United States v. Bestfoods

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INTRODUCTION

On June 8, 1998, the Supreme Court in United States v. Bestfoods\(^1\) resolved a circuit split over the circumstances under which parent corporations can be held liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)\(^2\) due to the actions of their subsidiaries. The Bestfoods decision allows parent corporation liability to be established through two distinct methods. First, derivative liability, based on ownership of a subsidiary, can be established by piercing the corporate veil. Second, direct operator liability can be established based on a connection between the polluting facility and the parent corporation, in the form of either an agent solely affiliated with the parent corporation or a dual officer or director who departs from the norms of corporate behavior. This second liability model differs significantly from the majority position of the courts, which had allowed direct operator liability to be established through pervasive parental control over the subsidiary corporation.

While the Bestfoods decision comports with the language of CERCLA, it highlights two of the statute's primary weaknesses: (1) the arbitrary manner in which the statute imposes retroactive liability, and (2) the perverse incentives the statute creates for corporations to limit liability through corporate structure instead of environmental controls. The capricious imposition of liability forces litigants to face uncertain outcomes based on past actions that the corporation could have easily changed had the acceptable legal norms been settled when the activity occurred.

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The perverse incentives provided under Bestfoods' reading of CERCLA create a situation in which neither corporate nor environmental goals are met. This Casenote concludes that given the inefficiencies and inconsistencies posed by the current law, Congress should revise CERCLA, recognizing that regulating future activity requires a different approach than redressing past wrongs.

1 BACKGROUND OF CERCLA AND "OWNER OR OPERATOR" STANDARDS

In 1980 Congress passed CERCLA in response to the public outcry over the disaster at Love Canal. CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), endeavors to provide a comprehensive solution to the problem of inadequate hazardous waste disposal. This legislation has two goals: cleanup of past contamination and prevention of future pollution. CERCLA attempts to meet these goals by imposing liability for cleanup on those who discharged the hazardous materials. Section 107(a) subjects all potentially responsible parties to joint and several liability for the cost of the remedial action related to hazardous waste sites. The statute is also retroactive in nature, and thus imposes liability even for those sites contaminated before CERCLA was enacted. As Justice Brennan once stated, "The remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of the cleanup."


5. See 42 U.S.C. § 9607 (1994); United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988) (potentially responsible parties are jointly and severally liable unless they can show that the harm is divisible). CERCLA is structured so that the government has the right to independently cleanup the site and sue private parties to recover the costs. See 42 U.S.C. §§ 9604-9607 (1994).

6. See United States v. Olin Corp., 107 F.3d 1506, 1511-15 (11th Cir. 1997) (holding that CERCLA must be interpreted to include locations contaminated prior to the statute’s enactment); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-37 (8th Cir. 1986) (holding that CERCLA is a retroactive statute that allows recovery of response costs incurred prior to the statute’s enactment); see also Peter S. Menell, Legal Advising on Corporate Structure in the New Era of Environmental Liability, 1990 COLUM. BUS. L. REV. 399, 406 (1990).

CERCLA assigns liability to "owners" and "operators" of polluting facilities.\(^8\) Section 107(a) provides that "any person who at the time of disposal owned or operated any facility"\(^9\) is liable for the costs of the "removal or remedial action."\(^10\) While the terms "facility"\(^11\) and "person"\(^12\) are well-defined, the vague and circular definition of "owner or operator"\(^13\) has made it difficult for courts to determine when a parent company should be liable for the actions of a subsidiary. This uncertainty led to the conflicting lines of decisions that culminated in Bestfoods.\(^14\)

Prior to Bestfoods, many federal circuit courts had addressed the issue of parent corporation liability in the CERCLA context with the majority following the First Circuit decision in United States v. Kayser-Roth Corp.\(^15\) In Kayser-Roth, the First Circuit reasoned that Congress used the conjunction "or" in "owner or operator" to indicate that operators could not hide from liability based on the legal structure of ownership.\(^16\) The First Circuit stated that mere ownership by the parent of a wholly owned subsidiary would not result in liability. If the parent pervasively controlled the subsidiary, however, liability as an operator would ensue.\(^17\)

The Kayser-Roth test would later be referred to as the "actual control" standard.\(^18\) In what would become an important feature of this test, the Kayser-Roth court indicated that control over environmental matters was not necessary to establish liability if sufficient overall control over the subsidiary was present.\(^19\)

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9. Id. § 9607(a)(2).
10. Id. § 9607(a)(4)(A).
11. "Facility" is broadly defined as including any contaminated human-made structure or plot of land. Id. § 9601(9).
12. "Person" includes individuals, firms, corporations, associations, partnerships, consortiums, joint ventures, commercial entities and various governmental groups. Id. § 9601(21).
13. The only definition given by the statute is that owners and operators of facilities are persons "owning and operating such facility." Id. § 9601(20).
16. Id. at 26.
17. See id. at 26-27 (noting that more than ownership and the ability to control was necessary in order to establish parent corporation liability).
19. See Kayser-Roth Corp., 910 F.2d at 27 n.8 (stating that control decisions about hazardous waste are indicative but not essential to establishing operator
Coupled with the theory that parent corporations could be held derivatively liable as owners in situations in which the corporate veil could be pierced, the 
Kayser-Roth opinion became the majority position adopted by many of the federal appellate courts.\textsuperscript{20}

\textit{Kayser-Roth}, however, did not become the only interpretation of parent corporation liability under CERCLA. Two significant minority positions developed, both of which involved a more limited interpretation of parent corporation liability than the interpretation found in \textit{Kayser-Roth}. The Fifth Circuit in \textit{Joslyn Mfg. Co. v. T.L. James & Co.}\textsuperscript{21} adopted an approach in which liability would attach only if the traditional veil piercing requirements were met. Unlike the court in \textit{Kayser-Roth}, the Fifth Circuit made no attempt to distinguish between liability as an owner versus liability as an operator. Instead, parent corporations could be found liable as an owner or operator for the actions of the subsidiary, but only if the corporate veil could be pierced.\textsuperscript{22}

\textsuperscript{20} The Eleventh Circuit stated that liability could be found if the parent engaged in operating the facility or conducting the activities that resulted in the disposal or if the parent exercised control over the corporation immediately responsible for the operation of the facility. See Jacksonville Elect. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993). The necessary level of control rose to involvement in the daily decisions of the subsidiary. Like previous cases, involvement in the decisions regarding hazardous substances was found to be a sufficient, but not a necessary condition, for establishing liability. The Third and Eighth Circuits followed suit by adopting the actual control test. See \textit{Lansford-Coaldale}, 4 F.3d at 1209 (adopting the actual control test rather than the authority to control test); United States v. TIC Inv. Corp., 68 F.3d 1082, 1091-92 (8th Cir. 1995) (adopting the actual control standard and requiring additional nexus between control and polluting activity for arranger liability); see also Schiavone v. Pearce, 79 F.3d 248, 255 (2d Cir. 1996) (adopting direct operator liability). In related decisions, the Fourth and Seventh Circuits found personal liability as operators for corporate principals, directors, or officers. See Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994); United States v. Carolina Transformer, 978 F.2d 832, 836-37 (4th Cir. 1992).

\textsuperscript{21} See Joslyn, 893 F.2d 80 (5th Cir. 1990). There were several prior cases that addressed the liability of individual owners of corporations rather than the liability of parent corporations. See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), aff'd in part and rev'd in part, 810 F.2d 726 (8th Cir. 1986).

\textsuperscript{22} See Joslyn, 893 F.2d 80. The \textit{Kayser-Roth} court viewed the Fifth Circuit's \textit{Joslyn} decision as relating primarily to owner liability. 910 F.2d at 27. A later Fifth Circuit ruling, which accepted the possibility of independent operator liability at least in the context of directors, officers or employees, supports the \textit{Kayser-Roth} viewpoint. See Riverside Market Dev. Corp. v. International Bldg. Prods., 931 F.2d 327, 330 (5th Cir. 1991).
The "capacity to control" standard represents the other minority view. Under this standard, CERCLA liability attaches when "the defendant had authority to control the cause of the contamination." Some district courts apply this standard in analyzing parent corporate liability questions due to the capacity of parent corporations to control the actions of their subsidiaries. At the time of Bestfoods, no federal appellate court had adopted this view in the parent-subsidiary context, although it had been applied in other CERCLA disputes. For example, the Fourth Circuit adopted the capacity to control standard when examining whether tenants had the capacity to control underground storage tanks. In addition, the Ninth Circuit embraced capacity to control when determining whether an excavator was liable for waste found during a construction project.

In summary, prior to the Bestfoods decision, the circuits generally agreed that parent corporation "owner" liability could be established through traditional veil piercing. The circuits split, however, on the existence of an independent basis for "operator" liability. The clear majority of the courts favored independent liability based on the relationship between the parent and the subsidiary. Finally, the courts left open the question of whether the capacity to control standard, previously used in other contexts, could be applied to parent-subsidiary relationships. This ambiguity spawned numerous law review articles that addressed the circumstances under which parent corporations should be held accountable for the CERCLA violations of subsidiaries.

23. See Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992); Nurad, Inc. v. William E. Hooper & Sons, Co., 966 F.2d 837, 842 (4th Cir. 1992); Northeastern Pharmaceutical, 810 F.2d at 743 (reversing the district court decision without commenting on the district court's reasoning).
24. Kaiser Aluminum, 976 F.2d at 1341-42; see also Nurad, 966 F.2d at 842.
26. See Nurad, 966 F.2d 837.
27. See Kaiser Aluminum, 976 F.2d 1338.
A. History of the Case

At the center of the Bestfoods controversy lay a chemical plant located in Muskegon, Michigan, operated by Ott Chemical Company (Ott I) from 1957 to 1965.\(^ {29} \) In 1965, Ott I was purchased by a wholly owned subsidiary of CPC International Inc. (CPC), which CPC named Ott Chemical Company (Ott II).\(^ {30} \) After the acquisition, Arnold Ott (the founder, president, and principle shareholder of Ott I) continued to manage Ott II and, like several other Ott II officers, held a position within CPC. In addition, CPC’s governmental and environmental affairs director became involved in environmental issues confronting Ott II.\(^ {31} \) Story Chemical Company bought the Muskegon plant in 1972 from Ott II, and the facility went through a number of other owners over the next seventeen years.\(^ {32} \) In 1989, the Environmental Protection Agency (EPA) instituted a remedial plan for the site and filed an action under Section 107(a)\(^ {33} \) of CERCLA.\(^ {34} \) Although Ott II had dissolved, EPA named CPC, which would later become Bestfoods Corporation, as a defendant.\(^ {35} \) The court divided the trial into liability, remedy, and insurance claims phases. Because the parties stipulated that the site contained hazardous substances and that releases as defined by CERCLA had occurred,\(^ {36} \) the liability phase focused on whether CPC was liable as a parent corporation for the

\(^ {29} \) See Bestfoods, 118 S. Ct. at 1882.

\(^ {30} \) See id.

\(^ {31} \) See CPC Int'l Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 561 (W.D. Mich. 1991). The extent of Williams’ involvement was not fully explored and was a primary reason for the Supreme Court’s remand of Bestfoods.

\(^ {32} \) In 1977 after Story went bankrupt, the Michigan Department of Natural Resources began trying to find a suitable buyer for the facility, which it knew to be heavily contaminated. See Bestfoods, 118 S. Ct. at 1882. Cordova Chemical Company, a wholly owned subsidiary of Aerojet General Corporation, bought the site in 1977 and then created Cordova Chemical Company of Michigan to manufacture chemicals at the site. Chemical production continued at the site until 1986. See id.

\(^ {33} \) 42 U.S.C. § 9607(a) (1994).

\(^ {34} \) See Bestfoods, 118 S. Ct. at 1882-83. Intentional and accidental releases of hazardous substances had polluted the soil and groundwater at the site. See id. at 1882.

\(^ {35} \) See CPC Int’l, 777 F. Supp. at 554. There were also four other defendants involved in the initial case, but their claims did not reach the Supreme Court. See Bestfoods, 118 S. Ct. at 1888. A consent decree settling claims against Arnold Ott was signed prior to the district court trial. See CPC Int’l, 777 F. Supp. at 554.

\(^ {36} \) See CPC Int’l, 777 F. Supp. at 556.
actions of Ott II. The specific question addressed was whether CPC "owned or operated the facility within the meaning of Section 107(a)(2).

The district court applied an approach similar to the Kayser-Roth majority standard. The court found that liability attaches to parent corporations in one of two circumstances: either direct liability as an operator, or derivative liability as an owner under state common law veil piercing standards. Focusing on direct operator liability, the district court held that the level of involvement must reach the point where the parent "actually operated the business of its subsidiary." To determine whether the parent actually operated the facility, the district court looked at many of the same factors that would be used in the traditional veil piercing context. Based on the specific facts and circumstances of the case, the district court found that CPC was liable directly as an operator, but the court did not reach the question of whether CPC could be held liable indirectly as an owner under traditional veil piercing theories.

In 1995, the Sixth Circuit Court of Appeals heard the case en banc and reversed the district court's decision. The appellate court unsurprisingly held that a parent corporation would be held liable if piercing the corporate veil was justified. Applying Michigan veil piercing law, the court found that CPC

37. See Bestfoods, 118 S. Ct. at 1883.
38. Id.
39. At the time, only the Kayser-Roth decision from the First Circuit and the Joslyn decision from the Fifth Circuit had been published. Thus, the district court was not following a clear majority standard. Nevertheless, between the district court case and the Supreme Court's Bestfoods decision, the appellate courts adopted the "actual control" test. See supra note 20.
40. See CPC Int'l, 777 F. Supp. at 571-72, 574.
41. Id. at 573.
42. See id. Factors listed included the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal. This can be compared to Professor Blumberg's discussion of veil piercing in the parent subsidiary context that identifies factors frequently emphasized in finding liability based on domination of subsidiary affairs: (1) participation in day-to-day affairs; (2) determination of important policy decisions; (3) determination of business decisions bypassing subsidiary's directors and officers; and (4) issuance of instructions to subsidiary's personnel or use of its own personnel in the conduct of subsidiary's affairs. See Philip I. Blumberg, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATION 111 (1987).
43. See CPC Int'l, 777 F. Supp. at 575.
44. See id. at 575-76.
46. See id. at 580.
was not liable for the cleanup costs because first, its subsidiaries maintained separate personalities, and second there was no indication that its subsidiaries were used to perpetrate fraud or subvert justice. In so doing, it stressed that derivative liability arose when a parent corporation abused the corporate form.

The Sixth Circuit decision departed from the majority position by sharply limiting the scope of derivative operator liability. The appeals court envisioned operator liability as occurring only when the parent corporation was involved in the independent or joint operation of the polluting facility. This Sixth Circuit decision solidified the split in the circuits, ultimately leading to the Supreme Court's decision in Bestfoods.

B. The Supreme Court Decision

In a unanimous decision, the Supreme Court vacated the Sixth Circuit's judgment and remanded the case to the district court. The Bestfoods decision, authored by Justice Souter, held that parent corporation liability could be based on either traditional veil piercing doctrine or direct parental control of the operations at the polluting facility. The Court found that a parent corporation may incur derivative CERCLA liability for its subsidiary's actions when, and only when, the corporate veil can be pierced. Otherwise, a petitioner would have to establish that the parent corporation was directly liable as an operator of the facility under an analysis the Court limited in two important new ways. The Court's first limitation was that the parent had to

47. See Bestfoods, 118 S. Ct. at 1884.
48. See id.
51. See Bestfoods, 118 S. Ct. at 1884.
52. See id.
53. See id. at 1881.
54. See id. at 1884.
55. This analysis thus differs from the majority standard, which used the
control the facility; a simple showing of pervasive control of the subsidiary does not suffice.\textsuperscript{56} The Court's second limitation involved establishing two classes of parental employees: agents solely affiliated with the parent, and persons holding positions at both the parent and the subsidiary companies. While all activities conducted by sole agents are attributable to the parent, the government must overcome the presumption that joint officers and directors are working on behalf of the subsidiary in order to attribute their activities to the parent corporation.\textsuperscript{57}

In arriving at these conclusions, the Court first examined whether parent corporations could be held liable as owners of polluting facilities through ownership and control of the subsidiary. Justice Souter cited the bedrock principle of corporate law—parent corporations are generally not liable for the acts of their subsidiaries unless the corporate form is being used for wrongful purposes or fraud.\textsuperscript{58} Against this backdrop, Justice Souter found the "congressional silence" in CERCLA audible.\textsuperscript{59} Because Congress had not explicitly established new rules, the Court was unwilling and uninterested in abrogating common law principles in order to extend CERCLA liability to parent corporations based purely on their ownership of the subsidiary.\textsuperscript{60} Ultimately, the court ruled that "when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions."\textsuperscript{61}

The \textit{Bestfoods} Court did not address the appropriate veil piercing standards because no party challenged the Sixth Circuit's finding that CPC had not incurred derivative liability.\textsuperscript{62} Of particular importance, the Supreme Court explicitly did not address the question of whether state veil piercing law should be adopted or a federal veil piercing standard should be developed.\textsuperscript{63}

After concluding its discussion of derivative liability, the

\begin{itemize}
  \item \textsuperscript{56} See \textit{Bestfoods}, 118 S. Ct. at 1887.
  \item \textsuperscript{57} See id. at 1888.
  \item \textsuperscript{58} See id. at 1885.
  \item \textsuperscript{59} See id. at 1884-85.
  \item \textsuperscript{60} See id. at 1885.
  \item \textsuperscript{61} Id. at 1884-85.
  \item \textsuperscript{62} See id. at 1886 n.9.
  \item \textsuperscript{63} See id. This question has sparked significant debate. See, e.g., Aronovsky & Fuller, supra note 28, at 455; Lucia Ann Silecchia, Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform, 67 FORD. L. REV. 115, 190-91 (1998).
\end{itemize}
Court moved to the second major question: When can a parent corporation be held directly liable as an operator? After defining "operator" to be anyone managing, directing, or conducting operations specifically related to polluting activities, the Court rejected the district court's analysis for two reasons. First, the Court stated that the district court erred by focusing on the relationship between the parent and subsidiary rather than the parent and the polluting facility. Second, the Court decided that imposing liability based on the actions of joint directors and officers of the parent and subsidiary corporations was inappropriate based on the evidence presented.

The Court initially found that the "question is 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." The court reasoned that the "actual control" test used by the district court improperly fused owner and operator liability. The Court found that questions concerning the interactions between the parent and subsidiary corporations more appropriately fit solely into the analysis of whether the parent is liable as an owner. Once the Court oriented the analysis toward the facility, it framed the liability question as "whether, in degree and detail, actions directed to the facility" by the parent "are eccentric under accepted norms of parental oversight of a subsidiary's facility." The Court, however, did not define which actions would and would not be considered eccentric.

After articulating its facility-based approach, the Court determined that the district court had inappropriately imposed liability based on the actions of joint officers and directors of CPC and Ott I. The Court first held that judges must presume that joint officers and directors acted on behalf of the subsidiary. To establish operator liability, the government must overcome

64. See Bestfoods, 118 S. Ct. at 1887.
65. See id. at 1887-88.
66. See id. at 1889.
67. Id. at 1887.
68. See id.
69. See id. at 1889 (noting that the actual control "test is administered by asking a question about the relationship between the two corporations [an issue going to indirect liability] instead of a question about the parent's interaction with the subsidiary facility (the source of any direct liability]).
70. Id. ("[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability.").
71. See id. at 1888.
this presumption by showing that the officers and directors acted instead on behalf of the parent. The Court then ruled that actual control of the subsidiary based only on the activities of joint officers and directors without overcoming this presumption would be insufficient to establish liability.

The Court therefore agreed with the Sixth Circuit Court of Appeals that an actual control test, which assumes that dual officers act on behalf of the parent, cannot be used to establish operator liability. The Court stopped short, however, of declaring that the Sixth Circuit had established the correct standard in holding that operator liability can only result from the joint or independent operation of the facility. Instead, the Supreme Court suggested two circumstances under which independent operator liability could be found. The first circumstance, as previously indicated, requires the government to overcome the presumption that the joint officer or director was acting on behalf of the subsidiary. The second allows liability based on the activities of an agent of the parent who had no formal connection to the subsidiary.

The Court did not give any examples of the first circumstance in *Bestfoods*, but indicated that the actions of G.R.D. Williams, CPC's governmental and environmental affairs director, might fulfill the second circumstance. Notably, the Court strongly emphasized the fact that Williams was not an employee, officer, or director of Ott II. This fact, coupled with Williams' involvement in Ott II's responses to regulatory inquiries and his control over a variety of environmental issues at Ott II, was the primary reason the Court remanded the case for a determination of whether CPC's control of the facility went beyond the norms of parental oversight.

### III

**ANALYSIS**

The Court's decision in *Bestfoods* is important for two reasons. First, this case will affect decisions made by both litigants already facing CERCLA liability based on past events, and by corporate executives worried about future environmental
problems. The Court's new focus on the connection between the parent corporation and the polluting facility guarantees that litigants and planners will shift their approach to CERCLA. Second, the decision demonstrates that traditional corporate law is perhaps not the most appropriate avenue for addressing environmental harms. The arbitrariness of imposing retroactive liability based on the type of corporate structure utilized prior to the enactment of CERCLA raises considerable questions of fairness. In addition, under current law corporations may not have appropriate incentives to mitigate future environmental problems. Thus, this Casenote concludes that Congress should modify traditional concepts of limited liability to address these problems in the CERCLA context.

A. The Extent to Which Bestfoods Narrows Parent Corporation CERCLA Liability Remains Unclear

*Bestfoods* altered the analysis of operator liability by first, focusing the analysis upon the facility and second, eliminating consideration of activities conducted by joint officers and directors unless the presumption of loyalty to the subsidiary can be overcome. To illustrate how the *Bestfoods* decision will affect future CERCLA decisions, it is useful to examine how the outcomes of previously litigated cases would be changed by the new *Bestfoods* analysis. Two First Circuit decisions, *United States v. Kayser-Roth Corp.*, 78 and *John S. Boyd Co. v. Boston Gas Co.*, 79 illustrate both the questions addressed by *Bestfoods* and the questions courts will struggle with in the future. 80

The *Kayser-Roth* court found that a parent corporation can incur liability based on its pervasive control over the subsidiary. Although *Bestfoods* explicitly rejected this standard, it nevertheless seems likely that the decision would have withstood scrutiny because the level of parent-subsidiary interaction in *Kayser-Roth* was extreme. The court noted, for example, that the parent corporation had issued a "directive that subsidiary governmental contact, including environmental matters, be funneled directly through" the parent corporation. 81 In addition, the parent corporation directly approved the installation of the

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79. 992 F.2d 401 (1st Cir. 1993).
80. This is not intended to be an exhaustive survey of the many decisions related to parent-subsidiary liability. The cases are merely illustrative.
system that resulted in the environmental problem. Although the Kayser-Roth court used these facts to establish pervasive control, these are the same type of events—direct involvement of the agents of a parent corporation in environmental matters—that the Court in Bestfoods found could be the basis of operator liability. Therefore, even analyzed in light of the new framework established by the Supreme Court in Bestfoods, it is very likely that the parent corporation in Kayser-Roth would still have been found directly liable as an operator.

Further, the district court in Kayser-Roth had pierced the corporate veil in establishing parent corporation liability. Although the appeals court never reached the question of ownership liability, the district court held that the same factors important in determining operator liability also warranted piercing the corporate veil. This suggests that courts may reach identical results by premising their decisions on piercing the corporate veil instead of the actual control test. One indirect effect of narrowing the applicability of direct operator liability may be that the government will increase its attempts to establish derivative liability through veil piercing. In light of this possibility, the Supreme Court's decision not to address the creation of a federal veil piercing standard becomes very important.

The John S. Boyd case illustrates different concerns. The appeals court in Boyd held a parent corporation, New England Electric System (NEES), liable for the polluting activities conducted by a subsidiary, Lynn Gas. All the evidence cited against the parent corporation in the appeals court decision involved the activities of joint officers and directors of the two entities. For example, the president of Lynn Gas also served as president of the NEES's gas division. Similarly, NEES appointed the directors of Lynn Gas, and a senior NEES officer approved Lynn Gas' budget and capital expenditures. The First Circuit ultimately found that NEES could be held liable as an operator. Under Bestfoods, this sort of evidence would not create liability by itself because the plaintiffs did not show a connection between the activities of NEES and the specific polluting activities at the facility. It is also unlikely that the corporate veil

82. See id.
83. See id. at 22-23.
84. See John S. Boyd Co., 992 F.2d at 408 (discussing issues related to whether a second subsidiary of the parent was liable under CERCLA for the activities of the subsidiary).
85. See id.
could have been pierced, as there was no indication of fraud and the petitioners made no attempt to overcome a presumption that joint officers and directors were "wearing the hat" of the parent when making decisions on behalf of the subsidiary.

The district court decision similarly failed to provide a justification for imposing liability on NEES under Bestfoods. The district court found that NEES provided Lynn Gas with "management and operations memoranda, including standards for gas production and distribution, policies for decontamination and disposal of hazardous substances." While this activity involves the management or direction of operations specifically related to pollution, it probably would not have created liability under the Bestfoods analysis because of the Supreme Court's admonition that "general policies and procedures" should not give rise to direct liability. However, this is an area where significant ambiguity remains in the law. Since the Supreme Court has not articulated what sort of "general policies and procedures" are allowed, this issue will be a significant source of future litigation and regulatory concern.

This analysis of Kayser-Roth and John S. Boyd illustrates that two important questions remain unanswered after the Bestfoods decision. First, the courts will have to determine whether to develop a federal veil piercing standard or to rely on state veil piercing law. Second, the courts will have to establish the appropriate level of parental oversight at a facility and clarify the boundaries of "general policies and procedures."

The question of federal common law versus state law in the veil piercing context has elicited much commentary. Despite

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87. Id. at *5-6.
88. See Seilheimer, supra note 4, at 319 (reaching a similar conclusion and stating that "it remains to be seen how lower courts will apply the U.S. Supreme Court's direct liability test").
89. One position is that adopting state law is consistent with the notion that CERCLA does not displace, but rather incorporates, common law. See Richard G. Dennis, Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law, 36 VILL. L. REV. 1367 (1991); Silecchia, supra note 63, at 190-91; Harvard Note 1986, supra note 4, at 1000 ("[A] uniform rule would merely limit the ability of states to create a haven for unsafe hazardous waste disposal activities."). A second position argues that CERCLA implementation should not be hampered by the various state laws regarding corporate veil piercing. See Aronovsky & Fuller, supra note 28, at 455; Brown, supra note 50, at 292-93. The traditional argument is that CERCLA is nationally important and that its purposes would be frustrated by the application of inconsistent state laws. See Brown, supra note 50, at 292. This analysis is based on the 1988 Supreme Court case Boyle v. United Technologies Corp., 487 U.S. 500 (1988). Finally, it has been argued that there is
the Supreme Court's refusal to address directly the issue in the case, *Bestfoods* does provide some guidance. In making its decision, the Supreme Court was very concerned with not mixing factors that relate to indirect liability with factors that relate to direct operator liability. This concern is important because a significant number of jurisdictions include factors related to direct and indirect liability when deciding whether to pierce the corporate veil. In particular, the instrumentality doctrine, one of three primary state veil piercing standards, requires that the control over the subsidiary must proximately cause the injury or unjust loss. Clearly, the state courts in these jurisdictions are looking at factors relating to direct liability in making a decision regarding whether to pierce the corporate veil. This is precisely the sort of analysis proscribed by the Supreme Court in *Bestfoods*.

Because of these concerns regarding mixing direct and derivative liability, courts should adopt a uniform federal standard that clearly separates derivative liability from direct liability. The dominant factors should be: intermingling accounts or property, extensive economic integration, unified public persona, financial dependence on the parent, administrative and operation dependence on parent group, manipulation of corporate assets, failure to observe corporate formalities, and inadequate capitalization. This list represents the primary independent factors for establishing derivative liability on parent corporations. In accordance with the Supreme Court's presumption that joint directors and officers act on behalf of the subsidiary, overlapping boards and officers should be considered an important factor only if their duty of loyalty to the subsidiary has been compromised. Parental involvement in the actions of the facility would be adequately addressed through the imposition of operator liability and, therefore, would have no place in the analysis of owner liability.

The second important question that courts will face after

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90. *See Bestfoods*, 118 S. Ct. at 1887.
91. *See Blumberg*, supra note 42, at 168.
92. *See Cox*, supra note 89, at 112.
93. *See Bestfoods*, 118 S. Ct. at 1887.
95. This outcome conforms closely to Professor Oswald's analysis. *See Oswald*, supra note 18, at 281-82.
Bestfoods is how wide a swath is cut by the Supreme Court’s statement regarding general policies and procedures. One suggestion is for Congress to clearly define “operate” by adopting the standard used for establishing lender liability under CERCLA. This definition, consistent with Bestfoods, would emphasize the connection between the parent and the facility. Nonetheless, the definition lacks a bright line distinction between activities that constitute “normal” parental oversight and activities that constitute more “eccentric” parental oversight.

The level of supervision that qualifies as “normal” is an open question, and it is difficult to predict how lower courts will use this standard. The Supreme Court’s discussion regarding CPC’s governmental and environmental affairs director seems to indicate that the parental oversight needs to be specific and related to environmental issues. Therefore, a general memorandum establishing standards would probably not expose the parent corporation to liability, but answering questions about or directing specific environmental activities would probably create liability. The key seems to be the parent corporation’s involvement in the day-to-day operations of the facility and whether that involvement was appropriately channeled. Nevertheless, until courts define the boundaries of “general policies and procedures,” the extent of Bestfoods’ impact will remain murky.

B. Policy Considerations: Traditional Corporate Law and Its Inability to Address Environmental Concerns

Bestfoods establishes a standard that promotes form over substance; while this model succeeds from the viewpoint of traditional corporate law, it is problematic in terms of environmental policy. First, liability will attach in an arbitrary manner to companies that fail to follow prescribed formalities in an arena where liability was unforeseeable. Second, corporations planning for the future will have perverse incentives to avoid liability by simply creating subsidiary corporations.
instead of addressing environmental concerns. 98

The Bestfoods case itself shows how liability attaches in an arbitrary manner. Arnold Ott and other directors served on both boards. Since Ott II was a wholly owned subsidiary, the only party who benefited from Ott II's enterprise was CPC. Therefore, even if Arnold Ott and other dual officers wore "two hats" at the time of the hazardous releases, their ultimate allegiance must have been to CPC. Yet the Supreme Court's new liability model does not allow the dual officer's actions to create liability in the parent corporation. Does it follow that CPC should be held liable for these officers' decisions? Not necessarily, but clearly CPC ultimately controlled the actions undertaken by Ott II. CPC's defense, as it pertains to Arnold Ott and other officers and directors, was not a lack of control, but rather that the control was appropriately based on the corporate structure.

Notably, the Supreme Court's commentary relating to Williams, the CPC's governmental and environmental affairs director who advised Ott II, demonstrates a vastly different treatment. While the joint officers and directors were allowed to change hats, Williams was deemed to possess only one hat. Williams' actions thus reflected directly on CPC, while Arnold Ott's were presumed to have been for the subsidiary's benefit. This dichotomy in the treatment of officers makes it clear that the Supreme Court focused on titles, rather than on the motivations and beneficiaries of management decisions. If CPC had decided to appoint Williams as a joint officer or director, his conduct would not have been questioned by the Court. The problem, therefore, is not that CPC gave Williams too much authority in regards to Ott II, but that it failed to give him a matching title.

This absurd result obviously has negative consequences. If a corporation's environmental expertise lies in officers of both corporations, there is no liability; however, if the parent must turn to its own employee to solve the subsidiary's environmental problems, liability will attach. Under current law, a parent corporation totally uncommitted to environmental matters is more likely to avoid giving its subsidiaries any direction concerning environmental affairs and will therefore escape liability. 99 Conversely, a parent corporation concerned about the environmental impacts created by its subsidiary organization might send an employee to help address the situation and

98. See Allen, supra note 28, at 45; Silecchia, supra note 63, at 196.
99. See McKane, supra note 97, at 1681.
thereby unwittingly subject itself to liability. This possibility should strongly encourage parent corporations to avoid liability based on corporate structure rather than by preventing environmental harm.\textsuperscript{100} Allowing corporations to avoid liability, or at least devastating liability, by simply creating subsidiaries and observing corporate formalities removes all the incentives to monitor environmentally sensitive aspects of their subsidiaries' operations.

C. The Solution Lies in the Revision of CERCLA Legislation

It is important to remember that the Supreme Court did not create the arbitrariness and perverse corporate incentives of CERCLA. In enacting CERCLA, Congress proclaimed it a comprehensive response to hazardous waste problems yet failed to address parent corporation liability. Therefore, Congress, not the courts, bears the responsibility for filling in this gap. Congress should revise the underlying legislation and consider competing environmental and corporate justifications in allocating responsibility for pollution.\textsuperscript{101}

In terms of litigation regarding past environmental offenses, the law is settled on the issue of corporations that sufficiently mix their activities with the activities of their subsidiaries such that they would be caught by the veil piercing standards. These corporations clearly should be held liable in the CERCLA context. They knew, or should have known, that this outcome was a possibility since corporate veil piercing has always been a means of attaching liability to parent corporations.

However, the same cannot be said for corporations that merely send an agent to help a subsidiary manage an environmental problem or deal with governmental regulators. A more appropriate standard for agents solely employed by a parent corporation would presume that the agents are acting on behalf of the subsidiary. The government would be free to overcome this presumption, but if a parent corporation is allowed to control its subsidiary it should not matter through

\textsuperscript{100} See Menell, \textit{supra} note 6, at 404 (stating that the "principal risk-insulating strategy would be to set up ... a wholly-owned subsidiary corporation"); \textit{Harvard Note 1986, supra} note 4, at 990. \textit{See generally} State Dep't of Envtl. Protection \textit{v. Ventron Corp.}, 468 A.2d 893 (N.J. 1983) (stating that not piercing the corporate veil would allow businesses to frustrate the New Jersey Spill Compensation and Control Act simply by operating through wholly owned subsidiaries).

\textsuperscript{101} See \textit{Harvard Note 1986, supra} note 4, at 990. This Casenote does not address the difficult issue of defining a parent corporation. \textit{See Allen, supra} note 28, at 76 (discussing the definition of a parent corporation).
whom the control was asserted, be it an agent or a joint officer. While this approach does not comport with traditional agency doctrine, it would diminish the harsh and arbitrary effect of hinging CERCLA liability on the title of the person sent to address environmental problems.

In terms of how legislation might regulate future industrial activity, a number of possibilities have been suggested. One suggestion is to abrogate the common law principle of limited liability in the parent-subsidiary context and hold parent corporations strictly liable for the environmental contamination created by their subsidiaries.102 This approach would be politically difficult to implement,103 however, because the specter of unlimited liability could have a chilling effect on investment.104 Another model would create a duty for the parent corporation to monitor hazardous waste disposal.105 This approach would probably not create sufficient incentives for industry to respond to environmental problems because procedural oversight will never create the same incentives to respond as strict liability for pollution. Monitoring would simply create a different type of corporate formality that parent corporations must follow to ensure liability avoidance. An effective piece of legislation must create parent corporation liability sufficient to create adequate incentives to avoid environmental problems without imposing penalties so severe that parent corporations cannot invest efficiently.

To address these problems, Congress should hold parent corporations strictly liable, but cap the amount of liability. This would give parent corporations a monetary incentive rather than just a mandate to monitor the activity of the subsidiary. By capping liability, Congress would remove the fear that might chill investment—unlimited liability. The level of liability imposed should be related to the size of the parent corporation's holdings. A large corporation can absorb a larger judgment without ceasing risky activities but will be motivated to adopt more environmentally friendly measures if it is subject to significant

102. This possibility was suggested more than a decade ago. See Allen, supra note 28, at 75; Harvard Note 1986, supra note 4, at 987-88. For a detailed discussion of the difficulties of applying limited liability to parent corporations, see McKane, supra note 97, at 1647-49.

103. While this approach might be optimal from an economic point of view, even one of the leading proponents of this approach has stated that it is not certain whether it could be implemented. See Menell, supra note 6, at 408-10.

104. See Aronovsky & Fuller, supra note 28, at 436-37.

105. See McKane, supra note 97, at 1681-82.
liability. In contrast, a smaller corporation would have adequate incentives to prevent environmental problems while facing a smaller amount of potential liability.

The extent to which liability should be extended is a political question: To what extent is the government willing to allow industries to externalize pollution costs in order to maintain the industries' willingness to invest in industrial activities? Congress may decide to allow the costs to be completely externalized (the current regime) or to internalize the costs by increasing the parent corporation's liability. Recognizing that the issues are political and influenced by both environmental and corporate concerns, a balance must be struck to ensure both continued industrial prosperity and a healthy environment.

CONCLUSION

The Supreme Court in United States v. Bestfoods narrowed the circumstances under which a parent corporation can be found liable under CERCLA for activities occurring at a facility owned by a subsidiary corporation. The extent to which Bestfoods restricts the group of potentially liable parties will not become entirely clear until the courts establish and apply the standards for veil piercing and appropriate parent corporation supervision. What is clear is that the Supreme Court is not going to expand CERCLA liability beyond the bounds warranted by common law tort doctrine in order to satisfy the statute's broad remedial purposes. Equally apparent is that traditional corporate law often creates inequitable results because parent corporations may have been unaware of the consequences of their actions prior to CERCLA's enactment. Another problem with adhering to traditional corporate law is that it sets up perverse incentives for corporations to act in a manner inconsistent with environmental protection. To solve these problems, Congress should craft a solution that addresses both how CERCLA affects future activities and how it distributes liability for past actions.