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The Impact of United States v. Bestfoods on "Owner or Operator" Liability Under CERCLA

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NOTE

The Impact of *United States v. Bestfoods* on "Owner or Operator" Liability Under CERCLA

I. INTRODUCTION

A. The Recent Case of United States v. Bestfoods

In 1998, the United States Supreme Court decided *United States v. Bestfoods*.[1] The decision attempted to bring uniformity to the standard for imposing CERCLA liability on a parent corporation for the release of hazardous substances by a subsidiary corporation. In *Bestfoods*, the Court held that the correct standard for determining direct liability under the "operator" standard was "not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary."[2] This casenote summarizes the tests previously used in the circuits, the test created in *Bestfoods*, and the implications of the Supreme Court's new approach.

B. Enactment of CERCLA

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a means of dealing with the clean-up of hazardous waste disposal sites.[3] Unlike prior environmental legislation, CERCLA is not regulatory; it is remedial, requiring those parties responsible for the hazardous waste releases to pay for the clean-up.[4]

CERCLA liability is extensive. In order to establish liability under CERCLA, the government must prove that: the contaminated site is a facility; there was a release or threatened release of a hazardous substance; response costs have been incurred; and that the responsible party is one of the "covered persons" listed in Section 107(a).[5] "Facility," "release," and "hazardous substance" are all defined broadly. "Facility" is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[6] "Release" is defined to include any means by which a hazardous substance is released into surface or subsurface

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1. 118 S. Ct. 1876 (1998).
2. *Id.* at 1887.
3. *See* Nurad Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 841 (4th Cir. 1992).
4. *See* United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985).
5. *See* Kamie Brown, *Parent Corporation Liability for Subsidiary Violations Under §107 of CERCLA: Responding to* United States v. Cordova Chem. Co., 1998 B.Y.U. L. Rev. 265, 268 (1998).
6. 42 U.S.C. § 9601(9) (1995).

water, land, or ambient air.[7] "Hazardous substance" includes a comprehensive list of substances defined as hazardous or toxic under various other environmental statutes and those that the EPA has specifically identified under CERCLA.[8]

The "covered persons," commonly called potentially responsible parties, include the owner or operator of a facility, the owner or operator of a facility at a time when hazardous substances were disposed, any one who arranges for disposal or treatment of hazardous substances, and any transporter who selects a disposal facility.[9]

C. Owner or Operator Language of Section 107(a)(2)

Courts have wrestled with the question of who qualifies as an "owner or operator" since CERCLA was enacted. Nowhere is this question more frequently asked than in the context of parent and subsidiary corporations. Is a parent corporation an "owner or operator" when its subsidiary is subject to CERCLA liability?

This question arises because of the lack of precision in the drafting of CERCLA. The statute defines "owner or operator" as "any person owning or operating such facility."[10] This circular definition gives no insight as to whether Congress intended to include parent corporations when imposing liability on an "owner or operator." An examination of the legislative history of CERCLA also fails to provide any insight. The statute was hurriedly enacted, and no evidence exists as to whether Congress intended liability to extend to parent corporations.[11]

Certainly Congress did not intend CERCLA to displace all of the established principles of corporate law. According to corporate law doctrine, a parent corporation is not liable for the acts of its subsidiary.[12] Indeed, the whole of corporate law is based on the premise of limited liability. On the other hand, Congress also intended CERCLA to be far-reaching, evidenced by the statute's broad definitions.[13] Therefore, the question must be answered in light of the two competing premises—corporate limited liability and CERCLA's expansive liability.

D. Definition Left to Judicial Determination

Lacking congressional directive, the question of a parent corporation's liability for the acts of its subsidiary is left to judicial determination. Courts

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7. *Id.* § 9601(22).
8. *Id.* § 9601(14).
9. *Id.* § 9607(a).
10. *Id.* § 9601(20)(A)(ii).
11. *See* United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997) (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1039-42 (2d Cir. 1985)).
12. The doctrine of corporate veil piercing is an exception to this principle.
13. *See* United States v. Kayser-Roth Corp., Inc., 910 F.2d 24, 26 (1st Cir. 1990).

have tended to read "owner or operator" disjunctively and imposed liability if they find that the parent corporation is either "an owner" or "an operator."[14] Under this bifurcated test, courts applied the corporate law theory of veil piercing to determine whether a parent corporation qualified as "an owner."[15] Then, if they did not find owner liability, they would determine if the party was liable as an operator. On this second question, the lower federal courts failed to reach a consensus and the United States Supreme Court resolved the conflict in *United States v. Bestfoods*.[16] But before addressing the decision in *Bestfoods*, it is necessary to look at prior jurisprudence and consider the different tests used in the circuits.

II. PRIOR JURISPRUDENCE

A. The Different Tests

The circuits articulate three different tests for resolving the operator issue: the control test, the actual control test, and the *Joslyn* test. The first two tests define operator broadly and focus on the relationship between the parent and its subsidiary. The third test narrowly defines operator so as to write it almost completely out of the statute.

B. Focusing on Operator: A Parent Corporation's Control of Its Subsidiary

1. Authority-to-Control Test

Some circuits adopted the "authority to control" test to determine operator liability. Under this test, an entity is deemed to be an operator for purposes of liability if it *could* have controlled the hazardous waste activities of its subsidiary.[17]. Predictably, the authority to control test has been criticized as "unduly broad" and "overinclusive."[18]

One of the first cases to deal with operator liability, *United States v. Northeastern Pharmaceutical & Chemical Co.*,[19] involved an individual who was an officer and shareholder of a corporation, rather than a parent corporation. The district court did not bifurcate the analysis into owner liability and operator liability and it made no veil piercing analysis but instead, considered both owner and operator under an operator test. It defined "owner and operator" in terms

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14. *Id.* at 26.

15. The courts have not, however agreed as to whether they should apply federal law or state law to make the determination. *See* United States v. Bestfoods, 118 S. Ct. 1876, 1877 n.9 (1998).

16. 118 S. Ct. 1876 (1998).

17. *See infra* text accompanying note 24.

18. *See* Erika Birg, *Redefining "Owner or Operator" under CERCLA to Preserve Traditional Notions of Corporate Law*, 43 Emory L.J. 771, 810 (1984).

19. 810 F.2d 726 (8th Cir. 1985).

of capacity to control, rather than the exercise of actual control. Many courts faced with the question of parent corporation liability as owners or operators use the NEPACCO I[20] court's analysis[21] even though the Eighth Circuit reversed the district court's holding on the owner or operator liability issue. The court did not comment on the lower court's substantive reasoning because it found the specific application of the statutory language incorrect.[22] Specifically, it reversed the trial court because neither the officer/shareholder nor the corporation owned or operated the "facility."[23]

Idaho v. Bunker Hill[24] is the only case to apply the authority-to-control test to a parent corporation. In *Bunker Hill*, the state brought an action against a parent corporation (Gulf) and its subsidiary (Bunker Hill), alleging violations of CERCLA. Gulf contended that Bunker Hill owned and operated the facility in question. The court failed to bifurcate "owner or operator" and analyzed "owner or operator" as one test, the operator test.[25] It relied on *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*[26] which held that anyone who owns an interest in a facility and is actively participating in its management can be held liable.[27] Based on the holding of *Northeastern Pharmaceutical*, the court defined "owner-operator" as anyone who "has power to direct the activities of persons who control the mechanisms causing the pollution."[28] The court noted that Gulf's approval was necessary before $500.00 could be spent on pollution matters, Gulf obtained weekly reports of the day-to-day aspects of Bunker Hill's operations, and Bunker Hill's net worth was only $1100.00 after it paid $27 million to Gulf in dividends.[29] Based on these facts, the court concluded Gulf had the capacity to control disposal and releases and could be held liable as an "owner or operator".[30]

Nurad v. William E. Hooper & Sons Co.[31] is a Fourth Circuit case that discusses the authority to control test. Although *Nurad* did not involve a parent-subsidiary relationship, it dealt with the question of who qualifies as an "owner or operator". The current owner of the property (Nurad) brought an action against previous tenants for reimbursement of costs incurred in removing

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20. NEPACCO I is the anacronim for the district court proceedings in *Northeastern*.

21. *See* Lynda Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 Wash. U. L.Q. 223, 240 (1994).

22. *Id.* at 239.

23. *Id.*

24. 635 F. Supp. 665 (D. Idaho 1986).

25. Based on the facts about Gulf's control, it is highly probable that if the court would have considered the owner test, it would have found grounds to pierce the corporate veil.

26. 579 F. Supp. 823 (W.D. Mo. 1984) (dealt with the liability of a vice-president and major stockholder as an owner or operator).

27. *Id.*

28. Idaho v. Bunker Hill, 635 F. Supp. 665, 672 (D. Idaho 1986).

29. *Id.*

30. *Id.*

31. 966 F.2d 837 (4th Cir. 1992).

underground storage tanks and their hazardous contents from the property. The court focused on the term "operator" and held that the correct standard was whether the defendants had the authority to control the facility.[32] The court held that the tenants were not operators because they "lacked authority to control the operations or decisions involving the disposal of hazardous substances at the site . . . ."[33] While the court cited *Bunker Hill*,[34] it applied the test to exclude liability, not to impose it.

The Ninth Circuit adopted the authority-to-control test in *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*[35] There, the city sued a prior owner of property to recover the costs of removing contaminated soil from the property. The prior owner filed a third party claim against the excavator, alleging that the excavator exacerbated the extent of the contamination by spreading contaminated soil over the uncontaminated areas of the property. The excavator argued that he did not qualify as an operator for purposes of liability. The court rejected his argument and, citing *Nurad*, held that operator liability attaches "if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment."[36] The court concluded that the excavator's operations on the property tended to show that he had sufficient control over the particular phase of development to be an operator.

2. Actual Control Test

Other circuits have rejected the authority-to-control test. These circuits refuse to impose liability merely because a parent has the authority to control its subsidiary, holding that a parent corporation must exhibit *actual* control over its subsidiary before operator liability attaches. This approach is known as the actual control test.

The First Circuit adopted the control test in *United States v. Kayser-Roth Corp.*[37] The United States government brought a CERCLA claim against Kayser-Roth, alleging that the corporation was responsible for the cleanup costs incurred by the EPA at a mill owned by a subsidiary, Stamina Mill, Inc. Kayser-Roth claimed that it could not as a matter of law be held liable as an operator or as an owner. Without discussing the owner prong of the statute, the court began its analysis by considering whether the definition of operator allowed a parent corporation to be held liable as an operator of a subsidiary corporation.[38] After concluding that it did, the court addressed whether Kayser-Roth was an

32. *Id.* at 842.
33. *Id.*
34. *Id.*
35. 976 F.2d 1338 (9th Cir. 1992).
36. *Id.* at 1341.
37. 910 F.2d 24 (1st Cir. 1990).
38. *Id.* at 26-27.

operator. The court rejected the authority-to-control test because, "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership."[39] Instead, the court held that "[a]t a minimum [liability] requires *active* involvement in the activities of the subsidiary."[40] It then examined the degree of control Kayser-Roth had over Stamina Mills to determine if the requisite "active involvement" was present. Kayser-Roth had monetary control over Stamina Mills; it restricted Stamina Mill's financial budget; it directed that environmental matters be funded through Kayser-Roth; it had to approve buying or selling of real estate by Stamina Mills; and it placed its own personnel in director and officer positions at Stamina Mills.[41] These facts led to the conclusion that Kayser-Roth was an operator. In an important footnote, the court said that control decisions about hazardous waste were indicative of the type of control necessary but it alone was not enough; other indicia of pervasive control must exist.[42]

In the Third Circuit case, *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*,[43] the plaintiff discovered that a lot adjacent to the groundwater production which had formerly been a lead smelting plant was contaminating the water wells. The Authority brought a CERCLA claim against the company that had owned the lead plant, Tonolli PA, and its parent corporation, Tonolli Canada. Tonolli Canada contended that it was not an "owner or operator" for purposes of CERCLA liability. The court began its analysis by noting that "owner" and "operator" denote two different concepts and require two different standards.[44] The court then addressed the operator question. It adopted the actual control test because it considered the authority-to-control test too broad. The actual control standard "appears to strike the appropriate middle ground, balancing the benefits of limited liability with CERCLA's remedial purposes."[45]

One factor to consider when determining if a corporation has exerted sufficient control to warrant imposition of operator liability is the extent of the parent corporation's day-to-day involvement in the subsidiary's operations and policy-making decisions.[46] Analyzing the case before it, the lower court recognized that the corporations' lead smelting processes were not dependent on one another, that each owned its own equipment and procured its own raw materials, and that all transactions between the two corporations were on an arm's length basis.[47] The appellate court, however, focused on the facts that Tonolli Canada was the sole shareholder of Tonolli PA and that the two

39. *Id.* at 27.
40. *Id.* (emphasis added).
41. *Id.*
42. *Id.* at 24 and n.8.
43. 4 F.3d 1209 (3d Cir. 1993).
44. *Id.* at 1220.
45. *Id.*
46. *Id.* at 1222.
47. *Id.* at 1223.

companies shared a president and chief financial officer. Although shared officers without more are not enough to impute liability, that fact did raise questions. Moreover, Tonolli Canada's vice-president of manufacturing occasionally served as Tonolli PA's plant manager. The court said that his role in environmental decisions at the Tonolli site could be significant.[48] Ultimately, the court remanded the case for the district court to determine if Tonolli Canada exerted sufficient control over Tonolli PA based on the role of several Tonolli Canada officers.

The Second Circuit also adopted the actual control test. In *Shiavone v. Pearce*,[49] the owner of contaminated property brought suit to recover cleanup costs from a corporation whose wholly owned subsidiary had operated the facility. The court began its analysis of "owner or operator" by noting that liability may be imposed directly (under the "operator" standard) or indirectly (by piercing the corporate veil under the "owner" standard).[50] In discussing the propriety of imposing "operator" liability on a parent corporation, the court relied on both legislative intent and the statutory language. It stated that proof of parent operator liability "looks to the independent actions of the parent corporation, evidenced through its control over the polluting site."[51] It is important to note that the court claimed to subscribe to the views in *Kayser-Roth*, but the test in *Kayser-Roth* was whether the parent corporation had actual control over the subsidiary,[52] while the test employed in *Shiavone* was whether the parent corporation had control over the polluting site.

C. Focusing on Owner: Limiting Liability to Piercing the Corporate Veil

Some courts have taken a completely different approach. They have basically read out the "operator" part of the statute and focused on the "owner" standard and the doctrine of veil piercing. These courts read "operator" very narrowly and only apply it in very limited circumstances.

In *Joslyn Manufacturing Co. v. T.L. James & Co., Inc.*,[53] a prior owner (Joslyn) sued its predecessor's parent corporation (T.L. James), seeking contribution for cleanup costs. The district court granted T.L. James' motion for summary judgment, concluding that CERCLA was not intended to be an exception to the general rule in corporation law of limited liability.[54] Josyln appealed. The Fifth Circuit began its analysis by looking at the definition of "owner or operator" and acknowledging that several courts had extended liability

48. *Id.* at 1224.
49. 79 F.3d 248 (2d Cir. 1996).
50. *Id.* at 252.
51. *Id.* at 254 (citations and footnote omitted).
52. *See supra* text accompanying notes 37-42.
53. 893 F.2d 80 (5th Cir. 1990).
54. *Id.* at 81-82.

to parent corporations.[55] The court, however, refused to follow the other circuits, reasoning that "CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law."[56] The court said that if Congress wanted to extend liability to parent corporations, it was free to do so at any time. Also, of importance to the court was the fact that Congress had in fact adopted a "control" test in the next part of the statute that defined "owner or operator" for facilities conveyed to the state or local government.[57] That definition reads, "[A]ny person who owned, operated or *otherwise controlled* activities at such facility."[58] This "control" language is absent from the general definition of "owner or operator," suggesting that Congress did not intend mere control to be sufficient to impose liability on a previous owner or operator of an onshore facility.[59] The court went on to consider piercing the corporate veil and asked the question whether the corporate entity was a sham used to perpetrate a fraud or avoid personal liability. Concluding that it was not, the court affirmed the district court's holding and refused to extend liability to the parent corporation.[60]

In *United States v. Cordova Chemical Co.*,[61] the United States filed suit under CERCLA to recover past and future cleanup costs of soil, surface water, and ground waters surrounding a dormant chemical manufacturing plant. Among those sued were two parent corporations whose subsidiaries had owned the chemical plant. The parents contended that they were not "owners or operators" for the purpose of imposing liability. The court began its analysis by considering the enactment and purposes of CERCLA. It said that the statute should be construed so that those responsible for the environmental problems were responsible for cleanup but that "the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue."[62] It criticized the district court's application of the "control" test as an undefined "new, middle ground" and advocated what it considered a more predictable test, the corporate veil piercing doctrine.[63] It envisioned use of the "operator" standard in situations where "a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually

55. *Id.*
56. *Id.*
57. *Id.* at 83.
58. *Id.* (quoting 42 U.S.C. § 9601(20)(A)(iii) (1995 and Supp. 1998) (emphasis in original) (alteration in original)).
59. *See* the definition of "owner or operator" given in 42 U.S.C. § 9601(20)(A)(ii) (1995 and Supp. 1998).
60. *Joslyn*, 893 F.2d at 83-84.
61. 113 F.3d 572 (6th Cir. 1997), *vacated*, 118 S. Ct. 1876 (1998).
62. *Cordova Chemical*, 113 F.3d at 578.
63. *Id.* at 579-80.

operate the facility alongside its subsidiary."[64] The court then decided that the parent corporation's involvement did not warrant veil piercing.[65]

III. FACTS OF *UNITED STATES V. BESTFOODS*[66]

The United States Supreme Court granted certiorari in *Bestfoods*[67] to settle the dispute between the circuits as to what standard to apply to determine when a parent corporation is an operator for purposes of CERCLA liability. In 1957, a chemical manufacturing company, Ott Chemicals (Ott I) opened a plant near Muskegon, Michigan. It both intentionally and unintentionally dumped hazardous waste that polluted the soil and ground water at the site.[68] In 1965, CPC International, Inc. contracted to buy the plant. CPC formed a wholly owned subsidiary which it named Ott Chemical Co. (Ott II). Ott II continued chemical manufacturing at the plant and continued to dump hazardous waste.[69] In 1972, CPC sold Ott II to Story Chemical Co., which operated the plant until Story's bankruptcy in 1977. Eventually, the Michigan Department of Natural Resources investigated the site and discovered the extensive environmental damage. It sought a buyer for the property who would contribute to the cleanup costs. Aerojet General Corporation arranged to acquire the property from Story Chemical's bankruptcy trustee later that same year. It formed a wholly owned California subsidiary, Cordova Chemical Company (Cordova CA) to purchase the property. Cordova CA, in turn, created a wholly owned Michigan subsidiary, Cordova Chemical Company of Michigan (Cordova MI) which manufactured chemicals at the site until 1986.[70]

By 1981, the EPA had begun investigating and cleaning up the site. It spent tens of millions of dollars in the process and then brought suit under Section 107 of CERCLA to recover some of the costs.[71] It sued Arnold Ott (the original shareholder and president of Ott I),[72] CPC, Aerojet, Cordova CA, and Cordova MI.[73] The parties stipulated that the Muskegon plant was a "facility" within the meaning of 42 U.S.C. § 9601(9), that there had been a "release" of a "hazardous substance," and that the United States had incurred reimbursable response costs in cleaning up the site. The remaining question was whether CPC and Aerojet,

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64. *Id.* at 579.
65. *Id.* at 581.
66. 118 S. Ct. 1876 (1998).
67. The company changed its name from Cordova Chemical to "Bestfoods" before certiorari was granted.
68. *Bestfoods*, 118 S. Ct. at 1882.
69. *Id.*
70. *See id.*
71. *See id.* at 1882-83.
72. *See id.* at 1882.
73. *See id.* at 1883.

as the parent corporations of Ott II and the Cordova Companies, had "owned or operated" the facility with the meaning of Section 107(a)(2).[74]

The district court held that each of the parent corporations could be held liable either as an operator if it operated the facility, or as an owner through the doctrine of "piercing the corporate veil." It applied the actual control test to determine operator liability. "[A] parent corporation is directly liable . . . as an operator only when it has exerted influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste."[75] Under this standard, the district court held that both CPC and Aerojet were liable as operators.[76] The Sixth Circuit Court of Appeals reversed the decision in part and applied a more stringent test for determining operator liability.[77]

The Supreme Court accepted the principle that "owner" and "operator" were distinct terms and that each had its own test. The Court agreed with the Sixth Circuit that "a participation-and-control test looking to the parent's supervision over the subsidiary, especially one that assumes that dual officers always act on behalf of the parent, cannot be used to identify [the] operation of a facility resulting in direct parental liability."[78] However, the Court felt that the Sixth Circuit had unduly limited "operator" when it confined it to situations of direct parental operation due to exclusive or joint ventures.[79] In a unanimous opinion, the Court held that the correct question for determining direct liability under the operator standard was "*not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary.*"[80]

IV. ANALYSIS

A. Ownership Liability—A Look at General Corporate Law

The Court began its analysis by looking at the general principals of corporate law. It noted that traditionally a parent is not responsible for the acts of its subsidiaries and that hornbook law directs that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary."[81] "Control" includes things such as

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74. *See id.*

75. *Id.* (quoting CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 573 (W.D. Mich. 1991)).

76. *See Bestfoods*, 118 S. Ct. at 1883.

77. *See supra* text accompanying notes 61-64, discussing the court of appeals decision, United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997).

78. *Bestfoods*, 118 S. Ct. at 1889.

79. *Id.*

80. *Id.* at 1887 (citation omitted) (emphasis added).

81. *Id.* at 1884 (citation omitted).

election of directors, the making of by-laws, and other acts incident to the status of stockholders. The Court then discussed the doctrine of corporate veil piercing and found it is appropriate to pierce the veil when "the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf."[82] Nothing in CERCLA indicates that these basic principles of corporate law were to be replaced and absent some directive in the statute, the Court could not abrogate these principals.[83] Only when the corporate veil may be pierced, may a parent corporation be held indirectly liable as an owner.[84]

B. Operator Liability

In addressing the question of liability based on operation, the court found that a difference existed between operator liability, which is direct liability for one's own actions, and owner liability, which is indirect liability based on veil piercing. "The fact that a corporate subsidiary happens to own a polluting facility operated by its parent does nothing . . . to displace the rule that the parent 'corporation is [itself] responsible for the wrongs committed by its agents in the course of its business.'"[85] The court then addressed the question of what constitutes direct parental operation.

1. Definition of "Operator"

The Court began its analysis of the operator standard with the statutory definition of "operator" as "'any person . . . operating' the facility."[86] Finding the statutory definition unhelpful, the Court turned to the ordinary meaning of the word, which is "to control the functioning of; run."[87] The Court concluded that under CERCLA an operator is "simply someone who directs the workings of, manages, or conducts the affairs of a facility."[88] The "operator must manage, direct, or conduct operations specifically related to pollution" (i.e. operations having to do with disposal or leakage of hazardous waste and compliance with environmental regulations).[89]

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82. *Id.* at 1885.

83. *Id.*

84. *See id.* at 1885-86. In a footnote, the Court recognized the lack of uniformity as to whether the courts should apply federal veil piercing law or state veil piercing law. But because the issue was not before the Court, it declined to address it. *Id.* at 1885 n.9.

85. *Id.* at 1886 (citation omitted).

86. *Id.* at 1887 (quoting 42 U.S.C. § 9601(20)(A)(ii) (1995 and Supp. 1998)).

87. *Bestfoods*, 118 S. Ct. at 1887 (quoting the American Heritage Dictionary 1268 (3d ed. 1992)).

88. *Bestfoods*, 118 S. Ct. at 1887.

89. *Id.*

2. Actual Control Test

With this definition in hand, the Court then considered the actual control test and found that it incorrectly fused direct and indirect liability.[90] With the actual control test, the focus of the inquiry of owner liability and operator liability is the same; they both focus on the relationship between the two corporations.[91] However, the test for operator liability should not focus on the relationship between the parent and its subsidiary; instead, it should focus on the relationship between the parent and the actual *facility* that is causing the pollution.[92] "Control of the subsidiary, if extensive enough, gives rise to indirect liability under [veil] piercing doctrine, not direct liability under the statutory language."[93] Under this analysis, the district court was wrong to focus on CPC's active participation and control over Ott II's board of directors; the focus should have been CPC's control over the chemical manufacturing plant itself.

3. Dual Officers

Next, the Court addressed the district court's analysis of the dual officers and directors at CPC and Ott II.[94] The district court had emphasized that CPC placed its own officials on Ott II's board of directors and that these directors made the day-to-day operating policies of the facility.[95] The United States Supreme Court stated that this type of control was entirely proper and directors of a parent corporation often served as directors of a subsidiary. This degree of control is not enough to expose the parent corporation to liability for acts of its subsidiary. The Court noted that it was a well-established principle that directors and officers holding dual positions "change hats" to represent the two corporations separately.[96] It said that the government would have to rebut this presumption and show that the officers and directors were acting in their capacities as CPC officers and directors, and not as Ott II officers and directors, when they committed the acts.[97] The Court concluded its discussion of the district court's application of the actual control test by saying that the actual control test and its focus on dual officers would leave the possibility of indirect liability under veil piercing a purely academic question. "There would in essence be a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability."[98]

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90. *Id.*
91. *See id.*
92. *See id.* at 1888.
93. *Id.* at 1887 (citation omitted).
94. *Id.* at 1888.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1889.

4. Limitation of "Operator" Liability to Joint Ventures

Although the Court agreed with the Sixth Circuit's analysis of the actual control test, it found that the appellate court had "stopped short" when it confined its examples of direct liability to exclusive or joint ventures.[99] The Court determined that there are other instances where the dual officers and directors could go beyond the norms of parental influence.[100] It also suggested another possibility—when an agent of the parent that has no position in the subsidiary corporation manages or directs activities at the facility. Activities consistent with a parent corporation's investor status such as monitoring performance, supervision of finances, and capital budget decisions should not give rise to direct liability, but when actions directed at the facility by an agent of the parent are "eccentric under accepted norms of parental oversight of a subsidiary's facility," imposing liability may be appropriate.[101] Because the Sixth Circuit's analysis was very similar to that of the Fifth Circuit in *Joslyn*, the Court effectively overruled *Joslyn* and its narrow reading of "operator."

5. Application to the Facts of the Case

Some evidence existed that some of CPC's activities at the Muskegon plant went beyond the accepted norms.[102] CPC's governmental and environmental affairs director (Williams) had no position at Ott II but some facts suggested that he played a part in dealing with toxic risks emanating from operation of the plant.[103] The district court found that he "actively participated in and exerted control over a variety of Ott II environmental matters" and "issued directives regarding Ott II's responses to regulatory inquiries."[104] Based on this information, the Court remanded so that the district court could determine, based on its analysis, Williams' role and the role of any other CPC agent who might have had a part in operating the Muskegon facility.[105]

V. UNANSWERED QUESTIONS AND FUTURE COMPLICATIONS

A. The Authority to Control Test

The Court never explicitly addressed the authority-to-control test adopted in some circuits as a means for determining operator liability. This could be

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99. *Id.*
100. *See id.*
101. *Id.*
102. *See id.*
103. *See id.* at 1890.
104. *Id.* (quoting CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 575 (W.D. Mich. 1991)).
105. *Bestfoods*, 118 S. Ct. at 1890.

because the district court in *Bestfoods* had adopted the actual control test and never discussed the authority to control test. Another possibility is that the Court considered the authority to control test in the parent corporation context too tenuous because only one court, a district court, had used it in that context.

The Court's criticism of the actual control test focused on its fusion of direct and indirect liability.[106] Courts which had applied the actual control test had asked whether the parent corporation was actively involved in the activities of its subsidiary, rather than whether it was involved in the activities of the facility.[107] But the test applied by courts adopting the authority-to-control test does not focus on the activities directed towards the subsidiary. Rather it focuses on the "mechanisms causing pollution," "decisions . . . at the site" and "cause of the contamination."[108] For example, in *Nurad, Inc. v. William E. Hooper & Sons Co.*,[109] the court focused on "authority to control the operations or decisions involving the disposal of hazardous substances . . . ."[110] Therefore, arguably, the authority-to-control test does not suffer from the same flaws as the actual control test. It is still doubtful, however, that the authority-to-control test would survive under the Court's analysis in *Bestfoods* because the actual control test was adopted as a more restrictive alternative to the authority-to-control test. Moreover, the definition of "operator" espoused by the Court excludes the authority-to-control test.[111] The Court defined "operator" as "someone who directs the workings of, manages, or conducts the affairs of a facility."[112] This definition connotes actions, not just the power to act. Therefore, the mere power *to act* would not be sufficient to invoke operator liability.

B. Implications for Parent Corporations and the Focus of Future Litigation

Limited liability is a hallmark of corporate law. It is expected that a majority shareholder, such as a parent corporation, will exhibit some control over its subsidiary. Under the actual control test, a thin line exists between what constitutes accepted amounts of control and what qualifies the parent corporation as an operator for purposes of CERCLA liability. As a result, courts almost always found that a parent corporation qualified as an an operator under the actual control test. The Court was correct when it criticized the test for fusing direct and indirect liability. Under the old analysis, a continuum of control existed with veil piercing at the far end and the actual control test a little to the left of it. The same type of activities that could result in veil piercing could result in a finding of actual control with just a slight variation of degree. Now,

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106. *See supra* text accompanying notes 90 and 91.
107. *See id.*
108. *See supra* text accompanying notes 18-36, discussing the authority-to-control test.
109. 966 F.2d 837 (4th Cir. 1992).
110. *Id.* at 842 (quoting lower court opinion).
111. *See* United States v. Kayser-Roth Corp., Inc., 910 F.2d 24, 27 (1st Cir. 1990).
112. *See supra* note 88 and accompanying text.

under the Court's analysis, a parent corporation need only worry about the traditional doctrine of veil piercing when it exerts control over the facilities of its subsidiary, not the vague middle ground of the actual control test. A parent corporation may look at its degree of control over the facility itself to determine the possibility of liability.

Unfortunately, the question the Court asks to determine the degree of control over the facility itself is somewhat vague. The Court said that "[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."[113] The questions remains as to what degree and what details are considered "eccentric." The only concrete example comes from the facts of the case—an employee of the parent corporation managed and directed activities at the facility and was not employed by the subsidiary. The Court emphasized that this employee did not just manage and direct "activities" but he managed and directed *environmental* "activities."[114] So a parent corporation should carefully scrutinize its activities with regard to facilities run by its subsidiaries and ensure that any of its employees involved with environmental issues at the subsidiary's facility are wearing "two hats."

Despite the rejection of the actual control test, a parent corporation must still worry about the degree of its involvement with the management and control of its subsidiary because indirect liability based on the "owner" standard is still alive. The Court upheld the court of appeals' veil piercing. Thus, a parent corporation may be charged with derivative liability for its subsidiary's actions.[115]

While the court's decision does bring some clarity and uniformity, the decision is unlikely to decrease the amount of litigation concerning whether a parent corporation is an owner or operator for purposes of CERCLA liability. Now, litigation will focus more on the "owner" standard and derivative liability through veil piercing because the activities that were sufficient to qualify under the actual control test are the same kinds of activities that implicate veil piercing. For example, in *United States v. Kayser-Roth Corp.*,[116] the parent had monetary control over the subsidiary, restricted its financial budget, directed its environmental matters, and had veto power over its buying and selling of real estate.[117] These facts were considered in the court's analysis of operator liability, but they are the same facts that a court would consider when piercing the corporate veil. Therefore, many of the questions will be the same; they will just be asked under a different prong of the analysis.

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113. United States v. Bestfoods, 118 S. Ct. 1876, 1889 (1998).
114. *Id.* at 1889-90.
115. *Id.* at 1885-86.
116. 910 F.2d 24 (1st Cir. 1990).
117. *See id.* at 27.

C. *Soundness of the Decision*

Despite the unanswered questions and future complications, the Court's decision in *Bestfoods* did bring some clarity to the owner or operator determination and the test it adopts seems to be a logical analysis. Lower courts are no longer faced with the problem of determining which of the three previous tests to apply. The Court overruled the actual control test and effectively overruled the *Joslyn* test. And, as discussed earlier, the viability of the authority-to-control test was called into serious question. We are left with one test that looks to a parent corporation's control over the facility—a test which makes decisions more predictable. Additionally, this test conforms to the language of the statute which imposes liability on "any person who . . . owned or operated any *facility*."[118]

VI. CONCLUSION

CERCLA was intended to be a broad statute that imposes liability on those persons responsible for the release of hazardous substances. It was not intended to displace established corporate law; namely, the limited liability of parent corporations for the acts of their subsidiaries. In defining who bears the burden of CERCLA liability, courts have struggled to find a common ground between these two conflicting policies. In *United States v. Bestfoods*, the United States Supreme Court addressed the issue. The Court adopted veil piercing to determine "owner" liability and defined "operator" as someone who directs the workings of, manages, or conducts the affairs of a *facility*, thus, clarifying the tests of "owner" and "operator" under CERCLA and bringing uniformity to the circuits.

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118. *See* 42 U.S.C. § 9607(a)(2) (1995 and Supp. 1998) (emphasis added).