation for the wrongs of its subsidiary, is a dense and frequently litigated field. Much of the complexity in the area of corporate liability begins with the amorphous concept of "piercing the corporate veil." Generally, courts will pierce the corporate veil and hold a parent corporation liable for the conduct of its subsidiary when equity demands it. Not surprisingly, courts have exercised this equitable power in a variety of situations, creating a body of inconsistent case law.

More important for present purposes, varying terminologies drive veil piercing law, which has led to a number of theories that differ in name but serve the same purpose: ignoring the traditional rule of limited liability when equity demands it. Although direct participant

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174. Thompson, supra note 39, at 383 (stating that veil piercing "is the most litigated issue in corporate law" (citing Thompson, supra note 155, at 1036 n.1)).

175. See supra notes 173–174 and accompanying text. Professor Blumberg has argued for an overhaul of the entire system of corporate liability to deal with economic realities:

It is no longer realistic to adhere to the traditional view that for legal purposes each of the constituent corporations in a corporate group is a separate legal entity with rights and duties unaffected by its functioning as an integral component of a group collectively conducting a common business under common control. It is time for the bench, bar, and academy to consider the circumstances under which the parent and affiliated companies of the group should also be liable for the duties and obligations of other group constituents.


176. See Bainbridge, supra note 173, at 77–78 ("The standard justification for veil piercing argues that it serves as a safety valve allowing courts to address cases in which the externalities associated with limited liability seem excessive." (citing WILLIAM L. CARY & MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 191 (7th ed. unabr. 1995))).

177. Id. at 78 n.4 (for the proposition that veil piercing "seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled." (citing Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. CHI. L. REV. 89, 89 (1985))); Gevurtz, supra note 153, at 853 ("[D]espite hundreds of opportunities to get it right, judicial opinions in this area have made it one of the most befuddled."); Thompson, supra note 39, at 387 (displaying the results of a study of the factors that courts consider in veil piercing cases).

178. Blumberg, supra note 31, at 307 (Veil piercing has become "almost inescrutable...behind conclusory metaphors such as 'mere instrumentality,' 'sham,' 'adjunct,' 'agent,' 'alter ego,' 'puppet,' or dozens of similarly murky terms"); see also Berky v. Third Ave. Ry., 155 N.E. 58, 61 (N.Y. 1926) (Justice Cardozo's famous caution that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it").
liability is generally considered conceptually different from veil piercing in that veil piercing is a form of vicarious liability, there are cases in which the distinction between direct and indirect actions is less than clear.\textsuperscript{179} The similarity between direct participant liability and veil piercing in Illinois becomes apparent after examining the rules for each theory of liability.\textsuperscript{180}

2. A Tenuous Distinction Between Theories Under Illinois Law

Direct participant liability is present "[w]here there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy and carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary."\textsuperscript{181} In comparison, Illinois courts will pierce the corporate veil when (1) there exists "such unity of interest and ownership that the separate personalities of the [subsidiary] corporation and the [parent corporation] no longer exist," and (2) "the circumstances . . . exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences."\textsuperscript{182} In other words, courts will pierce the corporate veil when the parent corporation directs a subsidiary’s actions to such a degree that it is unjust to allow the parent corporation to escape liability.\textsuperscript{183}

The first factor for piercing the corporate veil—lack of separate personalities of the subsidiary and parent corporations—closely resembles the rule for direct participant liability from Forsythe.\textsuperscript{184} The second veil piercing factor—the fiction of separate entities is a fraud,

\textsuperscript{179} Professor Guvertz argues that differentiating between direct and vicarious corporate liability is not always a significant step in determining the outcome of a case:

"Technically, these cases do not involve piercing at all, at least if by piercing one means holding the shareholder liable for the debt of the corporation. The reason is that in each of these cases, the plaintiff has a tort or contract cause of action against the shareholder. . . . If the shareholder committed the tort damaging the plaintiff . . . then the shareholder is liable for his or her own tort. . . . [T]he end result should be the same whether one labels the defendant’s liability as the result of piercing or as direct liability for the defendant’s own tort or contract. . . . Accordingly, one cannot complain too much if the court wants to label this piercing . . . ."

Guvertz, supra note 153, at 870–71.


\textsuperscript{181} Forsythe, 864 N.E.2d at 237.

\textsuperscript{182} 13 ILL. LAW & PRACTICE Corporations § 9, at 235 (2000).

\textsuperscript{183} See id.

\textsuperscript{184} See Forsythe, 864 N.E.2d at 237.
injustice, or promotes inequitable consequences—incorporates the concept inherent in tort law of remedying the consequences of an unjustifiable action.\textsuperscript{185} These similarities in language and purpose demonstrate that in Illinois direct participant liability and the doctrine of piercing the corporate veil both apply where the separation between the parent and subsidiary corporations has sufficiently broken down so that allowing the parent corporation to escape liability is unjustifiable.\textsuperscript{186} Consequently, a veil piercing analysis and a direct participant liability analysis under \textit{Forsythe} would likely reach the same result for the same reasons.

The \textit{Forsythe} court did not completely ignore Clark USA's argument that the plaintiffs had to pierce the corporate veil to hold it liable for Forsythe and Szabla's deaths, but the court reviewed the argument summarily.\textsuperscript{187} As an initial matter, the Illinois Supreme Court agreed with the \textit{Bestfoods} Court's recognition of the difference between direct and vicarious liability.\textsuperscript{188} Later in the opinion, the court clarified that "[d]irect participant liability, as we now recognize it, does not rest on piercing the corporate veil such that the liability of the subsidiary is the liability of the parent."\textsuperscript{189} Rather, direct participant liability turns on the manner in which most courts conceptualize the difference between the direct and indirect actions of parent corporations.\textsuperscript{190} As previously noted, the \textit{Forsythe} concurrence shows concern for the potential of the court's decision to dilute or confuse the theory of limited corporate liability, but argues that the majority deci-

\begin{itemize}
    \item \textsuperscript{185} See PROSSER AND KEETON ON \textsc{the Law of Torts} § 1, at 6 (W. Page Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER AND KEETON] ("The common thread woven into all torts is the idea of unreasonable interference with the interests of others. . . . The tort-feasor usually is held liable for acting with an intention that the law treats as unjustified . . . ." (emphasis added)).
    \item \textsuperscript{186} See generally \textit{Forsythe}, 864 N.E.2d 227.
    \item \textsuperscript{187} See id. at 233. Clark USA addressed veil piercing only briefly, focusing its efforts on rebutting the intermediate appellate court's finding that Clark USA owed a duty to the plaintiffs. Opening Brief of Defendant-Appellant Clark USA, Inc., \textit{supra} note 119, at 13 ("It is hornbook law that, unless the stringent standards for piercing the corporate veil are met, a parent company is not liable for the negligence of its subsidiary.").
    \item \textsuperscript{188} \textit{Forsythe}, 864 N.E.2d at 233–34 (citing United States v. \textit{Bestfoods}, 524 U.S. 51, 64–65 (1998)) (looking to the Douglas and Shanks article, \textit{supra} note 6, for the proposition that courts have viewed vicarious, or derivative liability, cases differently than those where the parent corporation's actions directly caused the harm).
    \item \textsuperscript{189} Id. at 241.
    \item \textsuperscript{190} See Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001) ("Unlike the responsible corporate office doctrine, or specific statutory liability, veil piercing is not dependent on the nature of the liability. In contrast . . . liability here is essentially based on his individual participation in the violations."); Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1038 (7th Cir. 2000) ("But a contention that \textit{A} is \textit{B}'s 'alter ego' asserts that \textit{A} and \textit{B} are \textit{the same entity}; liability then is not vicarious but direct."); Douglas & Shanks, \textit{supra} note 6, at 208.
\end{itemize}
sion outlines only a minor exception to limited liability. The con-
currence's effort to assuage fears that the court was broadening
corporate liability begs the question of why the Forsythe court did not
force the plaintiffs to pierce the corporate veil instead of allowing
them to move forward on a theory of direct participant liability.

The simple answer is that many courts, including the U.S. Supreme
Court, have recognized direct participant liability, and the Illinois
court in Forsythe saw no reason to prevent the plaintiffs from pursuing
its claim under a generally accepted theory. But consistency and
efficiency in judicial decision making counsel toward taking a second
look at the Illinois rule for direct participant liability. A potential for
overlap exists between direct participant liability and piercing the cor-
porate veil. Despite the similarities between the doctrines, the Illi-
nois Supreme Court failed to construct its direct participant liability
rule carefully enough to avoid confusion, as shown in the concurring
justices' attempt to fortify the majority opinion. Admittedly, in
suits involving parent corporations, as opposed to those involving a
corporate officer, the direct-vicarious distinction is not always criti-
cal. But, as in Forsythe, where the distinction is important because
the plaintiff's claim rests on budgetary control, a parent corporation
has no protection under Illinois law if a plaintiff simply argues a direct
participant theory of liability.

3. Addressing the Confusion: Recognizing That Parent
Corporations Are Different

It makes little sense for the Illinois Supreme Court to recognize two
separate theories of liability that accomplish the same end. Unfair-
ness to corporate defendants is a common argument against direct

191. See Forsythe, 864 N.E.2d at 244–45 (Freeman, J., concurring).
192. See id. at 233 (majority opinion) (“Defendant contends that unless the standards for
piercing the corporate veil are met, a parent company cannot be held liable for the negligence of
its subsidiary.”).
193. See supra notes 41–48 and accompanying text.
194. See Gevirtz, supra note 153, at 870–71.
195. Forsythe, 864 N.E.2d at 244 (Freeman, J., concurring) (“I underscore that our opinion
today does not alter the bedrock principle of limited liability for corporate shareholders, and
that direct participant liability is a very narrow exception to this general principle.”).
196. See Gevirtz, supra note 153, at 871; Thompson, supra note 39, at 385 (tracking direct
liability cases as part of a statistical study on veil piercing and noting that direct participant
liability occurred “in less than five percent of the cases studied”).
197. See generally Forsythe, 864 N.E.2d 227.
198. Compare Thompson, supra note 39, at 395–96 (arguing that in veil piercing cases, courts
should put “greater attention on the second part of the test which concerns the wrong committed
by the corporation”), with Prosser and Keeton, supra note 185, §1, at 6 (stating that the goal
of tort law is to assess liability for unjustifiable actions).
participant liability. But a parent corporation that adheres to the corporate formalities that allow it to avoid veil piercing liability should also avoid direct participant liability. Justice Douglas and Shanks provide a stronger argument against Illinois's concept of direct participant liability: abundant confusion exists in the area of corporate liability, making it difficult to predict the outcome of any particular case. To resolve this issue, some commentators have argued that courts should make veil piercing easier for plaintiffs where parent and subsidiary corporations share the blame in creating the conditions that led to a tort claim. This approach makes sense when viewed in the context of the origin of veil piercing law. The corporate veil is meant to encourage investment by making it difficult to hold individuals personally liable for the liabilities of the organization. Parent corporations receive protection under veil piercing law as a byproduct of their status as shareholders. But parent corporations are not the same as individual shareholders, and treating them as individual shareholders is a controversial fiction of corporate law.

Judicial recognition of the difference between parent corporations and individual shareholders would allow courts to accurately assess liability. Often the facts show that because of budgetary control, dual

201. See Thompson, supra note 39, at 384 n.31 ("[A] parent-subsidiary relationship will be more closely scrutinized and may be more readily susceptible to veil-piercing than corporations with individual shareholders." (citing Cathy S. Krendl & James R. Krendl, Piercing the Corporate Veil: Focusing the Inquiry, 55 DENV. L.J. 1, 43 (1978))).
203. Id. Professor Presser goes further, arguing that limited liability was a motivational force behind shaping American democracy and urbanization. Id. at 156 (citing RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855, at 70 (1982)).
204. See supra note 38 and accompanying text.
205. Judge Easterbrook and Professor Fischel argue that treating parent corporations differently than individuals when it comes to tort claims is economically and socially logical: Courts' greater willingness to allow creditors to reach the assets of corporate as opposed to personal shareholders is . . . consistent with economic principles. Allowing creditors to reach the assets of parent corporations does not create unlimited liability for any investor. . . . Moreover, the moral-hazard problem is probably greater in parent-subsidiary situations because subsidiaries have less incentive to insure. . . . If limited liability is absolute, a parent can form a subsidiary with minimal capitalization for the purpose of engaging in risky activities . . . This asymmetry between the benefits and costs, if limited liability were absolute, would create incentives to engage in a socially excessive amount of risky activities.

EASTERBROOK & FISCHEL, supra note 37, at 56–57; Jonathan M. Landers, A Unified Approach To Parent, Subsidiary, and Affiliate Questions in Bankruptcy, 42 U. CHI. L. REV. 589, 596–97 (1975) (stating that creditors that deal with multiple corporations face greater exposure because there exists a lesser emphasis on capitalization, a greater danger for the commingling of assets, and a greater potential for a subsidiary to fail to develop individual profit-making capabilities).
officers, directives to subsidiaries, or any other means of control, a parent company bears some responsibility for the torts of its subsidiary. Instead of validating the plaintiffs' direct participant liability theory, the Illinois Supreme Court should have considered the defendant's status as a parent corporation and conducted a veil piercing analysis to decide Forsythe. As a result, lower courts would focus less on the tenuous difference between direct and vicarious forms of liability that resulted from Forsythe. Instead, they would focus on whether the parent corporation's actions, which often include exercising considerable control over the subsidiary, were such that allowing it to escape liability would "promote inequitable consequences." This approach balances the interests of protecting individual shareholders and assigning liability to the parties that bear responsibility for the harm. Simultaneously, it prevents further confusion and avoids further crowding the lexicon of corporate liability law.

V. IMPACT

At a minimum, the court should have addressed the impact that its decision would have on corporate liability in Illinois and expanded its discussion of the relationship between veil piercing and direct participant liability. This Part addresses the impact of the court's failure to consider Forsythe's place in the broader scheme of corporate liability. Section A examines the meaning of the court's direct participant liability rule in application and the effect that the Forsythe decision will have on both defendants and plaintiffs in future cases. Section B discusses the potential for the decision to further confuse corporate liability law.

208. See Easterbrook & Fischel, supra note 37, at 56-57; Robert B. Thompson, Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise, 47 VAND. L. REV. 1, 40 (1994) ("Even if piercing would be harsh to a passive parent corporation that did not participate in the wrongful action, it would seem to be outweighed by the harshness to those injured.").
209. Commentators have recognized this problem:

[M]any writers have criticized the courts' tendency in this area to reason by pejorative. For example, courts often explain their decision to pierce by announcing that the corporation was a mere "sham" or "shell," or the defendant's "alter ego" or "instrumentality." At best, such terms are unhelpful. All too often, they confuse the issue.

Gevurtz, supra note 153, at 855.
210. See Forsythe, 864 N.E.2d at 241.
211. See infra notes 214-232 and accompanying text.
212. See infra notes 214-224 and accompanying text.
213. See infra notes 225-232 and accompanying text.
A. Impact of the Forsythe Rule

The Illinois Supreme Court held that direct participant liability arises when a parent company directed a budgetary strategy, the strategy was carried out under the parent company’s direction, and such direction surpassed the normal control that a parent company is entitled to exert over a subsidiary.\(^{214}\) Although the rule includes budgetary strategy, the court pointedly stated that budgetary mismanagement alone was not sufficient to hold a parent corporation liable for negligence under a direct participant theory.\(^{215}\) Accordingly, parent companies that exercise acceptable control over their subsidiaries should be able to avoid liability for the actions of their subsidiaries.\(^{216}\) In practice, however, courts applying Forsythe will have to confront the contradiction between the prohibition against basing a direct participant liability claim solely on budgetary control and the court’s decision to allow the plaintiffs to proceed when budgetary control was the basis for their claim.\(^{217}\)

In one of the first decisions to apply Forsythe, Sargent v. Cassens Corp., a federal district court focused on an additional aspect of the Forsythe rule in rejecting the plaintiffs’ direct participant liability theory.\(^{218}\) In Sargent, the court held that the plaintiffs had no claim under Forsythe because the parent corporation’s actions were not contrary to the interests of the subsidiary.\(^{219}\) The court distinguished Forsythe by focusing on the harm Clark USA caused to its subsidiary in creating conditions that led to the deadly fire.\(^{220}\) In contrast, the parent corporation in Sargent did not act to the detriment of its subsidiary and actually attempted to reduce on-the-job injuries.\(^{221}\)

\(^{214}\) Forsythe, 864 N.E.2d at 237.
\(^{215}\) Id.
\(^{216}\) Id. at 242 ("Budgetary oversight alone is insufficient, as is a parent company’s commission of acts consistent with its investor status.").
\(^{217}\) See supra notes 146-149 and accompanying text. The court emphasized that it was operating under a summary judgment standard of review, Forsythe, 864 N.E.2d at 232, but that logic fails to justify denying summary judgment when a claim is based on budgetary mismanagement after factoring in the costs of taking litigation past the point of summary judgment.
\(^{219}\) Id. at *7.
\(^{220}\) Id.
\(^{221}\) The Sargent court held that the plaintiff had clearly not met a required element of Forsythe:

Unlike Forsythe, Plaintiffs here acknowledge that the Loss Control Program was “aimed at reducing personal injuries resulting from on-the-job accidents” and fail to show how the Program was advantageous to Cassens Corporation and contrary to the interests of Cassens Transport. Thus, Plaintiffs fail to meet a necessary element of direct-participant liability.

Id.
icates that in addition to the stated requirement that plaintiffs allege more than budgetary mismanagement, *Forsythe* contains an additional barrier for plaintiffs\(^2\): plaintiffs alleging direct participant liability must prove that the parent corporation not only directly caused the accident but also harmed the subsidiary with its negligent actions.\(^2\) *Forsythe* was ostensibly a victory for tort plaintiffs seeking to recover from parent corporations in addition to the subsidiary's payments under the Workers' Compensation Act (or as a substitution for these payments in the case of an insolvent subsidiary); however, *Sargent* shows that in practice it will be difficult to prevail on a direct participant liability claim.\(^2\)

### B. Compounded Confusion for Corporate Liability

A second impact of the *Forsythe* decision is that it adds another wrinkle to corporate liability in Illinois.\(^2\) Part IV detailed some of the inconsistencies prevalent in the law of corporate liability.\(^2\) Parent corporations involved in tort litigation are the parties most likely to confront the effects of this type of confusion.\(^2\) Uncertainty makes it difficult for corporations to accurately assess their liability exposure, thus possibly deterring investment.\(^2\) Because the invention of limited corporate liability was motivated by a desire to protect shareholders and encourage investment, increased uncertainty in corporate liability law will likely discourage parent corporations from investing

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223. It is plausible that by directly causing an injury to an employee of the subsidiary, the parent company harmed the subsidiary corporation, especially considering the automatic compensation under the Illinois Workers' Compensation Act, thus establishing the element that was missing in *Sargent*.

224. The *Forsythe* court made clear that the plaintiff had not won the case by prevailing on the summary judgment motion:

> Drawing no ultimate conclusions on the merits of plaintiffs' case and mindful that summary judgment is an extraordinary remedy, summary judgment was inappropriate in this matter. We recognize the direct participant theory of liability. We note, however, that this theory of liability gives rise to a duty only in limited circumstances. *Forsythe*, 864 N.E.2d at 242; *see also* Helen Gunnarsson, *Parent Companies More Vulnerable to Suit for Subsidiaries' Torts*, 95 ILL. B.J. 172, 171 (2007) (noting that the court's "cautionary language" regarding a parent corporation's budgetary oversight presents an obstacle to the *Forsythe* plaintiffs' ability to prevail on the merits).


226. *See supra* notes 173-209 and accompanying text.

227. *See Forsythe*, 864 N.E.2d at 244-45 (Freeman, J., concurring) (dismissing Clark USA's argument that the court's decision will cause a rush of litigation against parent corporations).

228. *EASTERBROOK & FISCHEL*, supra note 37, at 43-44 (arguing that unlimited liability would prevent investment in risky ventures that have a positive net value, depriving society of the benefits of a positive investment).
in businesses with greater risk potential. Indeed, Clark USA's attorneys argued that a ruling in the plaintiff's favor would curtail business investment in Illinois. The concurrence addressed the effect of Forsythe on business, but was satisfied that the court's decision would not harm investment in Illinois.

At the least, it appears that Forsythe poses obstacles for both plaintiffs and defendants. While Sargent illustrates that the Forsythe rule is not necessarily more helpful to plaintiffs than the doctrine of piercing the corporate veil, parent corporations face uncertainty when attempting to limit tort liability because Forsythe blurred the distinction between direct participant liability and piercing the corporate veil. Consequently, Forsythe will ultimately disappoint both plaintiffs and defendants who dispute the proper scope of liability for parent corporations.

VI. CONCLUSION

Despite the preceding criticisms, the Forsythe decision does not represent a momentous change in corporate liability. The Illinois Supreme Court certified an idea that federal courts and other states had already accepted. What Forsythe lacked, however, was a more thoughtful approach that could have improved corporate law in Illinois. First, the court should have followed the decisions of the Waste Management and Coastal Corp. courts and rejected the plaintiffs' argument that Clark USA's budgetary control over Clark Refining provided a sufficient basis for parent corporation liability. Granting summary judgment in Clark USA's favor based on the insufficiency of budgetary mismanagement allegations would have provided clear guidance to parent corporations in their interactions with their subsidiaries and established a clear precedent for lower courts. Second, the court failed to create a meaningful difference between veil piercing and direct participant liability, exacerbating confusion in corporate liability. The court could have avoided this problem by requiring the plaintiffs to pierce the corporate veil to recover from Clark USA and ruling that parent corporations should be more vulnerable than indi-

229. See Presser, supra note 34, at 156.
231. Forsythe, 864 N.E.2d at 244-45 (Freeman, J., concurring).
233. See supra notes 41-48 and accompanying text.
235. See Gevurtz, supra note 153, at 853.
individual shareholders in a veil piercing analysis. In doing so, the court would have struck the correct balance between corporate protection and fairness to tort plaintiffs. At present, it is unclear whether Forsythe will change the way parent corporations do business in Illinois. Regardless of the eventual impact of Forsythe, the Illinois Supreme Court missed an opportunity to clarify and modernize corporate law in Illinois.

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