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Environmental Law - Owners or Operators: Two Distinct Paths to Parent Corporation Liability under CERCLA - United States v. Bestfoods

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ENVIRONMENTAL LAW—Owners or Operators: Two Distinct Paths to Parent Corporation Liability Under CERCLA—*United States v. Bestfoods*

I. INTRODUCTION

In the wake of public fear and outrage resulting from widely reported environmental disasters at places such as Love Canal and the Valley of the Drums,[1] Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[2] Two fundamental goals of Congress are evident throughout the statute. The first is to provide for the cleanup of hazardous substances that have been, or threaten to be, released into the environment.[3] The second is to hold responsible parties liable for the cost of the cleanup.[4] As one court has commented, "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions."[5]

To achieve this end, Congress cast a wide net to expropriate those parties who might be responsible for the release of a hazardous substance. However, in its alacrity to address the great threat to public health and welfare posed by hazardous waste disposal, Congress did not specifically state whether parent corporations of responsible parties should be brought within the purview of CERCLA.[6] Prompted by this statutory silence, much debate and litigation has arisen over the requirements necessary to hold a parent corporation liable for the acts of its subsidiary under CERCLA's "owner or operator" provision.[7] Adding to this debate has been increased public sensitivity to environmental issues, large remediation costs, and an inability by responsible parties to pay, resulting in increased pressures on environmental agencies and courts to extend liability to so-called "deep pockets".[8] Parent corporations are often the targets of liability based on their ability to pay, no

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1. *See* H.R. REP. NO. 96-1016, pt. 1, at 18-19 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6121-23. The Report describes Valley of The Drums, "[a]t the Valley of the Drums [in Kentucky], thousands of barrels were stacked illegally in the hauler's backyard . . . in a seriously deteriorating state . . . [S]ome have already burst and spilled their contents on the ground." *Id.*

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980), *amended by* Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1615 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1994 & Supp. II 1996)). CERCLA is often referred to as "Superfund" after the hazardous substance response cost fund that the Environmental Protection Agency (EPA) uses to fund the cleanup of dangerous sites. *See* 26 U.S.C. § 9507 (1994 & Supp. II 1996) (creating the "Hazardous Substance Superfund"); 42 U.S.C. § 9611(a) (raising revenue for Superfund by taxing the petroleum and chemical industries).

3. *See* H.R. REP. NO. 99-253, pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038 (discussing CERCLA's purpose during reauthorization amendment).

4. *See id.*

5. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

6. *See* Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 987 (1986); *see also* Lucia Ann Silecchia, *Pinning the Blame and Piercing the Veil in the Mists of Metaphor: Supreme Court's New Standards For the CERCLA Liability of Parent Companies and A Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115, 126 (1998) (footnote omitted).

7. *See infra* Part II.D.

8. *See* Mark F. Rosenberg, *Parent, Successor, and Alter Ego Liability Concerns in the Transactional Setting*, 25 SUMMER BRIEF (A.B.A.) 29 (1996).

matter how remote the connection to the contaminated site.[9] Against the backdrop of the above concerns and guided by the "bedrock" rule of limited corporate liability, courts and commentators have reached a wide variety of conclusions on this significant issue.[10]

It was in this environment that the Supreme Court addressed the application of CERCLA's "owner or operator" provision to parent corporations. In *United States v. Bestfoods*[11] the Court considered whether, under CERCLA, a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary.[12] The Court found that liability may not attach in these circumstances unless the corporate veil can be pierced.[13] The Court further held that a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility.[14]

Part II of this note discusses CERCLA liability in general, as well as the three theories used by the courts to hold parent corporations liable for the environmental wrongs of their subsidiaries. Part II also includes a brief discussion of the principles of limited corporate liability, which is an important background to the CERCLA "owner or operator" liability issue. Part III examines the district court's decision that forged a new, middle ground of CERCLA liability,[15] and the subsequent reversal of that decision by the Sixth Circuit Court of Appeals, which adopted a narrow, veil-piercing standard.[16] Part IV examines the Supreme Court's reasons for finding the district court's holding too broad and the appellate court's too narrow, and concludes that the Supreme Court significantly clarified CERCLA's "owner or operator" provision. Part V analyzes *Bestfoods* and determines that the decision maintains respect for traditional notions of corporate liability while at the same time furthering the goals of CERCLA. This section also contains an analysis of three related issues that will undoubtedly be the subject of litigation following the decision, specifically: (1) the Court's failure to announce a veil-piercing standard; (2) the lack of guidance the decision offers to corporations and government enforcers in determining an acceptable level of parent corporation involvement; and

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9. *See id.* at 29 (reasoning that CERCLA looks to the past for liable parties and often subsidiaries are no longer in business or lack assets thus making parent corporations primary targets); *see also* Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 422-23 (1990) (explaining that parent corporations are often targeted for liability because the assets of responsible corporations are often inadequate to pay for the cleanup and that many such corporations have sought bankruptcy); Susan D. Sawtelle, U.S. v. Bestfoods: *Supreme Court To Issue First Ruling on Corporate Superfund Liability*, METRO. CORP. COUNS. 60, col. 1, n.6 (discussing a case recently filed by the government seeking cleanup costs and punitive damages from a corporation that never owned, operated, or even leased the contaminated site). The CERCLA liability claim is based on "insubstantial" favors that the unrelated corporate defendant performed. *See id.*

10. *See infra* Part II.D.

11. 524 U.S. 51 (1998). As noted by the Court, CPC Int'l, Inc. has recently changed its name to Bestfoods. *See id.* at 56 n.3. Accordingly, CPC is used throughout the Court's opinion and this casenote.

12. *See id.* at 55.

13. *See id.*

14. *See id.*

15. *See* CPC International, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 573 (W.D. Mich. 1991).

16. *See* United States v. Cordova Chem. Co. of Mich., 113 F.3d 572 (6th Cir. 1997).

(3) the effect the decision may have on the relationship between parent corporations and their subsidiaries. Finally, Part VI appeals to legislative action as the only means to further clarify owner or operator liability under CERCLA.

II. BACKGROUND

A. *The Hazardous Waste Problem*

The reality of the hazardous waste problem is seeping into the everyday lives' of Americans. As of August 1998, officials of the EPA and other federal agencies reported there were more than 1200 sites on the National Priorities List[17] requiring cleanup under Superfund.[18] Astonishingly, more than 3000 sites await determination of status for the purpose of a National Priorities listing.[19] Of these potentially eligible sites, ninety-six percent are located within a half mile of places of regular employment or residences, the majority presenting a possibility of direct contact with contaminants.[20] Roughly seventy-three percent of the eligible sites have contaminated groundwater, and another twenty-two percent could contaminate groundwater in the future.[21] EPA has estimated that cleanup will cost over $500 billion.[22] Yet, the problem is not abating. In 1980, the year CERCLA was enacted, the EPA estimated that the United States produced 57,000,000 metric tons of waste a year, a figure equal to about 600 pounds per citizen.[23] Moreover, the EPA predicted that this amount would grow at an annual rate of three and one-half percent.[24] Congress sought to tackle this expensive, pressing and growing problem by seeking to ensure that parties responsible for hazardous waste contamination bear the costs of its cleanup.[25] Hence, Congress passed CERCLA.

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17. *See* THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW 798 (3d ed. 1996). The authors explain that EPA maintains a database known as CERCLIS (the Comprehensive Environmental Response Compensation and Liability Information System) listing all known polluted sites and cleanup activities. This database contains over 40,000 sites. In order to be listed on CERCLIS, a preliminary assessment is done and the site is scored according to the severity of the contamination on the Hazardous Ranking System (HRS). If the site scores over a certain level, it can be placed on the National Priorities List (NPL). An NPL listing enables EPA to take remedial action at the site. *See id.*

18. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE-UNADDRESSED RISKS AT MANY POTENTIAL SUPERFUND SITES 2 (Nov. 1998) [hereinafter GAO].

19. *See id.* at 4.

20. *See id.* at 5.

21. *See id.* at 4.

22. *See* Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RESOURCES & ENVTL. L. 77, 84 (1998) (footnote omitted); Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U. L.Q. 223, 229 n.23 (1994) (citing to various authorities for financial estimates).

23. *See* Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 585 (1993).

24. *See id.*

25. *See supra* note 3 and accompanying text; GAO, *supra* note 18 at 27 (stating that government officials are uncertain whether potentially eligible sites will be cleaned up and to what extent responsible parties will participate).

B. *CERCLA's Contribution to Solving the Hazardous Waste Problem*

Unlike its statutory predecessors and contemporaries,[26] CERCLA is remedial rather than regulatory.[27] CERCLA looks backward to redress environmental problems caused by hazardous waste produced and abandoned in the past, rather than looking to prevent future problems.[28] CERCLA was designed to complete a broad statutory program of environmental protection.[29] Accordingly, CERCLA has been described as the missing link[30] in a "cradle-to-grave regulatory scheme"[31] for hazardous wastes.

As the missing link statute, courts interpret CERCLA liberally to effectuate its goals.[32] Imposition of liability under CERCLA requires: (1) the contaminated property or site is a "facility";[33] (2) a release or threatened release of a hazardous substance from the facility has occurred;[34] (3) response costs have been incurred as a result of the release or threatened release;[35] and (4) the party to be held liable falls within one of the four classes of potentially responsible parties (PRPs) identified in Section 107 of CERCLA.[36] Each of the requirements is interpreted broadly under the Act in order to effectuate CERCLA's goals.[37]

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26. See for example, The Federal Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. II 1996); The Solid Waste Disposal Act, 42 U.S.C. §§ 6901-92 (1994 & Supp. II 1996); and The Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994 & Supp. II 1996).

27. *See* H.R. REP. NO. 96-1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6126 (discussing deficiencies of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994 & Supp. II 1996) and the intent to establish a mechanism to address problems associated with abandoned and inactive hazardous waste disposal sites). *But see* Silecchia, *supra* note 6 at n.7 (noting that CERCLA also performs regulatory functions).

28. *See, e.g.*, United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985) (stating that CERCLA is "by its very nature backward looking. Many of the human acts that have caused the pollution already had taken place.").

29. *See* H.R. REP. NO. 96-1016 at 22 (stating that "[a] major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the 'inactive hazardous waste site problem.'").

30. *See* Erika Clarke Birg, Comment, *Redefining "Owner or Operator" Under CERCLA to Preserve Traditional Notions of Corporate Law*, 43 EMORY L. J. 771, 772 (1994) (footnote omitted).

31. *Id.* at 772.

32. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992) (stating that CERCLA is liberally construed to effectuate its goals); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1371, 1380 (8th Cir. 1989) (explaining that CERCLA's liability scheme allows liberal judicial interpretation); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted . . . to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.").

33. 42 U.S.C § 9601(9) (1994 & Supp. II 1996) defines facility as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

34. *See* 42 U.S.C. § 9607(a)(4) (1994 & Supp. II 1996).

35. *See id.*

36. *See id.*

37. *See* Oswald, *supra* note 22, at 230-31; *see also* Amy C. Stovall, Note, *Limiting Operator Liability for Parent Corporations Under CERCLA:* United States v. Cordova Chemical Co., 43 VILL. L. REV. 219, 229-30 & n.31 (1998) (listing judicial decisions broadly interpreting CERCLA in order to effectuate its goals).

The courts' broad interpretation of CERCLA is evidenced by judicially inferred standards of liability despite the statute's silence on these issues.[38] CERCLA's standard of liability has been construed as strict liability.[39] Similarly, liability is joint and several for indivisible harm although no express statement exists in the statute.[40] Finally, liability is retroactive.[41] Courts have often justified this widened net of CERCLA liability by raising CERCLA's broad remedial goal.[42]

The defenses available also evince the sweeping liability imposed by CERCLA.[43] An otherwise liable party will not be held responsible when the release of hazardous substances was caused by an act of God, an act of war, or a third party with no relationship to the defendant if the defendant can show that adequate precautions and reasonable care were exercised to avoid the release.[44] Predictably, courts have interpreted these defenses narrowly.[45]

CERCLA's net of liability was cast in Section 107(a) towards four classes of parties potentially responsible[46] for environmental remediation costs:

> (1) the owner and operator of a vessel or facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract,

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38. *See id.* at 224 ("Liability under CERCLA is Draconian and deliberately so."); *see also* Silecchia, *supra* note 6, at 128 (declaring that liability under CERCLA has been interpreted as "joint, several, strict, and retroactive") (footnotes omitted); *infra* notes 39-41 and accompanying text.

39. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise.").

40. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) ("[w]here the environmental harm is indivisible liability is joint and several."); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) (recognizing that CERCLA does not mandate joint and several liability, but does permit it).

41. *See* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732-33 (8th Cir. 1986) (stating that while CERCLA does not expressly provide for retroactive liability, retroactive liability was the intent of Congress).

42. *See* cases cited *supra* note 32.

43. *See, e.g.*, Stovall, *supra* note 37, at n.37-38 (discussing generally CERCLA's defenses). Additionally, Congress added an "innocent purchaser" defense in the 1986 amendments. *See* 42 U.S.C. § 9601(35)(A)(i) (1994 & Supp. II 1996).

44. *See* 42 U.S.C. § 9607 (b)(1)-(4) (1994 & Supp. II 1996).

45. *See* United States v. Shell Oil Co., 841 F. Supp. 962, 970 (C.D. Cal. 1993) ("With CERCLA's basic remedial purposes in mind, the Court narrowly construes the defenses provided under section 107(b).").

46. Responsible parties must bear the following costs:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.
>
> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

42 U.S.C. § 9607(a)(4).

> agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . , and (4) any person who accepts or accepted any hazardous substances for transport . . . .[47]

Within the four categories, CERCLA further defines "person" to include an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."[48] The term "owner or operator", however, is defined circularly to include any person owning or operating a facility.[49] In short, there is nothing in the statutory language addressing parent corporation liability for the acts of its subsidiaries.[50] Neither is the legislative history helpful, as the Act has "virtually no legislative history at all."[51] Complicating the problem is Congress' unwillingness to clarify the issue.[52] Thus, it is with little congressional guidance that courts have determined the nature and extent of parent corporation liability under CERCLA.

C. *A Brief Discussion of the Principles of Limited Corporate Liability*

It is against the backdrop of CERCLA, labeled the "most radical environmental statute in American history,"[53] that traditional principles of limited liability for parent corporations have been applied.[54]

Traditionally, corporate shareholders are only investors in the corporation in which they own stock.[55] Shareholders are not typically liable for the acts and

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47. 42 U.S.C. § 9607 (a)(1)-(4).

48. 42 U.S.C. § 9601(21).

49. *See* 42 U.S.C. § 9601(20)(A): The term "owner or operator" is defined as:

> (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

50. *See* Silecchia, *supra* note 6, at 126 n.59 (listing commentators who have concluded that CERCLA is silent as to the liability of parent corporations).

51. Mark E. McKane, Comment, *Operator Liability for Parent Corporations Under CERCLA: A Return to Basics*, 91 NW. U. L. REV. 1642, 1652 (1997) (citing Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1,1 (1982)).

52. *See* Silecchia, *supra* note 6, at 174-175 & n.310-11 (discussing Congressional optimism on Superfund reform, but inability to accomplish such reform because of conflicts over issue of the liability).

53. *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465 (1986) (footnote omitted).

54. The principles of corporate limited liability are beyond the scope of this casenote. Therefore, the issue is only addressed to briefly illustrate the competing interest these principles create if CERCLA is interpreted to hold a parent corporation liable. For a detailed discussion of these principles, see PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 4.02 (1987 & Supp. 1997).

55. *See, e.g.*, United States v. Jon-T Chems., Inc. 768 F.2d 686, 690 (5th Cir. 1985). Discussing the issue of limited liability, the court found:

> Under the doctrine of limited liability, the owner of a corporation is not liable for the

obligations of the corporation beyond the extent of investment in the entity.[56] Corporate shareholders are generally viewed as entities separate from the corporation in which they own stock.[57] Consequently, shareholders are normally protected from a corporation's liabilities by the corporate veil.[58] This type of limited liability exists for both individual and corporate shareholders, including parent corporations.[59]

However, there exists an important exception to the protection of limited liability afforded a parent corporation known as corporate veil-piercing.[60] Piercing the corporate veil refers to the process of disregarding the corporate entity in order to hold corporate shareholders, directors, or parent corporations liable for the acts of the corporation or subsidiary.[61] As the Court in *United States v. Milwaukee Refrigerator Transit Co.*[62] stated:

> [A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.[63]

Veil-piercing is a deeply embedded doctrine that goes by several names.[64] No matter the name, veil-piercing is consistently criticized as a "rather vague notion".[65]

In deciding whether to pierce the veil, courts look to the degree of control a parent corporation has exercised over the subsidiary and the extent to which a parent has respected corporate formalities.[66] Factors relevant to veil-piercing

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> corporation's debts. Creditors of the corporation have recourse only against the corporation itself, not against its parent company or shareholders. It is on this assumption that "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."

Id. (citations omitted).

56. *See, e.g.*, 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 33, at 522 (perm. ed. rev. vol. 1999) (stating that liabilities of a corporation are not the same as the liabilities of shareholders).

57. *See id.* § 14, at 432.

58. *See id.* at 431-432 (stating that it is generally accepted that the corporate entity is distinct from its shareholders).

59. *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 148, at 355 (3d ed. 1983).

60. For a full discussion of the doctrine of corporate veil-piercing, see PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: STATUTORY LAW-GENERAL, § 2.02 (1989).

61. *See id.*

62. 142 F. 247 (C.C.E.D. Wis. 1905).

63. *See id.* at 255.

64. *See* BLUMBERG, *supra* note 60, § 2.02.2 (stating that piercing the veil has three variants: instrumentality doctrine, alter ego doctrine, and identity doctrine, and that despite different descriptions the doctrines are often treated as the same).

65. *See* Richard S. Farmer, Note, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769, 773 (1994) ("This rather vague notion of imposing liability on shareholders when the shareholders have manipulated the corporate form has evolved into a doctrine that cannot be cohesively articulated.") (footnote omitted); *see also* Birg, *supra* note 30, at 782 ("While courts employ different terms and often confusing jargon when discussing piercing the corporate veil, the result is often the same—courts ignore the corporate form.") (footnote omitted); Oswald, *supra* note 22, at 246 ("[P]iercing doctrine is by no means precise or predictable. As a common-law doctrine based in notions of equity, piercing doctrine has been criticized as 'defying any attempt at rational explanation' and has been described as being 'rare, severe, and unprincipled.'") (footnote omitted); Rosenberg, *supra* note 8, at 30 (stating that veil-piercing decisions are often rationalizations of results reached for other reasons) (footnote omitted).

66. *See* BLUMBERG, *supra* note 60, § 2.02.

analysis include failure to adhere to corporate formalities, day-to-day control of the subsidiary, inadequate capitalization of the subsidiary, a commingling of assets, and use of the subsidiary for fraudulent or unjust purposes.[67] Piercing is considered an equitable and extraordinary form of relief[68]—a relief courts are hesitant to embrace in the absence of exceptional and unusual circumstances.[69]

D. Past Judicial Interpretations of CERCLA's Owner or Operator Provision

Against the bedrock principle of limited corporate liability[70] and with little guidance from Congress, courts have been left to "breath[e] life" into CERCLA.[71] Federal courts have not been consistent when interpreting CERCLA's owner or operator provision. Prior to the *Bestfoods* decision, judges grappled with this issue, the result being three[72] different theories of parent corporation liability, each theory varying in the ease under which liability was found.[73]

Different reasons have been offered to explain the courts' struggle with CERCLA's owner or operator provision in the context of the parent corporation. One commentator has suggested that courts struggled with the provision because of a failure to understand and confront the key distinction under the Act—the difference between "owner" and "operator" liability.[74] Another commentator has attributed the struggle, at least in part, to the competing principles and purposes found in CERCLA on one hand, and principles of corporate limited liability on the other.[75] Whatever the difficulty, the circuits' three tests for parent corporation liability involved more than mere "semantic ado about nothing"[76]—the inconsistency among the tests resulted in a substantial difference in the scope of parent corporation liability.[77]

Each of the three theories is briefly examined and illustrated by way of a representative case below. Although previous liability theories are not the focus of this note,[78] a background discussion of these theories is useful in understanding the choices the Supreme Court confronted when it decided *Bestfoods*.

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67. *See, e.g.*, Rosenberg, *supra* note 8, at 29 (stating that variety exists among veil-piercing factors and that no single factor is determinative).

68. *See* Oswald, *supra* note 22, at 244 (footnote omitted).

69. *See* BLUMBERG, *supra* note 60, § 2.02.2.

70. *See* United States v. Bestfoods, 524 U.S. 51, 62 (1998).

71. *See* McKane, *supra* note 51, at 1653.

72. Although not widely endorsed, at least one court has recognized that a common law theory of agency may be employed to find parent corporation liability under CERCLA. *See* FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285, 1292-93 (D. Minn. 1987).

73. For a discussion of the various theories, see *infra*, notes 79-127 and accompanying text.

74. *See* Oswald, *supra* note 22, at 235.

75. *See* McKane, *supra* note 51, at 1653.

76. *See* Silecchia, *supra* note 6, at 120.

77. *See infra* notes 79-127 and accompanying text.

78. For an extensive list of past efforts reviewing the different liability theories under CERCLA before *Bestfoods*, see Silecchia, *supra* note 6, at n.42.

1. Capacity to Control Test

The capacity to control test has been justified on the grounds that CERCLA's remedial purpose and sweeping scheme of liability require a broad test.[79] This standard, described as "the most frightening prospect for parent corporations,"[80] attaches liability to a parent corporation when the parent had the authority or capacity to control the actions of the subsidiary, notwithstanding actual exercise of this authority.[81]

One of the earliest cases to address operator liability in the parent corporation context was *Idaho v. Bunker Hill Corporation*.[82] There, the state of Idaho sought to recover response costs for the cleanup of mining wastes from both the company that operated the mine, Bunker Hill, and its parent company, Gulf Resources and Chemical Company.[83] The court found Gulf liable as an operator although its subsidiary, Bunker Hill, owned and operated the facility.[84] Guided by Congress's intention that those who benefited from the hazardous waste disposal must also bear the cost, the court defined the contours of the capacity to control standard:

> Gulf was in a position to be, and was, intimately familiar with hazardous waste disposal and releases at the . . . facility [and] had the capacity to control such disposal and releases . . . if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and releases of hazardous wastes at the facility.[85]

The *Bunker* decision has been criticized for its failure to distinguish between operator and owner liability,[86] but also heralded for establishing that it is the parent's relationship to the facility, rather than the relationship to the subsidiary, that should be the guiding factor in determining parental liability.[87] Nonetheless, the failure of later courts to follow this "subtle signal,"[88] and the *Bunker* court's adoption of the broad "capacity to control" test rather than the narrower "actual control" test contributed to the pre-*Bestfoods* mire of parent corporation liability.[89]

While the capacity to control theory was not widely adopted,[90] its well taken criticism is found in a fundamental implication: every parent corporation could be

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79. *See, e.g.*, McKane, *supra* note 51, at 1654 ("The 'capacity to control' standard is a prime example of the federal courts' willingness to look beyond CERCLA's specific language and impose liability on parent corporations in the belief that a parent can handle this liability better than involuntary creditors.").

80. Silecchia, *supra* note 6, at 148 (footnote omitted).

81. *See infra* note 85 and accompanying quote.

82. 635 F. Supp. 665 (D. Idaho 1986).

83. *See id.* at 669.

84. *See id.* at 671-72. The *Bunker Hill* court relied, in part, upon the reasoning of *United States v. Northeastern Pharmaceutical & Chemical Co. Inc.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986) [hereinafter NEPACCO]. Although the NEPACCO court considered individual shareholder liability, not parent corporation liability, the *Bunker Hill* court found the reasoning instructive to determine when a parent corporation becomes an owner or operator of a subsidiary's facility.

85. *Bunker Hill*, 635 F. Supp. at 672.

86. *See* Silecchia, *supra* note 6, at 149 (footnote omitted).

87. *See* Oswald, *supra* note 22, at 261 (footnote omitted).

88. *Id.*

89. *See id.* at 262.

90. *See* Nurad Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992) (adopting the capacity to control test in the lessor-lessee context); Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992) (adopting the capacity to control standard with little discussion).

liable for a CERCLA violation by a subsidiary.[91] Holding parent corporations liable for the acts of subsidiaries based upon mere capacity to control would "radically rewrite corporate law doctrines on parent-subsidiary relationships."[92] Indeed, the *Bunker Hill* court was aware of the breadth of the test when it stated, "[t]he court is mindful that in adopting the [capacity to control] test, care must be taken so that 'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator."[93] Even in light of this recognition, the court failed to clarify where the line should be drawn, and, guided by congressional purpose, found the parent corporation liable.[94]

2. Actual Control Standard

In contrast with the capacity to control standard proposed by *Bunker Hill*, most courts faced with the issue of direct liability of parent corporations under CERCLA have adopted an "actual control" approach.[95] Rejecting the potentially expansive approach of the capacity to control, the actual control test looks to evidence of the parent corporation's actual exercise of control over the subsidiary and its activities.[96] In these decisions, the parent's capacity to control is of no consequence unless it was actually exercised.

The genesis of the actual control test is associated with *United States v. Kayser-Roth Corp.*[97] There, Stamina Mills, a wholly owned subsidiary of Kayser-Roth, maintained a textile manufacturing facility from 1952 until 1975.[98] Accidental and deliberate spills of trichlorethylene (TCE) on the Stamina property resulted in contamination of the aquifer, and ultimately cleanup action by the EPA.[99] The district court found Kayser-Roth directly liable for the costs of the EPA cleanup and Kayser-Roth appealed arguing that as a matter of law, a parent company of a dissolved subsidiary cannot be held liable either as an operator or as an owner.[100] The First Circuit did not agree.[101]

Affirming the lower court, the appellate court found the parent had "exerted practical total influence and control over Stamina Mills' operations."[102] This finding was based upon the following evidentiary factors: (1) the parent's financial

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91. *See* Oswald, *supra* note 22, at 260 (recognizing that a literal application of the test would always lead to parent corporation liability).

92. *See id.* at 262.

93. *Bunker Hill*, 635 F. Supp at 672.

94. *See id.*

95. *See* John M. Brown, Comment, *Parent Corporation's Liability under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries*, 31 TULSA L.J. 819, 829 (1996).

96. *See infra* notes 105-107 and accompanying text. The EPA also advocated such an approach as early as 1984. *See* Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, United States Environmental Protection Agency, to Assistant Administrator for Solid Waste and Emergency Response, Associate Enforcement Counsel for Waste, Regional Administrators, and Regional Counsels (June 13, 1984), *cited in* Silecchia, *supra* note 6, at n.107.

97. 910 F.2d 24 (1st Cir. 1990).

98. *See id.* at 25.

99. *See* United States v. Kayser-Roth Corp. 724 F. Supp. 15, 17-18 (D.R.I. 1989).

100. *See Kayser-Roth Corp.*, 910 F.2d at 25.

101. *See id.* The appellate court considered only operator liability and finding that it existed, refused to consider Kayser's arguments regarding owner liability. *See id.* at 28 n.11.

102. *Id.* at 27 (citing 724 F. Supp. at 18).

domination over the subsidiary; (2) the parent's requirement that subsidiary—governmental contact, including environmental matters, be funneled through the parent; (3) the parent's management of the subsidiary's real estate transactions; (4) the parent's requirement that it approve any expenditure over $5000; and (5) the parent's placement of its personnel in almost all subsidiary's director and officer positions.[103] In short, Kayser-Roth exercised pervasive control over its subsidiary sufficient to support direct liability under CERCLA.[104]

In articulating an operator standard, the court made two interesting points. First, the court acknowledged its failure to articulate an exact standard for holding a parent corporation liable as an operator under CERCLA.[105] Second, the court emphasized that it is not the usual case for a parent to be an operator of its wholly owned subsidiary.[106] Nonetheless, the court then went on to announce the actual exercise of control test: "To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary."[107]

Although the actual control test has been used extensively in CERCLA's parent corporation context, it has been criticized for its focus on the parent's activities with the subsidiary, rather than focusing on the parent's activities with the facility.[108] This is problematic because control of the subsidiary may give rise to indirect liability under the veil-piercing doctrine, whereas control over the facility itself is the more appropriate inquiry for direct liability. Interestingly, this is how the Supreme Court viewed the issue in *Bestfoods*.[109]

3. Operator Liability as Indirect Liability Only

Finally, although before *Bestfoods* a majority of courts recognized some form of direct, operator liability for parent corporations under CERCLA,[110] at least one court had refused to find this form of liability for a parent corporation.

In *Joslyn Manufacturing Co. v. T.L James & Co.*,[111] the Fifth Circuit held that a parent corporation could be liable under CERCLA for the activities of its subsidiaries only if the corporate veil was pierced.[112] Joslyn brought suit to recover the cleanup costs from a creosoting plant built, owned, and operated by Lincoln Creosoting Company.[113] Before the plant was sold to Joslyn, it had been completely

103. *See id.* (citing 724 F. Supp. at 22).
104. *See id.* at 28.
105. *See id.* at 27.
106. *See id.*
107. *Id.*
108. *See* Oswald, *supra* note 22, at 268-69.
109. *See infra* Part IV.
110. *See supra* notes 79-109 and accompanying text.
111. 893 F.2d 80 (5th Cir. 1990).
112. One commentator observes that *Joslyn* has been the subject of much scholarly commentary because of its minority status. *See* Silecchia, *supra* note 6, at n.176.
113. *See* Joslyn Corp. v. T.L. James & Co. Inc., 696 F. Supp. 222, 223-224 (W.D. La. 1988).

controlled by T.L. James.[114] Joslyn argued that James' relationship to the subsidiary constituted a relationship analogous to an owner or operator under CERCLA.[115]

The *Joslyn* court's reasoning in rejecting Joslyn's argument has been described as "one of the most pro-parent decisions ever authored."[116] In reaching its decision, the court first looked to the language of CERCLA. Finding that the statutory definition of owner or operator "[s]ignificantly . . . [did] not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries,"[117] the court refused to follow the paths on which other circuits had extended liability to parent corporations.[118] Additionally, the court found no authority in the legislative history directing it to disregard a basic tenet of corporation law.[119] Unpersuaded by Congressional silence on the issue, the court concluded "without an express congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis."[120] As discussed below, the Sixth Circuit, in part, followed the reasoning of *Joslyn* in *United States v. Cordova Chemical*,[121] a view the Supreme Court later rejected in *Bestfoods*.

The veil-piercing only standard was supported by several arguments, but accompanied by its own flaws.[122] First, veil-piercing was compatible with congressional silence on creating a new principle of corporate liability.[123] Veil-piercing refused to "court-create" CERCLA liability without explicit statutory authority. Second, the rule was in compliance with the expectations of the corporate form, a form based upon the concept of limited liability.[124] However, requiring that the corporate veil be pierced before holding a parent corporation liable had its faults. Piercing the corporate veil can prove to be extremely difficult.[125] This presents a hurdle to effectuating CERCLA's broad remedial goal of making those responsible for the pollution pay for the consequences of their pollution.[126] Moreover, this approach also disregards Congress's inclusion of "operator" within CERCLA, and instead focuses on "owner" liability.[127] Thus, while the minority standard did not require an expansive view of CERCLA, the creation of definitions omitted in the statute, or a change in the traditional notions of the corporate form, it failed to take into account CERCLA's broad remedial goal and the stated dual standard of liability.

It was in the midst of these conflicting interpretations that the *Bestfoods* saga began.

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114. *See Joslyn*, 893 F.2d at 81.
115. *See id.* at 82.
116. *See* John S.G. Worden, *CERCLA liability of Parent Corporations for the Acts of Their Subsidiaries*, 30 IDAHO L. REV. 73, 79 (1993-94).
117. *Joslyn*, 893 F.2d at 82.
118. *See id.* at 82-83.
119. *See id.* at 82.
120. *Id.* at 83 (citing Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1427, 1430 (D.C. Cir. 1988)).
121. 113 F.3d 572 (6th Cir. 1997). The Cordova case is discussed *infra*, Part III.
122. *See* Silecchia, *supra* note 6, at 154-56.
123. *See id.* at 154.
124. *See id.* at 154-55.
125. *See id.* at 155.
126. *See id.*
127. *See id.*

III. STATEMENT OF THE CASE

A. *Statement of Relevant Facts*

Chemical manufacturing began at the plant site near Muskegon, Michigan in 1957.[128] The first owner, Ott Chemical Company (Ott I) operated the site from 1957 until 1965.[129] Prior to the chemical manufacturing operations, the groundwater underlying the site was considered to be of excellent quality.[130] However, during Ott's control the intentional and unintentional dumping of hazardous substances contaminated groundwater flowing underneath the site and soil surrounding the site.[131] The contamination was confirmed by tests conducted in 1964.[132]

In 1965 CPC International Inc.[133] incorporated a wholly owned subsidiary (Ott II) to buy Ott I's assets.[134] CPC retained officers of Ott I as officers of Ott II, including Ott I's founder, principal shareholder, and president, Arnold Ott.[135] Mr. Ott and several other officers and directors were also given positions at CPC. These officers and directors performed duties for both corporations.[136]

The new company, Ott Chemical Company (Ott II) also manufactured chemicals.[137] Despite the intermittent use of purge wells, the pollution of soil, surface water, and groundwater continued.[138] The primary cause of contamination was the use of unlined lagoons as a means of chemical waste disposal from 1959 until at least 1968.[139] Other sources of contamination included chemical spills from train cars, chemical drums, and a cement-lined equalization basin.[140] Ultimately, the contamination migrated through the aquifer and reached two waterways.[141]

The Story Chemical Company purchased the site from CPC in 1972.[142] Story continued chemical manufacturing at the site until its bankruptcy in 1977.[143] The trustee in bankruptcy assumed title and attempted to find a buyer.[144]

Shortly after Story's bankruptcy, the Michigan Department of Natural Resources (MDNR) inspected the site to determine the extent of environmental problems and possible remedies.[145] MDNR described the site's environmental problems as "legion".[146] Decades of hazardous waste contamination had left "'groundwater'

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128. *See* U.S. v. Cordova Chem. Co. of Mich., 113 F.2d 572, 575 (6th Cir. 1997).
129. *See id.* at 575.
130. *See* CPC Int'l, Inc. v. Aerojet-General Corporation, 777 F. Supp. 549, 555 (W.D. Mich. 1991).
131. *See id.* at 555-56.
132. *See id.* at 555.
133. As noted above, CPC changed its name to Bestfoods. *See supra* note 11.
134. *See CPC Int'l*, 777 F. Supp. at 557.
135. *See id.* at 558.
136. *See id.*
137. *See id.*
138. *See id.* at 556.
139. *See id.*
140. *See id.*
141. *See id.* The waterways are Little Bear Creek and the Unnamed Tributary.
142. *See id.* at 555.
143. *See id.*
144. *See id.* at 562.
145. *See id.*
146. *See id.*

contain[ing] foam [of] a brownish color like root beer[,] . . . [t]he stench of chemicals permeat[ing] the air, [s]oil . . . showing purplish colors[, h]undreds of chemical drums . . . strewn among trees [on the site] . . . [that] were crushed, corroded and leaking, with their contents seeping into the ground[,] . . ., [and] tanks of explosive phosgene gas, potentially deadly if released into the air."[147] MDNR sought a buyer willing to contribute toward the remediation of the Muskegon facility.[148] After extensive negotiations,[149] Aerojet-General Corporation (Aerojet) arranged for transfer of the property from the Story bankruptcy trustee in 1977.[150]

Aerojet created a wholly-owned Californian subsidiary, Cordova Chemical Company (Cordova California) to purchase the property. In turn, Cordova California created a wholly owned Michigan subsidiary, Cordova Chemical Company of Michigan (Cordova Michigan), which manufactured chemicals at the site until 1986.[151]

By 1982, the Environmental Protection Agency had committed to cleaning up the site.[152] The site and the surrounding area ranked 137th on the National Priorities List.[153] The cleanup plan called for expenditures into the tens of millions of dollars.[154] To recover some of that money, the United States filed an action under CERCLA in 1989, naming five defendants as responsible parties: CPC, Aerojet, Cordova California, Cordova Michigan, and Arnold Ott.[155]

After the parties "launched a flurry of contribution claims, counterclaims, and cross-claims" the district court consolidated the cases for trial in three phases: liability, remedy, and insurance coverage.[156] The court held a fifteen-day bench trial on the issue of liability and as a result of party stipulations, the trial focused on the issues of whether CPC and Aerojet, as the parent corporations of Ott II and the Cordova Companies, had owned or operated the facility within the meaning of § 107(a)(2) of CERCLA.[157]

B. The District Court's Conclusions

Under the pretext of CERCLA's remedial purpose,[158] the district court found that liability may attach to a parent corporation in two ways: first, liability can attach directly, when the parent itself operates the facility;[159] second, liability can attach

147. *Id.* at 562-63.
148. *See id.* at 563.
149. *See id.* at 563-67 (describing the negotiations).
150. *See id.* at 564.
151. *See id.* at 555.
152. *See id.* at 556.
153. *See id.* For a brief description of the National Priorities List see SCHOENBAUM & ROSENBERG *supra* note 17.
154. *See* U.S. v. Bestfoods, 524 U.S. 51, 57 (1998).
155. Ott I and II were by then defunct. Arnold Ott settled out of court with the government before the trial. *See id.* at 58 n.6.
156. *See id.*
157. *See id.*
158. *See CPC Int'l*, 777 F. Supp. at 572 (W.D. Mich. 1991) ("reading the statute to employ only traditional concepts of ownership and liability through veil-piercing would require the court to ignore not only the statute's broadly remedial intent, but also its explicit words.") (footnote omitted).
159. *See id.*

indirectly, when the corporate veil can be pierced under state law.[160] In finding that CERCLA may impose direct liability in situations in which the corporate veil cannot be pierced under traditional concepts of corporate law, the court noted that CERCLA does not reject "the crucial limits to liability that are inherent to corporate law."[161] Rather, the court found CERCLA's owned or operated language forged a "new, middle ground" of liability.[162] The court's "new, middle ground"[163] of liability required a parent corporation to actively participate in and exercise control over the subsidiary's business during a period of disposal of hazardous waste.[164] However, the court stated, parental oversight consistent with an investment relationship will not give rise to operator liability.[165] The court identified several factors helpful in determining whether a parent corporation operated its subsidiary for the purpose of CERCLA liability.[166] These factors included the parent corporation's involvement in the board of directors, management, daily operations, and certain policy matters, including the area of waste disposal.[167] Applying these factors to the case before it, the court found both CPC and Aerojet liable as operators.[168]

In addition, the court found that a parent corporation may be held indirectly liable as an owner if the traditional state law standard for veil-piercing is satisfied.[169] As to CPC, the court found it unnecessary to reach the question of veil-piercing,

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160. *See id.* at 574.

161. *See id.* at 573.

162. *See id.*

163. *Id.*

164. *See id.* The court further elaborated:

> [A] parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates 'operator' liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

Id.

165. *See id.*

166. *See id.*

167. *See id.* The court also stated:

> In addition, determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful in determining whether the parent has operated a wholly owned subsidiary. Other evidence may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.

Id.

168. *See id.* at 575, 580. The court found eight factors probative in finding CPC liable as an operator. *See id.* at 575. Similarly, the court found eleven factors probative in finding Aerojet liable. *See id.* at 579.

169. *See id.* at 574. The court cited *Anspec Co., Inc. v. Johnson Controls Inc.*, 922 F.2d 1240, 1248 (6th Cir. 1991) for authority in using state law veil-piercing. The court outlined the inquiry for veil-piercing under Michigan law as being "the subsidiary has been a mere instrumentality of the parent, that the separateness between the corporations has been used to commit fraud or wrong, and that unjust loss or injury to the plaintiff has occurred." *CPC Int'l*, 777 F. Supp. at 574 (citations omitted). The court also found that "[i]t . . . may be appropriate under some circumstances to pierce the veil of a separate corporate entity to serve the interests of justice when an individual is the sole shareholder of a corporation, as in the case of a parent corporation and its wholly owned subsidiary." *Id.* (citations omitted).

labeling it an alternative theory of liability, because CPC had been held directly liable under an operator standard.[170] The court did, however, apply the veil-piercing standard to Aerojet.[171] Finding Aerojet indirectly liable, the court stated "Aerojet totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and the wholly owned subsidiary."[172] The Sixth Circuit next considered the district court's two theories of liability.

C. District Court Reversed in Part by the Court of Appeals for the Sixth Circuit

A divided panel of the Sixth Circuit Court of Appeals reversed in part,[173] granted rehearing en banc, and vacated the panel decision.[174] On rehearing, the court again reversed in part.[175]

The appellate court noted that Congress intended CERCLA to be a remedial statute, as such its goals were not to be frustrated by judicial interpretation.[176] Yet, the court also recognized that CERCLA should not be interpreted over-broadly, "snar[ing] those who are either innocently or tangentially tied to the facility at issue."[177] The court concluded that the district court had done just that.[178]

The appellate court criticized the lower court opinion for its articulation of the "new, middle ground" basis for liability and for its lack of clarity.[179] Accordingly, the court rejected the lower court's analysis, finding it unsupported by CERCLA.[180] In the alternative, the court found that when a parent corporation is sought to be held liable as an operator based upon the extent of its control of the subsidiary owning the facility, liability can only attach when the corporate veil can be pierced.[181]

The majority did, however, acknowledge the possibility that a parent corporation might be held directly liable as an operator of the facility owned by the subsidiary.[182] The court found that parent liability depended upon the degree to which the parent controls the subsidiary and the extent and manner of its involvement with the facility.[183] According to the court, involvement must have amounted to an abuse of the corporate form in order for direct liability to attach.[184]

In summary, the appellate court recognized three ways in which a parent may be held liable as an owner or operator: 1) indirectly, as an owner, by piercing the corporate veil; 2) as an operator where the parent directly operates the facility itself,

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170. *See id.* at 575.
171. *See id.* at 578.
172. *Id.*
173. *See* United States v. Cordova Chem. Co. of Mich., 59 F.3d 584 (6th Cir. 1995).
174. *See* United States v. Cordova Chem. Co. of Mich., 67 F.3d 586 (6th Cir. 1995).
175. *See* United States v. Cordova Chem. Co. of Mich., 113 F.3d 572 (6th Cir. 1997).
176. *See id.* at 577.
177. *See id.* at 578.
178. *See id.* at 581-83.
179. *See id.* at 579.
180. *See id.* at 579-80 (quoting Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80, 83 (5th Cir. 1990)).
181. *See id.* at 580.
182. *See id.* at 581 (stating "[a]lthough a parent conceivably could be held liable under this theory . . .").
183. *See id.* at 580.
184. *See id.*

either independently of its subsidiary, or as an actual "co-operator" alongside the subsidiary; or 3) directly, as an operator, by piercing the veil.[185]

IV. THE SUPREME COURT'S REASONING

The United States Supreme Court granted certiorari[186] in this case to resolve the split among the Circuits on the issue of parent corporation liability.[187] By way of a unanimous opinion authored by Justice Souter, the Court held that there are two theories under which a parent corporation may be found liable for the acts of its subsidiaries under CERCLA. Under the first theory, the Court agreed with the Sixth Circuit's conclusion that only when the corporate veil can be pierced will a parent corporation be held indirectly liable under CERCLA's owner provision for the acts of its subsidiaries.[188] However, the Court failed to discuss whether courts should apply a federal or state veil-piercing standard.[189] Under the second theory, the Court found that direct liability will attach to a parent corporation when the parent acts as an operator of the facility itself.[190]

A. *Owner Liability*

The Court began its analysis by affirmatively reciting the "bedrock principle" of corporate law that a parent corporation is not liable for the acts of its subsidiaries.[191] It is "hornbook law," the Court said, that control consistent with stock ownership cannot give rise to liability beyond the assets of the subsidiary.[192] Although the Court recognized that this principle has been severely criticized,[193] it also recognized that nothing in CERCLA purports to rewrite such a deeply ingrained principle. In fact, the Court stated, "congressional silence is audible."[194]

The Court acknowledged the "equally fundamental" principle of corporate veil piercing permitting a shareholder to be held liable for the corporation's conduct when "the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf."[195] Generally, in order to abrogate a principle of common law, the Court stated, a statute must directly speak to the issue.[196] Just as CERCLA is notably silent on its intention to rewrite the principle of limited corporate liability, it is equally silent on rewriting the well-accepted rule of veil piercing.[197] The Supreme Court, therefore, found the

185. *See id.* at 581.
186. *See* United States v. Bestfoods 522 U.S. 1024 (1997).
187. *See* United States v. Bestfoods, 524 U.S. 51, 60 (1998).
188. *See id.* at 61-62.
189. *See id.* at 61; *infra*, Part V.B.1
190. *See id.* at 62.
191. *See id.* at 61 (citations omitted).
192. *See id.* at 61-62.
193. *See id.* at 62 (citing Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, cited *supra* note 6).
194. *Id.*
195. *See id.* (citation omitted).
196. *See id.* at 63 (quoting United States v. Texas, 507 U.S. 529, 534 (1993)).
197. *See id.*

court of appeals correct in holding that a parent may be charged with derivative liability for its subsidiary's actions only when the corporate veil can be pierced.[198]

B. *The Direct/Operator Analysis*

The Court's second avenue to parental liability is the heart of the decision. Not only does it present a much more interesting and less predictable path,[199] it brings clarity to the question of a parent corporation's operator liability under CERCLA, an issue that has plagued the courts since *NEPACCO*, one of the earliest CERCLA cases.[200]

The Court followed the veil-piercing analysis by noting that CERCLA liability may also turn on operator, as well as owner status.[201] The Court found nothing in CERCLA barring a parent corporation from direct liability for its own actions in operating a facility owned by its subsidiary.[202] Citing an article written by Justice Douglas,[203] the Court stated that derivative liability cases are to be distinguished from those cases in which the parent participates directly in the wrong.[204] In these cases, the parent should be directly liable for its own actions, even if the subsidiary owns the polluting facility.[205] In this instance, the corporate relationship is to be disregarded if the acts of pollution were done on behalf of the parent; accordingly, the parent-subsidiary relationship is irrelevant to the issue of direct liability.[206] Thus, unlike derivative liability stemming from traditional veil piercing, CERCLA provides for direct liability under an operator theory, as was at issue in this case.[207]

Recognizing the difficulty in defining operator for the purpose of CERCLA and commenting on the "uselessness"[208] of CERCLA's circular definition of the term, the Court turned to the term's ordinary and natural meaning.[209] The Court, guided by dictionary definitions, stated that in a mechanical sense, operate means "[t]o control the functioning of; run: operate a sewing machine"[210]or "to work; as, to operate a machine."[211] In an organizational sense, operate means "to conduct affairs of; manage: operate a business"[212]or "to manage."[213] The Court concluded that under CERCLA, "an operator is simply someone who directs the workings of,

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198. *See id.* at 63-64. The Court recognized that there is some disagreement among courts and commentators over whether state or federal law applies to veil piercing. *See id.* at 63 n.9. As the question was not presented, the Court did not address it further. For a discussion of this issue, see *infra* Part V.B.1.

199. *See* Silecchia, *supra* note 6, at 170.

200. *See* Oswald, *supra* note 22, at 243 (stating "NEPACCO I, the first major CERCLA liability case, started CERCLA jurisprudence off on the wrong foot.").

201. *See Bestfoods*, 524 U.S. at 64; *see also* 42 U.S.C. § 9607(a)(2).

202. *See Bestfoods*, 524 U.S. at 64.

203. As the Court noted, Justice Douglas wrote the article before his appointment to the Court. *See id.* at n.11.

204. *See id.* at 65 (citation omitted).

205. *See id.*

206. *See id.*

207. *See id.*

208. *Id.* at 66 ("[h]ere of course we may again rue the uselessness of CERCLA's definition of a facility's 'operator' as 'any person . . . operating' the facility"(citing 42 U.S.C. § 9601(20)(A)(ii)).

209. *See id.* (citing Bailey v. United States, 516 U.S. 137, 145 (1995)).

210. *Id.* (citing American Heritage Dictionary 1268 (3d ed. 1992))(emphasis omitted).

211. *Id.* (citing Webster's New International Dictionary 1707 (2d ed. 1958)) (emphasis omitted).

212. *Id.* (citing American Heritage Dictionary 1268 (3d ed. 1992))(emphasis omitted).

213. *Id.* (citing Webster's New International Dictionary 1707 (2d ed. 1958)).

manages, or conducts the affairs of a facility."[214] Sharpening the definition for purposes of CERCLA's concern with environmental contamination, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[215]

In light of this definition, the Court agreed with the Sixth Circuit's rejection of the district court's finding of direct liability.[216] One of the two problems with the district court's analysis, said the Court, lay in the court's application of the actual control test to determine whether the parent operated the subsidiary.[217]

Using this opportunity to analyze the actual control test, the Court found the test objectionable because of the test's melding of direct and indirect liability.[218] According to the Court, the actual control test incorrectly examined the relationship between the parent and subsidiary corporation.[219] This analysis, the Court stated, is more appropriate under a theory of indirect liability.[220] Instead, the district court should have examined the parent's interaction with the subsidiary's facility, which is the proper inquiry for direct liability.[221] The Court reasoned that if the two liabilities were to remain distinct, the focus of the inquiry must necessarily be different under the two tests:

> The question is not whether the parent operates the subsidiary, but whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary. Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability under the statutory language.[222]

Thus, the district court's analysis should not have turned on CPC's controlling relationship with Ott II but should have examined the relationship between CPC and the Muskegon facility itself.[223]

The Court saw another problem with the district court's decision in that it failed to recognize that corporate personalities may remain distinct.[224] The Court stated that well established principles of corporate law allowed directors and officers of both a parent and a subsidiary to "'change hats' to represent the corporations separately, despite their common ownership."[225] The fact that persons were wearing dual hats does not necessarily expose the parent corporation to liability for its subsidiaries' acts.[226] In fact, the judicial presumption is that directors are wearing

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214. *Id.*
215. *Id.* at 66-67.
216. *See id.* at 67.
217. *See id.*
218. *See id.*
219. *See id.* at 68.
220. *See id.*
221. *See id.*
222. *Id.* (quoting Oswald, *supra* note 22, at 269).
223. *See id.*
224. *See id.* at 69.
225. *See id.* (quoting Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 779 (5th Cir. 1997)).
226. *See id.*

a subsidiary hat when acting for a subsidiary.[227] In order to establish liability it was not enough to show that dual officers directed the facility, rather, the government would have had to show, over the general presumption to the contrary, that officers and directors were acting in the capacity of the parent corporation directors and not the capacity of subsidiary directors when the relevant acts were committed.[228] The Court found that the district court's failure to inquire into this disregarded a well-established common law rule.[229]

The Court reasoned that if evidence of commingled corporate personalities were sufficient to support parent direct liability under CERCLA, veil-piercing would be "academic".[230] The result would be a relaxed, CERCLA specific rule that would in effect circumscribe traditional principles and expectations from the law of CERCLA liability, a task that CERCLA's silence cannot accomplish.[231]

Turning to the Sixth Circuit's analysis, the Court found that though the appellate court was correct in rejecting the district court's broad interpretation, the appellate court's holding was too narrow.[232] Specifically, the Court took issue with the appellate court's finding on circumstances in which operator liability may attach.[233] By confining its examples of direct parental operation to sole or joint ventures, the appellate court failed to realize the breadth of the operator provision under CERCLA.[234] Thus, in addition to the scenario envisioned by the appellate court, the Court anticipated two more scenarios giving rise to parent liability.[235] The first was addressed earlier in the opinion and arises when a dual officer or director departs from the norms of parental influence and dual officeholding and acts, though ostensibly for the subsidiary, on behalf of the parent to operate the facility.[236] The second possibility, suggested by the facts of *Bestfoods* itself, was that an agent of the parent and not of the subsidiary was extensively involved with environmental activities at the facility.[237]

The Court acknowledged that this exercise calls for line drawing and instructed that norms of corporate behavior should serve as critical reference points.[238] These norms serve to identify oversight oriented activities, while at the same time identifying control oriented activities.[239] In drawing a line, the critical examination becomes whether the action taken by the agent of a parent is eccentric with the point of reference as the accepted norms of parent corporation oversight.[240]

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227. *See id.*
228. *See id.* at 69-70.
229. *See id.* at 70.
230. *See id.*
231. *See id.*
232. *See id.* at 71.
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.*
237. *See id.* An account of the agent's (Williams') role is found in *CPC Int'l*, 777 F. Supp. at 561.
238. *See Bestfoods*, 524 U.S. at 71.
239. *See id.* at 71-72.
240. *See id.* at 72 ("The 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.").

Finding some evidence that CPC engaged in questionable activity at the plant, the Court remanded the case.[241] Of interest to the Court was the district court's finding that a CPC agent participated in waste disposal activities at Ott II.[242] This agent, Williams, worked only for CPC, not Ott II. Therefore, his actions were necessarily taken on the behalf of CPC. In fact, it was through Williams that CPC became directly involved in the environmental affairs of Ott II.[243] Moreover, Williams had substantial involvement in the environmental affairs of Ott II.[244]

From the Court's perspective, the activity of Williams was enough to raise issues of CPC's status as an operator.[245] The Court exercised judicial restraint in remanding the case to the lower court for reevaluation of Williams role, or any other CPC agent who may have had a part in operating the facility.[246]

V. IMPLICATIONS OF *BESTFOODS*

A. *Overview*

Bestfoods constitutes the Court's first substantive ruling on the question of CERCLA liability since the act's passage.[247] Independent of this status, the significance of *Bestfoods* is readily apparent because it is in agreement with CERCLA's language, CERCLA's goals, and strikes a balance between competing theories of liability offered by the lower courts.

First, in recognizing two distinct theories of liability, the decision is in agreement with the language of CERCLA. Through the use of the disjunctive "or," CERCLA's "owner or operator" provision envisions two theories of liability. It follows that two theories of liability demand two distinct standards of liability.[248] The owner liability theory requires an examination of the relationship between the parent and the subsidiary. By way of a different analysis, the operator liability theory looks to the parent's control of the physical facility from which liability stems. This conforms to the language of CERCLA which places liability on the "owner or operator" of a "facility," not the corporate relationship between a parent and subsidiary.[249]

Second, the decision also adheres to CERCLA's goals while simultaneously respecting traditional notions of corporate limited liability. CERCLA's stated goal of holding responsible parties liable for the costs of cleanup implies that parties should be responsible only for their own actions, not the actions of others. The Court's operator standard directly effectuates this goal by focusing on the amount

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241. *See id.* at 73.

242. *See id.*

243. *See id.* at 73 n.14 (citing the lower court at 777 F. Supp. at 561).

244. *See id.* at 72 ("[Williams] actively participated in and exerted control over . . . environmental matters . . . issued directives regarding Ott II's responses to regulatory inquiries.") (citing *CPC Int'l*, 777 F. Supp. at 575).

245. *See id.*

246. The Court refused to make conclusions. The Court's reluctance to make conclusions was based upon the fact that it would be making the finding in the first instance and the fact that the district court did not apply the correct standard. *See id.* at 72-73. At the date of this writing, there has been no decision on remand.

247. *See* Lisa K. Seilheimer, *October 1997 Term:* United States v. Bestfoods, 5 ENVTL. LAW. 303 (1998) (citation omitted).

248. *See* Oswald, *supra* note 23, at 279-280 (discussing the need for bifurcation of the two distinct concepts).

249. *See* Silecchia, *supra* note 6, at 172.

of responsibility the parent corporation actually undertook with respect to hazardous waste at a facility. Only when a parent corporation assumes responsibility such that it is committing the actual release, should it be liable as an operator. This is in direct conformity with CERCLA's goal of "let the polluter pay"[250] rather than the taxpayer. If the parent corporation's involvement was limited to a corporate relationship with the subsidiary, however, in keeping with limited corporate liability, the parent corporation should not be forced to assume responsibility for actions that were not its own. Accordingly, as the Court reasoned, it should not be held liable unless the corporate veil can be pierced.

Third, by adhering to CERCLA's language the decision strikes a balance between the varying theories of liabilities previously offered by the courts.[251] It expands on the too-narrow scope of liability under which only veil-piercing was sufficient. This prevents a parent corporation from placing ownership of a facility in a "valid" subsidiary, managing the site for its own benefit, and then hiding behind the corporate veil.[252] At the same time it narrows the expansive liability under which capacity to control was sufficient. This allows a parent to act consistently with its investor status by enabling it to engage in issues of financial oversight and articulate general policies without incurring liability.[253] Moreover, no longer will operator liability be contingent on the particular jurisdiction in which the action is tried. The Court's articulation has the potential to guide lower courts in creating a uniform test of parental liability, not dependent upon which court is hearing the case. This should serve to curb varied judicial pronouncements that have piqued concern that the lower court's disparate decisions "will only lead to greater confusion."[254]

B. Questions Left Unanswered By Bestfoods

While the *Bestfoods* decision adheres to statutory language, CERCLA's goals, and the principle of limited liability, it leaves related issues unresolved. First, the decision fails to address whether state or federal law governs the veil-piercing necessary for indirect liability. Second, the decision offers little guidance to government agencies, corporations, and courts trying to assess the proper role of a parent corporation's relationship with its subsidiary and facility. Third, the decision may affect future relationships between parent corporations and the facilities of their subsidiaries. Even though CERCLA liability is backward looking,[255] the decision encourages CERCLA concerned parent corporations to adopt a future "hands off" approach with respect to the facilities of their subsidiaries.

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250. *See id.* at 116 (footnote omitted).

251. *See Bestfoods*, 524 U.S. at 60 (stating that the Court granted certiorari to resolve a conflict among the Circuits); *see also supra*, Part II. (discussing three different court-created tests before *Bestfoods*).

252. *See* Silecchia, *supra* note 6, at 172-73.

253. *See* Seilheimer, *supra* note 247.

254. *See* Thomas R. Mounteer & Michael J. Myers, *CERCLA does not articulate whether shareholders and parent corporations can be liable under Superfund; as a result, federal circuit courts are in conflict*, NAT'L L.J., Sept. 22, 1997, at B4.

255. *See supra* note 28 and accompanying text.

1. Veil-Piercing Standard: State or Federal?

While the Court's treatment of the "owner or operator" distinction was a welcome addition to CERCLA jurisprudence, the Court acknowledged, but left undecided, the disagreement of what law should govern veil-piercing in assessing indirect parental liability.[256] Relegating this issue to a footnote, the Court concluded that because the question had not been challenged by the parties or presented in the case, it would not be addressed.[257] Thus, the Court left unanswered a question that has already been the subject of some debate in the CERCLA arena.[258]

Before *Bestfoods*, writers and courts confronted with the choice of law issue in CERCLA veil-piercing actions have taken different approaches.[259] A minority of federal courts has been slow to replace the use of state law in the corporate veil-piercing context.[260] Some courts and observers have found that from a practical standpoint, the outcome is unlikely to differ whether courts apply a federal rule or state rule.[261] The majority of courts, however, have analyzed the issue under federal common law.[262]

Federal courts have the ability to develop and apply federal common law when interpreting federal statutes.[263] This is generally true only when Congress has expressly granted them the power to do so, or if a federal rule of decision is "necessary to protect uniquely federal interests."[264] Like many other issues involving CERCLA, Congress did not address whether state or federal common law should apply in veil-piercing actions under CERCLA.[265] Moreover, the legislative history is of little assistance.[266] The only evidence exists in a statement made by the CERCLA House Sponsor, Congressman Florio, "[t]o insure the development of a uniform rule of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the

256. *See Bestfoods*, 524 U.S. at 63-64 n.9.

257. *See id.*

258. *See, e.g.*, Silecchia, *supra* note 6, at 175 (stating "[w]hether the interest in deferring to state corporate law outweighs the government's and parties' interest in uniformity is a difficult question with serious ramifications"); *see also supra* note 256.

259. *See supra* note 256 (citing the approach taken by different courts.) Writers advocating a state veil-piercing standard include: Silecchia, *supra* note 6, at 190-92; Richard G. Dennis, *Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law*, 36 VILL. L. REV. 1367 (1991); and Dana Lee, *Should CERCLA Liability for Limited Partnerships Be Governed by State or Federal Law?*, 17 J. LAND RESOURCES & ENVTL. L. 367 (1997). Writers advocating the use of federal law include: Aronovsky & Fuller, *supra* note 9; Birg, *supra* note 30; Note, *supra* note 6; and Jay A. McKendree, *Appropriate Federal Rules of Veil-Piercing in Response to* United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997), *cert. granted sub nom.*, United States v. CPC Int'l, 118 S. Ct. 621 (Dec. 12,1997) (No. 97-454), 23 U. DAYTON L. REV. 419 (1998).

260. *See, e.g., Cordova Chem.*, 113 F.3d at 575.

261. *See, e.g.*, Oswald, *supra* note 23, at 247; *In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 33 (D. Mass. 1987).

262. *See Cordova Chem.*, 113 F.3d at 585, (Merritt, concurring in part and dissenting in part)(collecting cases).

263. *See* United States v. Kimbell Foods Inc., 440 U.S. 715, 728-29 (1979).

264. *See* Texas Indus. Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).

265. *See* Brown, *supra* note 95, at 834 (declaring that the "[c]ontroversy over whether to apply state or federal veil piercing standards exists because CERCLA's liability provisions are vague.") (footnote omitted).

266. *See* Dennis, *supra* note 259, at 1446 ("Neither the CERCLA statute nor its legislative history contain any express indication of congressional intent concerning choice of law on direct liability or piercing the corporate veil.") (footnote omitted).

further development of a Federal common law in this area."[267] Some have argued that this statement is evidence of Congressional preference for the application of federal law.[268] However, at least one commentator has argued that Representative Florio was addressing the issue of joint and several liability and therefore no evidence of Congressional intent to apply federal law can be gleaned from his statement.[269]

The case for applying a federal common law is guided by the standards for the development of federal common law rules as articulated in *United States v. Kimbell Foods, Inc.*[270] Under the holding of that case, federal courts must balance several factors in determining whether federal common law applies.[271] The court must first determine whether there is a need for a nationally uniform body of law; second, whether the application of state law frustrates the special objectives of the federal program; and third, whether application of a federal rule will disrupt commercial relationships predicated on state law.[272] Under the *Kimbell* standard, a federal rule of veil-piercing in CERCLA should be followed.

Under the first *Kimbell* factor, CERCLA is a program that must be uniform throughout the nation, and, of equal importance, the standard of indirect liability must be unvaried throughout the nation. Uniform interpretations are necessary to effectuate uniform objectives. This idea was captured best in the oft-quoted passage from *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*:[273] "[I]n attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection."[274] Because CERCLA's standard of owner liability must be interpreted uniformly throughout the nation, a federal rule of veil-piercing should be followed.

Under the second *Kimbell* factor, the use of state law and its attending discrepancies can work to frustrate the specific objectives of CERCLA. The stated objective of CERCLA is to provide for clean-up of hazardous waste and to hold

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267. 126 CONG. REC. 31,965 (1980).

268. *See, e.g.*, Note, *supra* note 6, at 1000; *Cordova Chem.*, 113 F.3d at 583 (Merritt, J., concurring in part and dissenting in part).

269. *See* Dennis, *supra* note 259, at 1446 (footnote omitted).

270. 440 U.S. 715 (1979).

271. *See id.* at 728.

272. *See id.* at 728-729.

273. 675 F. Supp. 22, 31 (D. Mass. 1987).

274. *Id.* at 31. The *Acushnet River* court considered veil-piercing in the context of jurisdiction, not substantive liability. Another important reason arguing for federal law is the lack of uniformity presented by state law. *Acushnet River* also acknowledged this problem:

> Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitude of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.

Id. at 31.

Yet another reason stems from convenience. Parent corporations owning several or more subsidiaries benefit from a uniformly structured corporate relationship rather than a structure dependent on states' varied piercing standards.

responsible parties liable for the clean-up.[275] State law has the potential to frustrate this important objective in a number of ways.

First, state common law veil-piercing tradition has developed in a variety of unrelated contexts.[276] Veil-piercing jurisprudence is often applied without regard to the particular issue before the court. Generic veil-piercing law fails to take into account the primary federal concerns in each case.[277] Second, there is a strong public policy concern driving CERCLA that is notably absent in the common law controversies such as contract and tort, which gives rise to veil-piercing.[278] The emergency situation addressed by CERCLA did not exist at the time that state veil-piercing was developed.[279] A new context, taking into account CERCLA's purpose, more appropriately serves its goals. This end is best served by applying a federal veil-piercing standard. Third, there are many and important variations among state veil-piercing doctrines.[280] This can lead to dissimilar results, where liability is not based in culpability but geographic location.[281] Different states have adopted widely divergent, even contradictory, standards when analyzing the corporate veil.[282] Commentators in this field generally point to "main" factors, but there is still a noticeable variety that could lead to inconsistent results.[283] Finally, the use of state law could frustrate CERCLA's objectives in other ways. For example, if indirect liability hinges on state law, corporations may find it beneficial to incorporate in states with more stringent standards for piercing the veil.[284] Moreover, this might lead the defendant to shop for a better possible result in another forum.[285] Therefore, because state veil-piercing law arose in unrelated contexts, fails to take into account CERCLA's unique goals, and varies from state to state, state law may frustrate the specific objectives of CERCLA.

Some commentators have advocated the position that because corporations are "creatures" of state law, the application of state veil-piercing law more properly adheres to the expectations of corporations which have formed and operated under

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275. *See supra* notes 3-4 and accompanying text.

276. *See* BLUMBERG, *supra* note 60, § 2.02.2.

277. *See id.* § 2.04.3, at 61. According to the author, it is "fundamentally wrong" to determine legal problems without taking into account the legal policies and objectives behind the governing law. *See id.* § 2.04.4, at 62.

278. *See id.* (citing Judge Friendly's statement in Bowater S.S. Co. v. Patterson, 303 F.2d 369, 372-73 (2d. Cir. 1962): "the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law").

279. *See* Kamie Frischknecht Brown, Note, *Parent Corporation Liability for Subsidiary Violations Under SECTION 107 of CERCLA: Responding to* United States v. Cordova Chemical Company, 1998 BYU L. REV. 265, 285 (1998).

280. *See* BLUMBERG, *supra* note 60, § 2.04.04, at 63, stating:

> Although traditional 'piercing the veil jurisprudence' is still accepted as a general principle of corporate jurisprudence, there are important variations among the doctrines of the several states. Because of these variations between the different state versions of 'piercing the veil,' reference to state law would inevitably lead to the undesirable result of a lack of uniform application of federal statutes."

281. *See id.*

282. *See* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 855 (1982) (citing 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (rev. perm. ed. 1974)) (collecting cases).

283. *See* BLUMBERG, *supra* text accompanying note 280; Rosenberg, *supra* note 8, at 29-30.

284. *See supra* note 274 and accompanying text.

285. *See* Brown, *supra* note 95, at 284; McKane, *supra* note 51, at 788: ("Another consequence is forum shopping because plaintiffs will take each potential forum's veil piercing standard into account before filing suit.").

those laws.[286] While decisions and risks may be based upon expectations under state law, only in the rarest of circumstances will such an expectation be undercut. A federal rule of decision will not create a radically new standard unknown to corporations, but will "borrow" from existing state law standards as it has in the past,[287] to create a CERCLA-relevant standard. A possibility exists for interference with a corporation's expectations, relative to CERCLA, where the corporation anticipated dodging CERCLA liability under a particular state's law. This surely cannot comport with Congress' intention in enacting CERCLA.

The third *Kimbell* factor urges the same result. Admittedly, the application of a federal rule may affect commercial relationships predicated on state law, but it should not disrupt them.[288] Both commentators and courts alike have recognized that state law governs the internal workings and affairs of the corporation,[289] but that external affairs may be governed by the law of the forum.[290] Internal workings may include things such as voting rights and the relationship of officers, directors, and shareholders,[291] while external affairs include the rights of third parties.[292] Because the rights of the federal government and parties affected by a Superfund site fall within an external classification, relationships based on state law will not be disrupted by CERCLA's interest in hazardous waste clean-up.

Yet, there are several difficulties with adopting a federal veil-piercing standard. One can look to past efforts at applying a federal standard to find non-uniformity in the standard.[293] Federal law in the veil-piercing area is not as well developed as state law.[294] Moreover, a federal standard may take time to develop into a body of law yielding consistent results.[295] Whether state or federal law is applied, veil-piercing leads to non-uniform results,[296] and if there is the potential to find a uniform rule of liability for parent owners, it is under a federal rule of decision.

In summary, the application of a federal rule of veil-piercing is warranted, and needed, under CERCLA.

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286. *See* Silecchia, *supra* note 6, at 190 ("[A]pplying state veil-piercing law best respects the expectations of parents and subsidiaries who rely on a long tradition of state law as the applicable rule") (footnote omitted).

287. *See, e.g., Acushnet River*, 675 F. Supp. at 33 (noting that the federal common law draws heavily upon state law for guidance).

288. *See* Note, *supra* note 6, at 1000.

289. *See* Note, *supra* note 282, at 862; *Acushnet River*, 675 F. Supp. at 31.

290. *See* Note, *supra* note 282, at 862.

291. *See* McKendree, *supra* note 259, at 429 (footnote omitted).

292. *See Acushnet River*, 675 F. Supp. at 31.

293. *See* Aronovsky & Fuller, *supra* note 9, at 460 (stating that federal courts are a long way from agreeing on a standard).

294. *See* Silecchia, *supra* note 6, at 191 (footnote omitted); *see also* Sung Bae Kim, *A Comparison of the Doctrine of Piercing the Corporate Veil in The United States and in South Korea*, 3 TULSA J. COMP. & INT'L L. 73, 78 (1995) (stating that one reason that veil-piercing under federal common law is uncertain is the Supreme Court's failure to set a standard) (footnote omitted).

295. *See* Silecchia, *supra* note 6, at 191 (arguing that years would be necessary to clearly articulate a federal standard) (footnote omitted).

296. *See* BLUMBERG, *supra* note 60, § 2.02.2, at 40 (stating that hundreds of piercing decisions are "irreconcilable and not entirely comprehensible"); *see also* Rosenberg, *supra* note 8, at 30 (stating that veil-piercing decisions are often rationalizations of results reached for other reasons) (footnote omitted).

2. *Bestfoods* Offers Little Guidance in Assessing Proper Role of Parent Corporations

The second shortcoming of the *Bestfoods* decision is that it offers little guidance to government agencies, corporations, and courts in assessing the proper role of parent corporations with respect to relationships with the subsidiary and facility for the purpose of assessing CERCLA's operator liability. The Supreme Court acknowledged the difficulty in defining what type of actions will result in CERCLA operator liability.[297] Given the sparse and fruitless legislative history on the issue, the Court turned to construing the term through the use of dictionaries.[298] As one commentator has observed, the use of dictionaries is not an "unprecedented source for definitional authority,"[299] but neither is it the type of exact and tailored definition of activities that justify classifying a parent corporation as an operator of a facility deserve.[300] This is especially true given the ramifications of CERCLA liability.[301]

The Court's "sharpened" definition is ambiguous in its terms. As the focused definition contains verbs such as manage, direct, and conduct, much room is left for differing interpretations.[302] As one observer has noted, these verbs encompass a variety of actions, allowing for a broad range of practices in degree and detail.[303] While this standard may have more appeal and practicality than a detailed factual standard, it is ambiguous enough to raise doubts as to its application.

The definition's ambiguity is magnified by the fact that some level of parental involvement with a facility is necessary. Certain types of interaction with a facility are consistent with the status of an investor.[304] While specific activities "such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability,"[305] these activities will undoubtedly, to some degree, affect the operation of a facility. The difficulty arises in classifying activities as "normal" or "eccentric."[306] In the words of the Court: "[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."[307] Yet, the Court failed to give any guidance on how to assess

297. *See* United States v. Bestfoods, 524 U.S. 51, 66 (1998).

298. *See id.* (where the Court constructs "operate" with the use of the American Heritage Dictionary and the Webster's New International Dictionary).

299. *See* Silecchia, *supra* note 6, at 176 (stating that the Court cites its own precedent of *Bailey v. United States*, 516 U.S. 137, 145 (1995) to justify its reliance on dictionaries); *see also Bestfoods*, 524 U.S. at 66.

300. *See* Silecchia, *supra* note 6, at 176 (discussing the difficulty of defining "operator" during the course of oral arguments in the *Bestfoods* case).

301. *See* Poulter, *supra* note 22, at 78 (stating that the average cleanup cost has been estimated at $25 to $50 million dollars) (footnote omitted).

302. *See Bestfoods*, 524 U.S. at 66.

303. *See* Silecchia, *supra* note 6, at 176.

304. *See Bestfoods*, 524 U.S. at 72.

305. *Id.* (footnote omitted).

306. *See id.*; *see also* Silecchia, *supra* note 6, at 177.

307. *Bestfoods*, 524 U.S. at 72.

the critical question and remanded this issue to the trial court for more detailed factual findings.[308]

The Court's failure to provide definitional guidance may have an adverse effect on effectuating CERCLA's goal of cleaning up hazardous waste for government enforcers, parent corporations, and lower courts. Given the high stakes nature of CERCLA liability, it is imperative that each potentially responsible party know the boundaries of liability. As each site indisputably requires a large investment of resources for investigation and remediation, this amount is exponentially compounded by litigation, in both time and money, which many government enforcers do not have to spare.[309] Often government agencies are uncertain as to the liability and participation of potentially responsible parties.[310] Definitional guidance would enable government enforcers to assess the likelihood of recovering resources spent remediating a particular site. In turn, agencies would be able to allocate more resources to a site where responsible party involvement is not expected.

Similarly, definitional guidance would benefit parent corporations in structuring a relationship with the facilities of a subsidiary. Like government agencies, parent corporations have limited resources.[311] A workable, factual definition would assist corporations in making an assessment of the likelihood of liability. Such a definition would assist parent corporations in determining which assessments are worthy of litigation. In turn, where operator liability is likely to be found, a corporation's resources will be better spent on investigation and remediation as opposed to costly litigation. By failing to outline a specific set of activities constituting operation, the Court opened the door to the possibility of inconsistent enforcement, which often spawns litigation and increases clean-up costs, contrary to CERCLA's goals.

Lower courts may also struggle with the Court's lack of guidance. The operator standard announced in *Bestfoods* demands that courts look at the process of decision making at the facility, yet failed to instruct lower courts as to what types of processes should result in operator liability. Undoubtedly, this requires a fact intense inquiry, which lends itself to disparate, even unfair, results, similar to the pre-*Bestfoods* environment.[312] This result would be clearly contrary to the *Bestfoods* decision itself; a decision described as questioning the wisdom of the expansion of CERCLA liability.[313]

In short, the Court's ambiguous definition leaves room for a variety of interpretations, possibly leading to a state of affairs over the fine points of operator liability similar to the pre-*Bestfoods* state of the law. This may prove to be of little assistance to government agencies, parent corporations, and courts seeking clarity as to what type of actions give rise to operator liability. This vagueness offers

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308. *See id.* at 73.

309. *See* GAO, *supra* note 18, at 30 (concluding that 52 percent of states participating in survey said that their states ability to fund cleanups is poor or very poor).

310. *See id.*

311. *See* Poulter, *supra* note 22, at 78 (stating that because cleanup costs are significant, the financial viability of all but the largest firms may be threatened).

312. *See* Mounteer & Myers, *supra* note 254, at B4.

313. *See* Seilheimer, *supra* note 247 (footnote omitted).

incentive to litigate the issue, as both enforcers and potentially liable parties argue for favorable interpretations.[314]

3. Future Ramifications for Parent-Subsidiary Relationships

Finally, the Court's failure to give definitional guidance may affect future relationships between parent corporations and the facilities of subsidiaries. Although CERCLA does not seek to regulate current environmental activities, but seeks to remediate past environmental harm,[315] the decision may have the effect of encouraging CERCLA-concerned parent corporations to adopt a future "hands off" approach with respect to facilities of subsidiaries.[316] Under *Bestfoods*, a contrary approach risks the severe penalty of CERCLA liability.[317]

The possibility of CERCLA liability is a strong incentive for a parent corporation to distance itself from environmental activities at a subsidiary's facility. The *Bestfoods* operator standard has the potential to allow a parent corporation to reap the profits contributed by a subsidiary without accepting the associated liabilities.[318] Indeed, the extreme logical consequence of this standard envisions parent corporations setting up subsidiaries with irresponsible environmental policies for the sole purpose of dodging environmental liability. While this position may nonetheless be financially risky given the possibility of owner liability attaching in this situation, it is not altogether unthinkable. Additionally, this standard may encourage parent corporations to unload existing subsidiaries posing a future threat of CERCLA liability.[319] A parental corporation "hands-off" approach could result in less responsible environmental compliance and more environmental contamination, a result clearly contrary to CERCLA's goals and the public health and safety.

The notion that parental "hands-off" could result in less responsible environmental activity is premised on the idea that parent corporations are more capable than are subsidiaries to ensure environmental compliance and prevent environmental contamination or pay for the remediation of a polluted site. As discussed below, this is not always the case. However, by definition, parent corporations often have more

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314. *See* Silecchia, *supra* note 6, at 177-78 (footnotes omitted).

315. *See supra* note 28 and accompanying text.

316. *See* Silecchia, *supra* note 6, at 178 (concluding that "[t]his actual control test, however, might have a significant impact on parental willingness to become involved in the operation of their subsidiaries' facilities.").

317. *See id.* ("Currently, the rule . . . penalizes parents who operate facilities at which contamination occurs . . . the decision gives . . . strong incentives to disassociate themselves from the activities of their subsidiaries.") (footnote omitted).

318. See Aronovsky & Fuller, *supra* note 9, at 463 for a pre-*Bestfoods* discussion of how a proposed standard of parental liability would not allow a parent corporation to enjoy the profits of a subsidiary, while at the same time, hide behind the protection of corporate limited liability.

319. *See* Silecchia, *supra* note 6, at 180-81; Farmer, *supra* note 65, at 804 ("[P]olicy-makers should reject adopting an unlimited parent corporation liability approach because of the potential for negative effects on the American economy and corporate structure. One particularly compelling reason is the likelihood that industries with potentially high environmental liabilities would splinter into smaller, less financially responsible firms.") (footnotes omitted); Todd W. Rallison, Comment, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA*, 1987 UTAH L. REV. 585, 620 ("[E]xpanding CERCLA's strict liability to shareholders may actually encourage some shareholders to act irresponsibly. For example, a corporate shareholder may well find that divestment, an impossibility for some corporations, is the only way it can fully insure against liability.").

resources,[320] thus more ability to prevent environmental contamination through aggressive programs of environmental compliance. Moreover, resources spur the development of new methods and technology for reducing, or at least decreasing, the toxicity and generation of wastes.[321]

Even if in some cases a parent corporation may be theoretically encouraged to distance itself from the environmental activities of a subsidiary's facility, it is naïve to assume a world of "fly-by-night" facilities set up for the purpose of escaping CERCLA liability.[322] The reality is that parent corporations often have important reasons for involving themselves in the environmental practices of their subsidiaries' facilities. One commentator has identified several reasons relevant to this discussion.[323] First, a parent corporation has a financial self-interest in having its subsidiary avoid unsound environmental practices that have the potential to bankrupt the subsidiary. Not only would a parent be robbed of its investment in the subsidiary, but it would also lose the benefit of future earnings generated by the subsidiary. Second, parent corporations and their subsidiaries are often closely related in the public view. An environmental "black-eye" upon a subsidiary may also be felt by the parent in the form of public relations costs, backlash from investors, and negative publicity. Finally, a number of subsidiaries have the resources necessary to manage and maintain an effective environmental compliance program. While this will be true more often in larger and wealthier corporate families, it nevertheless ameliorates the potential for environmental indifference by parent corporations.

At first glance, *Bestfoods* appears to provide a powerful incentive for a parent corporation to disassociate itself from its subsidiary's facilities. Further analysis, however, suggests that there exist similarly powerful incentives to remain involved.

VI. CONCLUSION

The *Bestfoods* decision assisted in clarifying the issue of parent corporation liability under CERCLA. The Supreme Court adhered to the statutory language and goals in delineating two distinct theories of liability under CERCLA's "owner or operator" provision. Moreover, the Court accomplished this end while respecting traditional notions of corporate liability.

The reception of the Court's interpretation of CERCLA's "owner or operator" provision has been mixed. The decision has been characterized as striking a balance between two different but competing interests.[324] It also has been described as favorable to the government enforcement agencies[325] and inversely, as protective of

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320. For example, the Bunker Hill (subsidiary) received $1100 in capital, while Gulf (parent corporation) earned $27,000,000 in dividends. *See* Idaho v. Bunker Hill Corp., 635 F. Supp. 665, 672 (D. Idaho 1986).

321. *See* Silecchia, *supra* note 6, at 183 (discussing that an expanded rule of parental liability provides incentives to reduce the generation or the hazards of wastes).

322. *See id.* at 181 ("It would be over-simplistic to assume that *Bestfoods'* expansion of liability to parents operating subsidiaries' facilities will, automatically or necessarily, lead to parental irresponsibility or raise the specter of under-funded, irresponsible subsidiaries stumbling blindly from one environmental crisis to another.").

323. *See id.* at 181-84 for a general discussion of the reasons for parental corporation concern.

324. *See id.* at 171.

325. *See* Linda Greenhouse, RIGHT OF STATES TO EXTRADITE FUGITIVES IS UPHELD, N.Y. TIMES, June 9, 1998, at A18 (characterizing *Bestfoods* as "a victory for Federal environmental enforcement"); *High Court Holds*

the corporate structure.[326] The true implications of the Court's decision on parent corporation liability, and the accompanying ease or difficulty in establishing liability, remain to be seen as lower courts apply the *Bestfoods* standard.[327]

Yet, several issues left unresolved by the Court are troubling. Lower courts are left to decide whether to apply a federal or state law veil-piercing standard for the purpose of determining indirect liability. Even more troubling, lower courts are left to define what types of action will result in operator liability.[328] The room left here for a variety of interpretations may lead to a state of affairs over the fine points of operator liability similar to pre-*Bestfoods* law. Also troubling is the seeming lack of incentive the decision offers to parent corporations to become involved with the environmental activities of its subsidiaries. The gap, however, may possibly be closed by built-in incentives that exist for parent corporations to ensure environmental responsibility at the facilities of a subsidiary.

Perhaps the criticisms of CERCLA proffered by different courts,[329] combined with a general level of frustration felt by corporations and governmental enforcers will encourage Congress to address problems left unanswered by *Bestfoods*.[330] Fundamental decision-making regarding the allocation of liability under CERCLA demands more than judicial determinations of legal issues.[331] Allocation of responsibility under CERCLA requires consideration of practical and financial issues, inquiry into facts and empirical studies, and an evaluation of public policy.[332] Congress, rather than the courts, is best suited to making these important determinations.[333]

Parent Liable for Unit's Pollution, ENGINEERING NEWS-REC., June 15, 1998, at 7 (reporting that Lois J. Schiffer, Assistant Attorney General for Environment, "praised the decision").

326. *See* Sillecchia, *supra* note 6, at n. 299 (citing Laurie Asseo, *U.S. Actions Under Superfund Limited*, LEGAL INTELLIGENCER, June 9, 1998, at 7 ("declaring that through *Bestfoods*, . . . '[t]he Supreme Court yesterday made it harder for the federal government to force companies to pay for cleaning up hazardous waste disposed at sites owned by subsidiaries'") & Kenneth J. Warren, *U.S. Supreme Court Clarifies Superfund Liability for Parent Corp. in Bestfoods*, LEGAL INTELLIGENCER, July 16, 1998, at 7 ("The court's specific focus on control over environmental activities at the facility . . . will lead many parent corporations to breathe a sign of relief. Bestfoods may result in noticeable limitations on CERCLA's reach over parent corporations.")).

327. *See, e.g.*, Browning-Ferris Indus. of Illinois Inc. v. Ter Maat, 13 F. Supp.2d 756 (N.D. Ill. 1998) (applying *Bestfoods'* operator analysis to transporter); United States v. Township of Brighton, 153 F.3d 307 (6th Cir. 1998) (reasoning that *Bestfoods'* operator analysis applies to government entity as well as parent corporation); Carter-Jones Lumber Co. v. Dixie Distrib. Co., 166 F.3d 840, 846 (6th Cir. 1999) (finding that *Bestfoods'* operator analysis "must logically" apply to cases involving arranger liability); U.S. v. Days Inns of America, Inc., 151 F.3d 822, (8th Cir. 1998) (recognizing *Bestfoods'* operator standard in action brought under Americans With Disabilities Act).

328. This is not a reflection upon the ability of the courts, but rather on the potential that exists within the judicial system for disparate results.

329. *See, e.g.*, United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (CERCLA's legislative history is "unusually riddled by self-serving and contradictory statements." The court further states that CERCLA "leaves much to be desired from a syntactical standpoint."); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) ("The structure of [CERCLA] section 107(a), like so much of this hastily patched together compromise Act, is not a model of statutory clarity."); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.").

330. *See* Mounteer & Myers, supra note 254 ("Congress should not let pass the opportunity to provide clearer guidance that can curtail this type of wasteful litigation.").

331. *See* Silecchia, *supra* note 6, at 173-74.

332. *See id.*

333. *See* Mounteer & Myers, supra note 254 ("[T]his is not an area in which Congress should acquiesce to

Notwithstanding Congressional action, courts will continue to grapple with the issues surrounding CERCLA liability. As one commentator has said, "it is doubtful that the Bestfoods case will be the final word . . . [t]here is simply too much emotion and commotion surrounding environmental cases for courts to permit deep-pocketed companies to walk away from a polluted site."[334]

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judicial interpretations.").

334. *See* Sillecchia, *supra* note 6, at n. 299 (citing Sean Connaughton, *Ruling May Keep Environmental Suits from Scaling the Great Corporate Wall*, J. COM. July 8, 1998, at 2B (stating that *Bestfoods* moves toward restoring the protection inherent in the corporate structure)).