Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court’s New Standards for the CERCLA Liability of Parent Companies & A Proposal for Legislative Reform

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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

Lucia Ann Silecchia*

I. INTRODUCTION ............................................. 116
II. THE NATURE AND ORIGINS OF CERCLA’S PARENT
LIABILITY PROBLEM ................................... 124
III. PRE-BESTFOODS THEORIES FOR PINNING THE BLAME &
PIERCING THE VEIL ................................... 138
   A. Direct “Operator” Liability for “Actual Control” .... 140
   B. Direct “Operator” Liability for “Capacity to
      Control” ........................................... 148
   C. Indirect “Owner” Liability for Piercing the Veil
      Under State Common Law ..................... 151
   D. Indirect “Owner” Liability for Piercing the Veil
      Under Federal Common Law ................. 156
IV. SUPREME COURT GUIDANCE IN UNITED STATES V.
BESTFOODS ............................................. 159
   A. The District Court’s Expanded View of Liability ... 163
   B. The Sixth Circuit’s Traditional Approach .......... 166
   C. The Supreme Court’s Resolution of Bestfoods .... 168
V. THE AFTERMATH OF BESTFOODS: QUESTIONS
   UNANSWERED AND PROBLEMS REMAINING FOR
   LEGISLATIVE REPAIR ................................ 173
   A. The Indirect “Owner” Liability Problem: Veil-
      Piercing Standards ................................ 175
   B. The Direct “Operator” Liability Standard:
      Definitional Problems ............................ 175
   C. The Direct “Operator” Liability Standard: Incentive
      Problems ......................................... 178
VI. LEGISLATIVE ANSWERS TO THE BESTFOODS QUESTIONS . 188
   A. Creating a Sound Standard for Indirect “Owner”
      Liability .......................................... 190

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   Article is dedicated to my family.
The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched. 1

I. INTRODUCTION

Let the polluter pay. Such was the intent of Congress 2 when it passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 3 in 1980 and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). 4 Unlike the other environmental statutes that now constitute the canon of American environmental law, 5 CERCLA is a remedial statute rather than a regulatory one. 6 Its primary goal is to foster the clean-up of


2. See, e.g., H.R. Rep. No. 99-253 (III), at 15 (1986), reprinted in 1986 U.S.C.C.A.N. 3038, 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").


6. This remedial focus is due, in part, to the fact that CERCLA was passed in direct response to a number of highly publicized hazardous waste problems in the 1970s. During the 1970s, many environmental statutes were promulgated to achieve regulatory ends. Incidents such as Love Canal demonstrated the need to deal with past environmental harms and not just prospective ones. CERCLA met this need. See David S. Bakst, Note, Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive, 19 B.C. Int'l & Comp. L. Rev. 323, 349 (1996) ("Environmental disasters have provided the main impetus for environmental legislation on both continents. The late 1970's marked the beginning of the period of significant environmental legislation in the United States. The Love Canal disaster ... spurred the movement toward strict liability for environmental torts." (footnotes omitted)); see also Lynda J. Oswald, Strict Liability of Individuals Under CERCLA: A Normative Analysis, 20 B.C. Envtl. Aff. L. Rev. 579, 585 (1993) ("At the time of CERCLA's enactment in 1980, the United States Environmental Protection Agency (EPA) estimated that the United States produced 57 million metric tons of hazardous waste per year—about 600 pounds per citizen—and that this amount would grow at an annual rate of 3.5 percent." (footnotes omitted)).
past problems rather than to regulate current or ongoing conduct. A major difficulty with advancing CERCLA's professed goal of having the "polluter pay" is the difficulty in defining who "polluters" are in a way that is clear and does not undermine the goals and policies underlying the rest of environmental protection law. The amount of litigation8 since the passage of CERCLA—"the most notable wellspring of environmental liability"9—demonstrates that defining "polluter" is not a straightforward task. This ambiguity is particularly problematic when one considers that the clean up of uncontrolled hazardous wastes remains a significant problem. The EPA "reports that 73 million Americans live within four miles of a site that is contaminated with hazardous substances."10 Yet, site clean-ups remain slow and litigious.11

7. This is a broad generalization since there are provisions in CERCLA that are regulatory, and there are provisions in the so-called regulatory statutes that are remedial. For a discussion of CERCLA's potential to serve a quasi-regulatory role, see infra notes 347-55 and accompanying text.

8. Indeed, the frequency with which CERCLA has found its way into the courts and the accompanying costs have been the subject of frequent criticism of the Act. However, this is symptomatic of a bigger problem. See, e.g., Kathryn R. Heidt, Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 52 Ohio St. L.J. 133, 134 (1991) ("Litigation regarding liability under CERCLA for the cleanup of sites contaminated with hazardous substances is booming." (footnote omitted)); Kurt A. Strasser & Denise Rodosevich. Seeing the Forest for the Trees in CERCLA Liability, 10 Yale J. On Reg. 493, 496 (1993) (observing that under CERCLA "the assignment of liability reportedly consumes as much, if not more, time and resources as the actual cleanups themselves"); Erika Clarke Birg, Comment, Redefining "Owner or Operator" Under CERCLA to Preserve Traditional Notions of Corporate Law, 43 Emory L.J. 771, 774 n.9 (1994) ("The number of lawsuits filed in 1992 under CERCLA exceeded the total number filed under all other remedial environmental statutes."); Michael Harrold, Brownfields: Superfund's Economic Toxic Shock, Issue Analysis, Dec. 8, 1995, at 1, 3 (describing Superfund's "excessive litigation costs that consume 36 cents of every dollar spent on cleanup."). The remedial goal of CERCLA still appears sound, and some blame for this avalanche of litigation must rest with the litigants as well as with the legislation. Nevertheless, deep problems plague the statute.


11. For an assessment of the current status of environmental cleanups and the times involved in cleanups, see United States General Accounting Office, Report to the Chairman, Committee on Government Reform and Oversight, House of Representatives: Superfund, Times to Complete the Assessment and Cleanup of Hazardous Waste Sites (1997). Among the disturbing facts compiled in this Report, its authors noted:

Cleanup completion times have also lengthened. Nonfederal [i.e. state and local] cleanup projects completed from 1986 through 1989 were finished, on average, 3.9 years after sites were placed on the National Priorities List. By 1996, however, non-federal cleanup completions were averaging 10.6 years. Id. at 2. Naturally, not all of these delays are caused by legal uncertainty. There may well be scientific and practical problems as well. Nevertheless, the parental liability uncertainty unnecessarily compounds this problem.
In the corporate context, determining who is a "polluter" is further complicated because CERCLA's definition of "owner or operator" must be interpreted.\textsuperscript{12} Here, it is often the case that the owner or operator potentially liable for a contaminated site is a corporation that is the subsidiary of another corporation.\textsuperscript{13} That the named subsidiary can be liable under CERCLA is beyond debate. What has not been so clear, however, is the extent to which the parent corporation shares this liability. While corporate law operates on the principle that corporate subsidiaries are separate legal entities,\textsuperscript{14} courts repeatedly face plaintiffs\textsuperscript{15} seeking to hold parent corporations liable for the CERCLA responsibilities of their subsidiaries. This has been justified primarily as an effort to cast a wide net for responsible parties and achieve CERCLA's oft-touted broad remedial purposes.\textsuperscript{16}

Until December, 1997, the United States Supreme Court declined to review this question. As a result, the circuits devised various and inconsistent tests for parental liability.\textsuperscript{17} The circuit courts had articu-

\textsuperscript{12} 42 U.S.C. § 9607(a) (1994).
\textsuperscript{13} See Make Them Liable, Fin. Times, Jan. 5, 1995, at 19 ("Most businesses of any size or substance in the late 20th century conduct their operations through subsidiaries which are owned and controlled by a parent company."). This is a relatively new problem, however, since it has only been in the past century that corporations were allowed to own shares in other corporations and have subsidiaries. See Louis K. Liggett Co. v. Lee, 288 U.S. 517, 562 (1933) (Brandeis, J., dissenting). In Liggett, Justice Brandeis traced the history of corporate growth in the United States and reported that:

There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. . . . The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed. Severe limitations were imposed on the amount of indebtedness, bonded or otherwise. The power to hold stock in other corporations was not conferred or implied. The holding company was impossible.

\textit{Id.} at 549-56 (Brandeis, J., dissenting) (footnotes omitted).
\textsuperscript{14} See infra notes 67-78 and accompanying text.
\textsuperscript{15} This class of plaintiffs has included both the United States seeking to bring actions against parent companies as well as private parties seeking contribution from the parent companies of subsidiaries who are potentially responsible parties for their sites.
\textsuperscript{16} See infra notes 54-65 and accompanying text; see also Thomas R. Mounteer & Michael J. Myers, CERCLA Does Not Articulate Whether Shareholders and Parent Corporations Can Be Liable Under Superfund; as a Result Federal Circuit Courts are in Conflict, Nat'l L.J., Sept. 22, 1997, at B4 ("The lack of a clear statutory standard—coupled with a desire to spread liability among as many potentially responsible parties as possible—has spawned a substantial amount of litigation.").

The importance of the environmental dispute in Cordova Chemical Co. is illustrated by the massive number of lawyers involved in the original appeal.
lated at least four major liability theories through which parent corporations could be held liable for their subsidiaries. The minority views followed a traditional "piercing the corporate veil" approach by holding parents liable as "owners." This severely limited the circumstances in which a court could disregard the corporate form and hold a parent derivatively liable for the mischief of its subsidiary. The Fifth and Sixth Circuits followed this narrow view. Courts taking the narrow view allowed the assessment of liability against parents only if traditional veil-piercing standards were met. One line of the minority-view cases held that veil-piercing should be accomplished via state law; the other line advocated the use of a federal standard.

In contrast, the majority liability theory espoused a direct approach that did not require piercing the corporate veil, but instead imposed direct liability on parents by classifying them as "operators" of the facilities owned by their subsidiaries. The two variations on the majority theory were that one advocated liability based upon the parent's actual control of the subsidiary's operations, while the other was primarily concerned with the parent's capacity to control. The rulings

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More than 10 attorneys, representing various departments and agencies of the United States, filed briefs or appeared at oral argument, and three others represented the State of Michigan. Additionally, seven attorneys appeared on behalf of the defendants and an amicus curiae, bringing the total number of lawyers to approximately 20.

Id. An extensive discussion exploring the circumstances surrounding the Supreme Court’s denial of certiorari in Joslyn and Kayser-Roth may be found in Christopher B. Hood, Comment, Metaphors of Shareholder Liability Under CERCLA, 10 J. Envtl. L. & Litig. 85, 119-27 (1995).

18. Naturally, any attempt to classify a large body of case law is, by definition, imprecise and involves a level of artificiality as the distinctions among these classifications may not lend themselves to precise, scientific classification. See Thomas J. Heiden, The New Limits of Limited Liability: Differing Standards & Theories for Measuring a Parent/Shareholder's Responsibility for the Operations of its Subsidiary, in Protecting the Corporate Parent 1993: Avoiding Liability for Acts of the Subsidiary 7, 16 (PLI Corporate Law and Practice Course Handbook Series No. 823, 1993) ("Many legal scholars and commentators believe the area to be hopelessly muddled."). Indeed, as will become obvious in the discussion that follows, the fact-specific nature of many corporate environment liability cases has often required courts to add qualifications and clarifications to these four broad categories. However, these broad classifications provide a helpful framework for discussion of the issue.

19. See, e.g., Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990) ("Without an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis.").


21. It should be noted, and will be explained later, that this latter group of cases do not stand for the view that federal veil-piercing is the only avenue for parental liability. Many of the cases provide for direct liability as well, but posit that if veil-piercing is to be used then it should be federal.

22. See John M. Brown, Comment, Parent Corporation's [sic] Liability Under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries, 31 Tulsa
of the First,\textsuperscript{23} Second,\textsuperscript{24} Third,\textsuperscript{25} Fourth,\textsuperscript{26} Seventh,\textsuperscript{27} Eighth,\textsuperscript{28} Ninth,\textsuperscript{29} and Eleventh\textsuperscript{30} Circuits adopted one of these two direct liability theories.\textsuperscript{31}

The differences among these liability tests involved more than much semantic ado about nothing. Until the Supreme Court intervened, these differing standards worked substantial differences in the scope of parental liability.\textsuperscript{32} This lack of uniformity made it extremely difficult for the regulated community to assess risks, plan financial allocations, and generate realistic policies and practices.\textsuperscript{33} Without a clear rule in place, it was exceedingly difficult to plan a corporate structure that took into account the reasonable allocation of risk.\textsuperscript{34} There were also important practical consequences that flowed from the nature of


\textsuperscript{24} See, e.g., Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp., 90 F.3d 671 (2d Cir. 1996) (adopting actual control theory); Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996) (same).

\textsuperscript{25} See, e.g., FMC Corp. v. United States, 29 F.3d 833 (3d Cir. 1994) (en banc) (adopting actual control theory); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993) (same).

\textsuperscript{26} See, e.g., Nurad Inc. v. William E. Hooper & Sons, Co., 966 F.2d 837 (4th Cir.) (adopting capacity to control theory).


\textsuperscript{28} See, e.g., United States v. TIC Inv. Corp., 68 F.3d 1082 (8th Cir. 1995) (adopting actual control theory), cert. denied, 117 S. Ct. 50 (1996).

\textsuperscript{29} See, e.g., Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992) (adopting actual control theory).


\textsuperscript{31} It is important to note that the opinions advocating direct liability do not disregard or abandon the assessment of liability via indirect veil-piercing. Rather, they generally advocate for the retention of the two theories.

\textsuperscript{32} See infra Part III (exploring various pre-Bestfoods theories of parental liability).

\textsuperscript{33} This is particularly true in the common circumstance in which one entity has subsidiary organizations in a number of different jurisdictions and must plan its operations in light of inconsistent rules. See, e.g., Second Circuit Adopts Expansive Test for Corporate Parent CERCLA Liability, BNA Daily Env't Rep., Mar. 18, 1996, at D2 (quoting Adam Cramer, Esq., who explains that "conflict in the federal appeal courts between those that recognize the Superfund liability of parent corporations without veil-piercing... and those that do not, creates serious problems for companies with subsidiaries in circuits that follow different rules of law").

\textsuperscript{34} This problem will also make it more difficult to assess the financial risk involved in the acquisition and management of subsidiaries. See Edward Jason Dennis, Court Applies Successor in Interest Liability Under CERCLA, 6 S.C. Envtl. L.J. 258, 266 (1997) ("Corporate relationships involving a parent holding company and a subsidiary should also take great measures to ensure that they retain corporate formalities, subject the relationships to independent scrutiny, and document the motives for their particular structure. Otherwise, those companies may find themselves inadvertently creating alter-egos or joint ventures.").
the liability theory chosen. Any ambiguity made it difficult for the government to calculate the risk of pursuing alternate liability theories in its enforcement efforts. Hence, the development of a clear and precise rule was needed for legal predictability.

Compounding this lack of uniform judicial guidance has been the ongoing silence of Congress on this important question. Proposed amendments to CERCLA have been languishing for several years without resolution. As Congress evaluates its options for fixing the defects in CERCLA, it has the opportunity to clarify this question—an opportunity that, to date, it has ignored.

However, in December 1997, the Supreme Court granted certiorari to review United States v. Cordova Chemical Co., a Sixth Circuit case

35. Heidt, supra note 8, states:

[The government may have to share the assets of the shareholder with all or some of the other creditors. By piercing the corporate veil, the government paves the way for other creditors to pierce the corporate veil. If other creditors are successful in piercing the corporate veil (following the government's lead) and the shareholder has insufficient assets to pay all of these claims the government will recover less because it must share with other creditors. Had the government pursued its claim directly under CERCLA, liability would have been imposed on the shareholder for the government's claim only.

Id. at 145-46 (footnote omitted).

36. See Superfund Revisions: Hearings on H.R. 3000 Before the Subcomm. on Finance and Hazardous Materials, 105th Cong. (1998) [hereinafter Hearings on H.R. 3000] (statement of Carol M. Browner, Administrator, U.S. Env't Protection Agency) ("The Administration remains concerned over the expiration of the authority to replenish the Superfund Trust Fund. It has been two years since the taxing authority expired, resulting in a steady erosion of the Trust Fund."); Deborah A. Hotzel & Michael R. Jeffcoat, Caught in the Web: CERCLA Owner or Operator Liability of Lenders, Shareholders, Parent Corporations, and Attorneys, 6 S.C. Envt. L. J. 161, 178 (1997) ("Members of Congress have recently sponsored several pieces of legislation to amend and reauthorize CERCLA. However, none of these bills provide any significant clarification of the circumstances in which a parent . . . can be deemed liable."); Allen Freedman, Congress Prepares New Assault on Troubled Superfund Sites, Cong. Q., June 28, 1997, at 1502 ("For nearly five years, Congress has tried and failed to revamp a program dogged by inefficiencies, costly snail's-prow cleansups, endless litigation and round after round of partisan sniping."). For a fuller discussion of Congressional wrangling over Superfund reauthorization and CERCLA reform, see Peter K. Johnson, Note, Mr. Smith Goes to Washington: 1997 Superfund Amendments: Will it Solve the Liability Problem and How Will this Affect Massachusetts?, 31 New Eng. L. Rev. 1269 (1997).

37. See Daniel Riesel & Lemuel M. Srolovic, The Search for Deep Pockets: The Developing Law of Corporate Officer, Shareholder & Successor Liability Under CERCLA, in ALI-ABA Course of Study: Environmental Law 67, 97 (1996) ("Congress should be urged to formulate clear standards for corporate officer, shareholder, and successor liability as part of CERCLA's reauthorization. . . . A consistent approach would reduce the vagaries attendant with the current law and provide a much-needed benchmark to guide corporate conduct."); see also Birg, supra note 8, at 812 ("Courts have implemented conflicting and confusing standards in imposing liability on parent corporations; therefore, either Congress or the EPA needs to clarify the intent of the statute, if that intent is to impose direct liability on parent corporations."). For a fuller legislative discussion, see infra Part VI.

that rejected all theories for parental liability except for indirect "owner" liability under state veil-piercing law. In June 1998, the Court ruled on the issue in this case, now known as United States v. Bestfoods. This decision vacated and remanded the Sixth Circuit's narrow reading of parental liability and held that while a parent could still be liable under the restrictive veil-piercing theory employed by the Sixth Circuit, a parent could now also be liable under a direct "operator" standard if it acted as the operator of a facility owned or operated by its subsidiary. This differed from lower court rulings that had previously assessed direct liability by looking at the parent's legal relationship to the subsidiary rather than to the facility.

The Supreme Court's new functional standard for direct liability has done much to promote judicial predictability and provide much needed direction and unity to the inconsistent voices of the lower courts. While Bestfoods narrowed the scope of the debate, however, it has left open three significant issues that now require Congressional guidance and clarification: (1) whether state or federal law should govern indirect liability via veil-piercing; (2) how "operator" should be defined for purposes of assessing direct liability; and (3) how the definition of "operator" may best be applied. This Article explores the legal intricacies of parent corporations' CERCLA liability in light of Bestfoods, with an eye toward creating a workable legislative solution to the dilemmas that the Supreme Court did not resolve.

The Article begins by introducing the scope of the parental liability problem and exploring the development, merits, and demerits of the pre-Bestfoods theories of parent liability under CERCLA. After

39. Id. at 580.
41. See id. at 1890.
offering this background, it will then analyze the *Bestfoods* decision and explore the specific ways in which it represents a step forward in resolving this complex issue and, yet, leaves open three key questions for Congress to answer.

First, *Bestfoods* continued to allow an indirect assessment of owner liability against parent corporations via traditional veil-piercing theories. Unfortunately, in its decision, the Court declined to state whether that assessment should be done under federal or state law. While recognizing the merits of both views, this Article will argue that Congress should establish that veil-piercing be governed by state law.

The second and third questions addressed in this Article involve direct assessment of operator liability. Congress must establish a definition of what it means to “operate” a facility for purposes of determining parental liability. The Article will offer a definition based on previous Congressional definitions in the lender liability context. Ideally, this definition will offer clear guidance to parent corporations upon which they can base their conduct, and to environmental en-

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forcement agencies, who will face less uncertainty in identifying responsible and liable parties. Although the *Bestfoods* decision attempted to do this, it failed to provide the detailed guidance that would be given by a clear legislative pronouncement.\(^{43}\)

The last and most vexing question is how to apply this new definition in such a way that it provides parents an incentive to assist their subsidiaries in environmental compliance rather than offering them a disincentive to become involved. Because CERCLA's backward-looking remedial purpose differs from the forward-reaching preventative goal of most other environmental statutes,\(^{44}\) it is difficult to apply the standard in an effective way. Unfortunately, the allocation of parental liability under CERCLA after *Bestfoods* may give parent corporations disincentives to intervene in the affairs of their subsidiaries.

This Article proposes a way to allocate that responsibility and help reduce the disincentives. The proposal is presented as a legislative initiative rather than as a judicial remedy.\(^{45}\) Unfettered by the restraints that bind courts—including the Supreme Court—in weighing this issue, Congress is free to take a broader view, to look at CERCLA in the context of environmental regulation generally, and to adopt a rule that will provide clear guidance to both the courts and the regulated community as to when and how the actions of subsidiaries should come back to haunt their parents. As the legislature, the business community, the lower courts, and the environmental regulators prepare to respond to *Bestfoods*, this Article will offer guidance to achieve clarity beyond the mists of metaphor.

**II. The Nature and Origins of CERCLA's Parent Liability Problem**

When CERCLA was enacted, its primary goal was not to regulate current or future environmental activity.\(^{46}\) Rather, CERCLA is "by its very nature backward looking."\(^{47}\) While there are elements of CERCLA that influence on-going conduct, and while the specter of future liability for current carelessness may have a deterrent effect on wrongful conduct, the premise of CERCLA was and remains remedial.\(^{48}\)

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\(^{43}\) This gives rise to two interrelated problems to be addressed later—the lack of detail in the guidance provided, and the poor suitability of the judiciary to articulate such standards. *See infra* Part V.

\(^{44}\) *See infra* note 350-55 and accompanying text (discussing CERCLA's remedial function).

\(^{45}\) The benefit of a legislative solution rather than a judicial one is discussed more fully *infra* notes 303-09 and accompanying text.

\(^{46}\) A backward-looking statute will have side-effects that may impact current and future behavior. *See infra* notes 351-54 and accompanying text.


\(^{48}\) *See supra* note 6 and accompanying text.
At the time it passed CERCLA, Congress was aware that past hazardous waste practices had left in their wake a host of contaminated sites containing waste that threatened human health, the environment, or both.\footnote{49} Thus, CERCLA's primary goal was to establish a comprehensive scheme through which these contaminated sites could be remedied in one of three ways:\footnote{50} (1) the government could order the responsible parties to clean up the site themselves;\footnote{51} (2) the government could execute the cleanup at public expense, and then seek reimbursement for its costs from the responsible party or parties;\footnote{52} or (3) where no solvent responsible party could be found, a $1.6 billion dollar Superfund created by CERCLA and funded by taxes on the petroleum and chemical industries would be available to finance needed clean-ups.\footnote{53}

Naturally, the money in the public Superfund is finite. Due to this fiscal limitation as well as the desire to have clean-up costs borne by the parties who have some relationship to the contamination rather than the public at large,\footnote{54} CERCLA cast a wide net for "covered persons" who might be called upon to pay for the CERCLA clean up.\footnote{55} Such persons are identified as those who are:

\begin{itemize}
\item \footnote{49} See Lucia Ann Silecchia, Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm, 20 Harv. Envtl. L. Rev. 339, 339-40 (1996) (“CERCLA was intended to provide an effective mechanism for cleaning up such dangers as quickly as possible, with as little expense as ... possible borne by the responsible parties, rather than by the taxpayers.”).
\item \footnote{50} This variety of options leads, of course, to differences in the procedural postures in which CERCLA cases are decided. Some are enforcement actions brought by the government, and others are contribution actions among the joint and severally liable responsible parties. Interestingly, parent corporations arguing for a narrow view of parent liability may be helped by such a rule if they are targeted as PRP's, but harmed by it if they, in turn, seek contribution from other parents.
\item \footnote{51} See 42 U.S.C. § 9606(a) (1994).
\item \footnote{52} See id. § 9607(a).
\item \footnote{53} See id. § 9611(a).
\item \footnote{54} See Aronovsky & Fuller, supra note 42, at 425 (arguing that “fiscal necessity demands that the government find new, more effective strategies for identifying and collecting cleanup costs from responsible, financially viable parties”); Oswald, Corporate Parent Liability, supra note 42, at 243 (“Because the costs of cleanup may well exceed the assets of a subsidiary, the EPA has an incentive to seek to hold the parent liable as well.”); Duncan John McCampbell, Note, The Triumph of Substance Over Waste Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980: A Case Analysis of United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989), 13 Hamline L. Rev. 407, 408 (1990) (“[A]t the very heart of CERCLA is the authority it confers upon the EPA to replenish the Superfund by suing persons or companies responsible for the cost of cleaning up the hazardous waste sites.”).
\item \footnote{55} The costs that the responsible parties must bear include:
\begin{itemize}
\item \footnote{A} all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
\item \footnote{B} any other necessary costs of response incurred by any other person consistent with the national contingency plan;
\end{itemize}
\end{itemize}
(1) the owner and operator of a vessel or facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . , and
(4) any person who accepts or accepted any hazardous substances for transport . . . .

Within these broad categories, "person" is further defined to encompass "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." Furthermore, the statute further qualifies "owner or operator" as excluding "a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."

There is nothing in the language of CERCLA that refers specifically to the liability of a parent company for the acts of its subsidiary. Equally unhelpful is the legislative history which, due to the rushed

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

56. Id. § 9607(a)(1)-(4).
57. Id. § 9601(21).
58. Id. § 9601(20)(A).
59. See Kessbom et al., supra note 42, at 45 ("CERCLA does not mention either 'successor' or 'parent' corporations in its listing of persons who are liable for response costs. In fashioning a body of precedent for this area, therefore, the courts have relied on the sparse legislative history of the statute, including the perceived intent of Congress to make those who have 'benefitted' from the pollution—rather than the taxpayers—bear the burden for its consequences."); John Copland Nagle, CERCLA's Mistakes, 38 Wm. & Mary L. Rev. 1405, 1427 (1997) ("[T]he scope of the term 'operator,'—defined less than helpfully as 'any person owning or operating,'—has proved especially uncertain. When does a parent corporation become the operator of its subsidiary corporation's facilities?"); Brown, supra note 22, at 820 ("CERCLA never expressly refers to parent or subsidiary corporations."); Hood, supra note 17, at 114 ("CERCLA is silent on whether shareholders' participation in management constitutes grounds for liability."); Lawson, supra note 42, at 732 (observing that CERCLA "neither defines 'arranged for,' nor expressly provides direct liability for nonparticipating . . . shareholders"); Anne D. Weber, Note, Misery Loves Company: Spreading the Costs of CERCLA Cleanup, 42 Vand. L. Rev. 1469, 1498 (1989) ("CERCLA does not address parent company liability explicitly."); see also Oswald & Schipani, supra note 42, at 261-62 (criticizing CERCLA for being "unequivocal in its insistence that those responsible for environmental contamination bear the costs of cleanup [yet] disturbingly reticent . . . as to who is ultimately 'responsible' for improper disposal"); Wolfer, supra note 42, at 978 ("While the determination of who is an owner or opera-
passage of CERCLA, offers relatively little guidance in defining liable parties. Indeed, it has been aptly observed that "CERCLA is an

tor is critical in finding that party to be responsible, the CERCLA statute does not clearly define owner or operator.").

60. Courts and commentators frequently lament the hasty passage of CERCLA, and the sparse legislative history and minimal Congressional guidance that resulted from this haste. See, e.g., United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions."); aff'd in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986); see also William H. Rodgers, Jr., Environmental Law: Hazardous Wastes and Substances 514 (1992) ("Vagueness, contradiction, and dissembling are familiar features of environmental statutes, but CERCLA is secure in its reputation as the worst drafted of the lot."); Aronovsky & Fuller, supra note 42, at 427 (calling CERCLA "hastily drafted and silent on many points"); Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1, 1 (1982) (describing CERCLA as "hastily put together . . . . It was considered on December 3, 1980, in the closing days of a lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments."); Nagle, supra note 59, at 1407 ("CERCLA is now viewed nearly universally as a failure."); (quoting United States v. A & N Cleaners & Launderers, Inc., 854 F. Supp. 229, 239 (S.D.N.Y. 1994)); id. at 1419 ("[P]ost hoc speculation drives much of the interpretation of the statute in the absence of any direct signals about congressional intent."); Donald M. Carley, Comment, Personal Liability of Officers Under CERCLA: How Wide a Net Has Been Cast?, 13 Temp. Envtl. L. & Tech. J. 235, 235 (1994) ("The 96th Congress that hastily enacted CERCLA as an eleventh hour compromise is to blame, at least in part, for the confusion and litigation that has arisen in this area. The statute itself is not a model of clarity and precision."); Heidelberg, supra note 42, at 854-55 (calling CERCLA "a last minute, hastily drawn compromise [with] little definitive legislative history to aid courts in interpreting its ambiguous liability provisions"); McCampbell, supra note 54, at 414-15 ("Congress left very few footprints in the sand in its rush to pass a major hazardous substances bill before the onset of the Reagan presidency and a newly elected Republican majority in the Senate."); Noonan, supra note 42, at 736 ("Hastily and broadly drafted, CERCLA is an ambiguous statute. Moreover, because Congress passed the bill in such limited time, the legislative history provides little guidance to clarify its open-ended provisions. Thus, the courts are left to fill in the gaps."); Clay M. Stevens, Note, Corporate Officer Liability as an "Operator" Under CERCLA: The Kelley v. Tiscornia Analysis, 9 J. Nat. Resources & Envtl L. 553, 556 (1994) ("CERCLA's legislative history has not aided in interpreting Congressional intent as to whether traditional corporate law is to be followed or abandoned in CERCLA's enforcement.").

61. See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (noting that "CERCLA's legislative history is shrouded with mystery"); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) ("The structure of section 107(a), like so much of this hastily patched together compromise Act, is not a model of statutory clarity."); Aronovsky & Fuller, supra note 42, at 436 ("[T]he language of CERCLA does not expressly authorize parent corporation or individual shareholder liability for the acts of subsidiary corporations."); George W. Dent, Jr., Limited Liability in Environmental Law, 26 Wake Forest L. Rev. 151, 155 (1991) ("Although CERCLA's provisions are elaborate, they contain many drafting gaps. Congress intended the federal courts to fill these gaps through federal common law."); Oswald, supra note 6, at 580 ("One conclusion that all can agree upon, however, is that the statute is poorly drafted and analytically incomplete."); Heidelberg, supra note 42, at 863 ("The liability provisions in CERCLA are among the most sketchy and ambiguous in an act roundly criticized for its vagueness.").
unusual law because its liability provisions are simultaneously draconian and nebulous.”

Thus, whether or not a parent company should be liable for the CERCLA responsibilities of its subsidiary turns solely on how broadly courts, with insufficient statutory guidance, choose to read the list of “covered persons.”

In most contexts, courts have broadly interpreted CERCLA’s liability provisions. This is perhaps best evidenced by the fact that liability under CERCLA is now widely acknowledged to be joint, several, strict, and retroactive despite the fact that this was not entirely explicit in the language of the statute itself. As courts steadily widened the net of CERCLA liability in this and other contexts, they often justified their actions by incanting CERCLA’s broad remedial goal.

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63. See, e.g. H.R. 7020, 96th Cong. § 3071(a)(1)(D) (1980) (stating that, with very limited defenses, “any person who caused or contributed to the release or threatened release shall be . . . joint and severally [liable] with any other person who caused or contributed to such releases”). H.R. 7020 was one of three bills that ultimately led to CERCLA. See Anthony J. Fejfar, Landowner-Lessor Liability Under CERCLA, 53 Md. L. Rev. 157, 162-90 (1994) (discussing CERCLA’s legislative history).

64. The classic and oft-cited case of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) makes this point clear. Although Shore Realty acknowledges that the legislative history of CERCLA is inconclusive, id. at 1039-40, the case firmly establishes the principle of strict liability:

Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that ‘liability’ under CERCLA ‘shall be construed to be the standard of liability’ under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability. Id. at 1042; see also United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231 (6th Cir. 1996) (noting that “if the tortured history of CERCLA litigation has taught us one lesson, it is that CERCLA is a strict liability statute”).

65. See, e.g., Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 297 (N.D. Cal. 1984) (“Courts that have addressed the question of the scope of CERCLA have erred on the side of giving a broad reading to the Act.”); Northeastern Pharm., 579 F. Supp. at 848 (“CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up.”); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (“CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted . . . to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.”); see also Aronovsky & Fuller, supra note 42, at 427 (calling the federal judiciary CERCLA’s “powerful ally” and observing that there is “overwhelming judicial support for CERCLA and its objectives”); id. at 429 (“[T]he trend in judicial decisions on this issue is to . . . give great deference to the statute’s objectives and to impose liability on parent corporations and shareholders where appropriate to advance those objectives.”); id. at 439 (“Overwhelmingly, courts have reached decisions that further the congressional objectives underlying CERCLA, even at the expense of significant equitable interests of private responsible parties.”); King, supra note 42, at 141 (“Courts holding parent corporations liable under section 107 of CERCLA have done so by relying almost exclusively on the statute’s remedial nature. Through the . . . statutory construction that remedial legislation should be interpreted liberally, the courts have turned to the generic federal interests embodied in CERCLA’s text and history . . . .” (footnote
This goal urges that liability attach to any party having a relationship to the hazardous waste site, a relationship with the person or entity who left the waste at the site, or a relationship with the person or entity who owned or operated the site at the time the wastes were left. On the surface, this would appear to be a net into which parents of liable subsidiaries would easily stumble.

The difficulty in blithely holding parents liable for the misadventures of their subsidiaries lies in the well-established principle of American corporate law that shareholders—individuals or corpora-

66. This is a view not limited solely to the United States. See Bakst, supra note 6, at 323-24. Bakst notes:

[The European Union (EU) has traditionally recognized the corporation as a separate legal entity from its shareholders. European Company Law generally limits shareholder liability to the amount of investment in the corporation. The rule of limited liability applies not only when the shareholders are individuals but also when they are other corporations. . . . [A] parent corporation could not be reached to satisfy obligations of a subsidiary corporation.

Id. (footnotes omitted). The problems raised by limited liability in the British environmental scheme are discussed more fully in Incorporation, Envtl. Liab. Rep., Jan. 1,
tions—enjoy limited liability for the obligations of the corporation in which they own shares.\textsuperscript{67} Indeed, as stated in the Model Business Law}

\textsuperscript{67} The authority for this point is quite consistent and requires little explanation or elaboration. \textit{See}, e.g., Joel R. Burcat \& Craig P. Wilson, \textit{Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA}, 50 Bus. Law. 1273, 1275-76 (1995) ("Generally, corporations and their shareholders are separate in the eyes of the law, and courts will not disregard this formal separation absent a sufficient showing that the two are not truly independent." (footnote omitted)); Dent, Jr., \textit{supra} note 61, at 158 ("The traditional rule of American law is that, with some important exceptions, shareholders, officers and creditors of a corporation are not liable for corporate debts."); Geltman, \textit{supra} note 42, at 387 ("A corporation is generally regarded as an entity separate and distinct from its shareholders or subsidiaries; and those independent identities will not be disregarded absent a showing of special circumstances."); Heidt, \textit{supra} note 8, at 136 ("Limited liability has been a standard part of the statutory corporate form since the mid 1800s and remains a fundamental part of corporate law."); King, \textit{supra} note 42, at 126 ("Generally, stockholders are not personally liable for debts of corporations in which they hold an equity interest. The axiom has its origins in the English common law and has been carried over to the United States as part of state corporation law."); Oswald, \textit{supra} note 6, at 622 ("Limited liability is the keystone of American corporate law; according to traditional analysis, shareholders invest in corporations precisely because their liability for the corporation's debts is limited to their contribution to capital."); Oswald \& Schipani, \textit{supra} note 42, at 294 ("[O]ne of the basic tenets of corporate law is limited liability."); Strasser \& Rodosevich, \textit{supra} note 8, at 500 ("Protection of shareholders, including parent company shareholders, from liability is a fundamental principle of the legal system and, in the customary jargon of the common law, parent liability is to be imposed only in exceptional cases."); Thompson, \textit{supra} note 65, at 1036 ("As a general principle, corporations are recognized as legal entities separate from their shareholders, officers, and directors."); \textit{id.} at 1039 ("[S]hareholders in a corporation are not liable for the obligations of the enterprise beyond the capital that they contribute in exchange for their shares. A corollary of this principle is that the corporation is an entity separate from its shareholders, directors, or officers."); Bakst, \textit{supra} note 6, at 323 ("One of the most basic doctrines of corporate law in the United States is that the corporation is a separate legal entity from its shareholders ... [and] the shareholders of the corporation are only liable for corporate obligations to the extent of their investment."); Chandler \& Grosser, \textit{supra} note 42, at 14 ("[A] parent corporation is typically regarded as an entity distinct from its subsidiaries. A parent is protected from the liabilities of its subsidiary by the corporate veil unless circumstances require that the veil be pierced."); Crawley, \textit{supra} note 1, at 262 ("[T]he law generally recognizes the separate corporate identities of subsidiaries and affiliated companies and grants their parent corporations limited liability absent special circumstances."); Lawson, \textit{supra} note 42, at 739 ("A fundamental tenet of corporate law is the limited liability provided to corporate officers, directors, and shareholders. The common law recognizes the corporation and its shareholders as separate legal entities. ... Most states adopted the limited liability rule for corporations by the late 1830s."); Tom McMahon \& Katie Moertl, \textit{The Erosion of Traditional Corporate Law Doctrines in Environmental Cases}, Nat. Resources \& Env't, Fall 1988, at 29, 29 ("The traditional 'corporate veil' may be pierced only under relatively narrow circumstances where the shareholder exhibits excessive control over the corporation and commits a wrong through use of the corporate form which results in an unjust loss or injury."). For a full analysis of the legal and economic justifications for limited liability, see Frank H. Easterbrook \& Daniel R. Fischel, \textit{Limited Liability and the Corporation}, 52 U. Chi. L. Rev. 89 (1985). For historical perspectives on this limited liability, see Henry W. Ballantine, \textit{Separate Entity of Parent and Subsidiary Corporations}, 14 Cal. L. Rev. 12 (1925); William O. Douglas \& Carrol M. Shanks, \textit{Insulation from Liability Through Subsidiary Corpora-
Corporation Act: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." 68

Although not universally popular, 69 this basic principle is supported by the familiar and long-standing 70 justifications that such a limit on liability is economically and socially useful because it encourages investors to take risks they otherwise might shun; 71 it protects personal assets of investors from the unpredictability of the business world; 72 it allocates risk among a wide group of individuals; 73 it promotes economic efficiency in various ways; 74 it satisfies the expectations of investors who currently rely on limited liability as a central feature of

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69. See infra Part III.
70. See Blumberg, supra note 42, at 297 (asserting that American corporate law has "misty medieval roots").
71. See, e.g., Aronovsky & Fuller, supra note 42, at 436 ("[l]imiting liability on parents and individual shareholders presents serious economic policy concerns. The risk of unlimited liability could have a chilling effect on investment on corporations that generate, transport or dispose of hazardous wastes."); Heidelberg, supra note 42, at 871 ("Limited liability is based on the economic policy that shareholders should be encouraged to commit limited amounts of capital to an endeavor which might be too risky for direct individual involvement.").
72. This unpredictability may be particularly problematic for investors in the CERCLA context. See, e.g., Dent, Jr., supra note 61, at 172-73 (observing that "risks of waste disposal are notoriously unpredictable . . . . The uncertainty of environmental liability is compounded by the fear that Congress will not only change the rules but change them retroactively.").
73. See, e.g., id. at 165 ("[L]imited liability spreads risks among risk-averse participants: Shareholders risk their investment while creditors shoulder the remaining risk."); Menell, supra note 9, at 408 ("The doctrine of limited liability has been defended on three economic grounds: (1) it fosters economic growth by encouraging investors to take risks; (2) it facilitates the efficient spreading of risk among corporations and their voluntary creditors; and (3) it avoids the enormous litigation costs that would be required to resolve suits between a corporation's creditors and its many shareholders.").
74. See Easterbrook & Fischel, supra note 67, at 94 ("[L]imited liability decreases the need to monitor. All investors risk losing wealth because of the actions of agents. They could monitor these agents more closely. . . . But beyond a point more monitoring is not worth the cost."); id. at 96 ("With unlimited liability, shares would not be homogeneous commodities, so they would no longer have one market price."); id. ("[L]imited liability allows more efficient diversification."); id. at 97 ("[L]imited liability facilitates optimal investment decisions."); Dale A. Oesterle, Viewing CERCLA as Creating an Option on the Marginal Firm: Does it Encourage Irresponsible Environmental Behavior?, 26 Wake Forest L. Rev. 39, 51 (1991) ("It is possible, given any established standard of environmental behavior, to instill too much environmental caution into the operation of a firm."); McKane, supra note 42, at 1646 ("Limited liability also reduces the costs for parent corporations to monitor the managers of the subsidiary . . . . Because it bears less risk, a parent corporation is not motivated to monitor excessively . . . . ").
the corporate form;\(^75\) and it allows investors to take advantage of the many legitimate business reasons for operating through subsidiaries.\(^76\) Thus, as a general rule\(^77\) parents and subsidiaries live legally separate lives.\(^78\)

Critics argue that limited liability encourages irresponsible conduct;\(^79\) unwisely leads to externalization of costs which invites ineffi-

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75. See, e.g., Sisk & Anderson, supra note 65, at 508 ("Fabrication of a new federal common law regime regarding a matter grounded in corporation law would disrupt existing commercial relationships and prove unfair to those who had legitimately relied upon long-standing state law principles.").

76. Birg, supra note 8, states:
Business entities utilize the corporate structure of a parent corporation with one or more subsidiaries for many reasons. The advantages of this enterprise structure include (1) diversification of a company's product-line, (2) restriction of jurisdictional forums upon which suit may be brought against the company, (3) favorable tax treatment of parent and subsidiary enterprises, (4) efficient management structures, (5) possible financing advantages, (6) retention of goodwill of an established business unit, (7) movement of businesses to avoid highly regulated areas and antitrust implications, and (8) limited liability.

Id. at 776; see also Todd W. Rallison, Comment, The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA, 1987 Utah L. Rev. 585, 614. Rallison states:
Corporations may also be shareholders in other corporations. Corporations invest in other corporations for a variety of reasons: to gain the organizational or marketing benefits of diversity, to receive potentially large investment returns, to assure quality control of product components, to create price stability in a volatile market, and to insure against sudden, unexpected product shortages or embargoes.

Id.

77. For a discussion of veil-piercing, the exception to this rule, see infra notes 172-79 and accompanying text.

78. Interestingly, at least one commentator has suggested that this protection applies to other forms of business organizations. See Anthony M. Sabino, Litigation Issues for the Limited Liability Company, N.Y. St. B.J., Feb. 1997, at 30. Sabino states:
There is no good reason not to apply a piercing the veil doctrine to the LLC, primarily because the theory itself exists to prevent injustice. Notwithstanding all the good intentions of prevailing LLC law to protect the members of the LLC, it is highly unlikely that a piercing doctrine would be unavailable to litigants, if the members were utilizing the LLC form to commit fraud or otherwise act unjustifyably.

Id. at 34. If this assessment proves to be accurate, then it becomes even more necessary to have clear standards to frame the discussion.

79. See Aronovsky & Fuller, supra note 42, at 463 ("A parent or individual shareholder enjoying both the profits generated by a subsidiary corporation and the protection of limited liability has no incentive to urge the subsidiary corporation to handle hazardous substances in a more prudent but less profitable manner."); Dent, Jr., supra note 61, at 165 ("[L]iability deters negligence. Those who are not liable for injuries they cause have no economic incentive to be prudent and may inflict serious avoidable injuries. If liable for the injuries they inflict, rational people exercise reasonable care to avoid causing harm."); Easterbrook & Fischel, supra note 67, at 104 ("[S]hareholders of a firm reap all of the benefits of risky activities but do not bear all of the costs. These are borne in part by creditors. Critics of limited liability have focused on this moral hazard—the incentive created by limited liability to transfer the cost of risky activities to creditors—as a justification for substantial modification of the doctrine."); McKane, supra note 42, at 1648 ("Because a parent corporation risks
cient investment.\textsuperscript{80} and works a particular unfairness on involuntary creditors,\textsuperscript{81} particularly tort victims.\textsuperscript{82} In their view, limited liability makes it too easy for liable parties to avoid financial responsibilities through skillful selection of business form.

Regardless of the legal and economic debate surrounding limited liability for shareholders, the fact remains that such limited liability is not only well-established law, but it is also the general expectation of most who incorporate. A full discussion of whether or not limited liability should be the law is beyond the scope of this Article. Rather, it is assumed that this essential attribute of corporate law will remain unchanged. Therefore, the issue is how limited liability can be reconciled with the competing policies of environmental law. Interestingly, only its investment in the subsidiary, these corporations may encourage their subsidiaries to engage in excessive risk-taking.\textsuperscript{I}; \textit{Incorporation, supra} note 66, at 1 ("[I]policy-makers in every country will feel a need to legislate against intentional avoidance of liability by parties who, for example, place the ownership of contaminated, or potentially contaminated, assets in the hands of under-capitalised shell companies."); see also Oesterle, \textit{supra} note 74, at 39-40 ("Limited liability and environmental obligations create an option on the firm. If the environmental liabilities exceed the [firm's] value, the firm's owners can declare bankruptcy and the firm's assets will escheat to the government . . . . [I]f the value of the firm exceeds the . . . liabilities, the . . . owners can pay the liabilities and keep the firm.").

80. See, e.g., Dent, Jr., \textit{supra} note 61, at 165 ("[I]mposing liability for injuries one causes promotes allocative efficiency. If such liability is not imposed, activities will not bear their costs and will be overutilized."); Oesterle, \textit{supra} note 74, at 53 ("[E]nvironmental legislation creates a significant distortion in incentives for marginally solvent firms. . . . [M]arginally solvent firms have an incentive to maximize the value of their option at the expense of the government. . . . [T]he option holder gets the benefit of all expected increases in upside potential without incurring any additional risks from the expected increases in downside potential.").

81. See, e.g., Dent, Jr., \textit{supra} note 61, at 165 ("Most potential tort victims, including victims of toxic spills, have no opportunity to negotiate with potential tortfeasors."); Easterbrook & Fischel, \textit{supra} note 67, at 112 ("Contract creditors . . . are compensated ex ante for the increased risk of default ex post. Tort creditors, by contrast, are not compensated."); King, \textit{supra} note 42, at 128 ("[T]he case for disregarding limited liability is even stronger when there are involuntary creditors—typically, persons who have incurred an injury in tort. In the context of hazardous waste disposal, involuntary creditors include governmental agencies, private parties harmed directly as a result of the disposal, and those indirectly harmed."); Oswald, \textit{supra} note 6, at 624 n.160 ("Liability under CERCLA is more akin to the tort situation, where the injured party is involuntarily forced into an unwanted relationship . . . . Society does not contract voluntarily with a defendant for environmental contamination, and is not able to negotiate for a better position . . . ."); Crawley, \textit{supra} note 1, at 261-62 ("Some legal commentators have questioned whether legislatures, in statutorily authorizing corporations, intended to allow corporations to insulate themselves with one or more subsidiaries which serve as 'shock absorbers' in risky aspects of business."); Farmer, \textit{supra} note 42, at 795 ("Involuntary creditors, including tort and CERCLA plaintiffs, do not choose their association with the corporation, while a contract creditor has the opportunity to evaluate the risks of doing business with the corporation and voluntarily assumes the risks involved.").

82. Ironically, in spite of consistent sentiment sympathizing with the plight of the tort victim, empirical evidence suggests that it is \textit{not}, in fact, the tort victim for whom the corporate veil is pierced most often. See Thompson, \textit{supra} note 65, at 1038 ("[C]ourts pierce less often in tort than in contract contexts").
although obvious differences exist between small corporations and large corporations, limited liability often appears to be essentially the same whether the controlling shareholder is an individual or a parent corporation. There may be, however, sound policy reasons for treating individual shareholders differently from or more gently than corporate shareholders. Nevertheless, this generally has not been

83. See, e.g., Oswald & Schipani, supra note 42, at 298-99 ("[C]ourts apparently have never pierced the veil of a publicly traded corporation to reach the individual shareholders. Experience suggests, therefore, that individuals who own stock in large corporations . . . are in little danger of being held individually liable for CERCLA violations." (footnotes omitted)); Strasser & Rodosevich, supra note 8, at 519 ("The cases that have articulated a broad liability rule involved relatively small companies managed by individuals who directly oversaw all business operations and could reasonably be charged with checking on hazardous substance management."); Robert D. Snook, The Liability of Shareholders of Closely Held Corporations Under CERCLA, 68 Conn. B.J. 422 (1994); Lawson, supra note 42, at 741 ("[C]ourts are much more likely to pierce the corporate veil of a closely held corporation than of a publicly held corporation.").

84. See, e.g., United States v. Nicolet, Inc., 712 F. Supp. 1193, 1203 (E.D. Pa. 1989) ("[I]f an individual stockholder can be liable under CERCLA for his corporation’s disposal, a corporation which holds stock in another corporation . . . and actively participates in its management can be held liable . . . ."); Aronovsky & Fuller, supra note 42, at 446 ("In cases considering the liability of individual shareholders for hazardous waste releases, courts have taken a similar approach to the cases involving parent corporations."); Lauri A. Newton, The Prevention Test: Promoting High-Level Management, Shareholder, and Lender Participation in Environmental Decision Making Under CERCLA, 20 Ecology L.Q. 313, 320 n.40 (1993) ("Courts generally do not distinguish between the liability of individual shareholders and parent corporation shareholders."); Brown, supra note 22, at 823 ("In the parent/subsidiary context, the parent is treated similarly to the shareholder. The parent corporation, like the shareholder, ordinarily is not liable for its subsidiary’s debts beyond the amount it invested in the subsidiary."). But see Heidelberg, supra note 42, at 880-81 ("Considerations of policy and fairness are reflected in the courts’ greater willingness to abrogate corporate limited liability in favor of a plaintiff seeking to hold a parent corporation, as distinguished from an individual controlling shareholder, liable for an obligation."); Rallison, supra note 76, at 617 ([C]ourts are more willing to impose liability on corporate shareholders than individual shareholders. This leniency towards individuals may be because courts view corporate shareholder liability as less distasteful or personally devastating than individual shareholder liability. Whatever the reasons, it is clear that corporate shareholders have less protection from liability than do individual shareholders." (footnote omitted)). The conflict over and ambivalence about the status of the corporate shareholder versus the individual shareholder is discussed in Dent, supra note 61, at 166-67 (describing the view of various commentators on this issue). For a discussion of this issue in light of Bestfoods see infra notes 211-38 and accompanying text.

85. For a fuller discussion of these reasons, see Allen, supra note 42, at 48 ("The common law raises the corporate veil primarily to promote risk-taking by individual investors . . . . However, parent corporations do not require this protection to take risks. Therefore, the law should not allow a parent corporation to raise the corporate veil between itself and a subsidiary." (footnotes omitted)); id. at 64-65 ("The considerations that mandate a stronger piercing remedy for parent corporations do not warrant the same conclusion for individual shareholders." (footnote omitted)); Heidelberg, supra note 42, at 881 ("Courts may recognize that there is less economic or other policy justification for providing multiple-limited liability insulation to a corporation that wishes to segregate high-risk activities in a subsidiary than there would be for an individual shareholder or a group of individuals . . . ."). Professor George
the case and corporate parents such as those discussed in this Article enjoy much the same limited liability as they would if they were individuals.\textsuperscript{86}

Obviously, the dichotomy between CERCLA's search—draconian or otherwise\textsuperscript{87}—for a solvent responsible party and corporate law's limited shareholder liability inevitably leads to conflict.\textsuperscript{88} Certain facts exacerbate this conflict:

- A parent corporation may be viewed as an attractive and easily "targetable" deep pocket.\textsuperscript{89}

Dent, Jr., however, provides an interesting perspective on the way in which a system unlimiting liability may actually work to the detriment of the corporate shareholder rather than the individual one:

Even if [individual] shareholders are liable, their risk is limited by insolvency. They still can escape liability by declaring bankruptcy. This creates an incentive to vest chemical firms in less wealthy hands. . . .

A large company considering the same opportunity could not disregard CERCLA liability so easily. It must weigh that liability to the point of its own bankruptcy; that is, up to its net worth. Further, because of joint and several liability and the EPA's practice of pursuing deep pockets, the large firm must anticipate that it will probably have to bear more than its share of a major spill while the impecunious firm may reasonably expect that it will have to pay little or not be sued at all.

Dent, Jr., \textit{supra} note 61, at 174-75 (footnote omitted).

86. Indeed, it appears that individual shareholders rather than their corporate counterparts have the most to fear vis-à-vis veil-piercing. \textit{See} Thompson, \textit{supra} note 65, at 1038 ("[A] piercing decision is not less but more likely when the shareholder behind the veil is an individual rather than another corporation."). Further, the number of shareholders also makes a difference—with piercing significantly more likely to happen in the small corporation rather than in the large corporation. \textit{See id.} at 1054-55. Professor Thompson explains:

The number of shareholders makes a difference in the propensity of courts to pierce the veil of corporations. Among close corporations, those with only one shareholder were pierced in almost 50% of the cases; for two or three shareholder corporations, the percentage dropped to just over 46%, and for close corporations with more than three shareholders, the percentage dropped to about 35%.

\textit{Id.} However, "[t]he identity of the plaintiff as either an individual or a corporation leads to no difference in results." \textit{Id.} at 1050 (emphasis added).

87. \textit{See}, e.g., Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994) ("CERCLA liability has been described as 'a black hole that indiscriminately devours all who come near it.'") (citation omitted).

88. As aptly explained by Professor Nagle, "[A]lthough CERCLA's [broadly remedial] goals rarely conflict, they often conflict with other statutes or common law assumptions." Nagle, \textit{supra} note 59, at 1441.

89. \textit{See} Rosenberg, \textit{supra} note 42, at 30. Professor Rosenberg states:

\textit{[R]eported decisions in this area often tend to be rationalizations of results reached for other reasons, such as the perceived need to find a deep pocket to pay for remediation . . . [and] to assure the availability of solvent defendants who are able to pay judgements to plaintiffs with whom a court sympathizes.}

\textit{Id.} (footnote omitted). Indeed, this aspect of the CERCLA liability scheme subjected the statute to criticism from its earliest development. For a stinging critique, see John J. Lyons, \textit{Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?}, 6 Stan. Envtl. L.J. 271, 272-74 (1986-87) (arguing that inequities in the CERCLA liabil-
• The liability of the parent will often not merely be a "supplement" to that of the subsidiary but, in the case of an insolvent or defunct subsidiary, it may be the sole pocket into which CERCLA's eager hand may reach.

• The joint and several liability scheme means that if a parent is liable, its responsibility is not in proportion to the damage caused by its subsidiary but may include response costs for the entire site.

• The strict liability scheme of CERCLA sharply limits the defenses available to a parent found liable for its subsidiary's misdeeds.

90. See Noonan, supra note 42, at 749 ("Due to the nature of the targeted sites, the corporation which caused the actual contamination often no longer exists."); Weber, supra note 59, at 1469-70 ("The typical case arising under . . . CERCLA involves hazardous waste generation and disposal spanning several decades by companies no longer in existence.") (footnotes omitted). This problem was noted in Idylwoods Associates v. Mader Capital, Inc., 956 F. Supp. 410, 418 (W.D.N.Y. 1997) ("[CERCLA] envisions that sometimes the cleanup must be paid for by those least responsible because those who are most responsible lack funds or cannot be found." (quoting Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1537 (E.D. Cal. 1992))).

91. For a full discussion of the particular problems associated with owning a culpable yet insolvent subsidiary, see Dent, Jr., supra note 61. See also Aronovsky & Fuller, supra note 42, at 422 ("In many cases, the assets of the corporation immediately responsible for the hazardous waste problems have proven inadequate to pay for the necessary clean-up at the site."); Burcat & Wilson, supra note 67, at 1273 ("A related question, which has not been directly addressed . . . relates to the potential liability of shareholders of dissolved corporations . . . . A company faced with this situation generally should not rush to dissolve the subsidiary under the belief that its potential liability will disappear along with the corporate entity."); McMahon & Moertl, supra note 67, at 29 ("In situations where the liable corporation is insolvent or defunct, recent court decisions construing CERCLA and RCRA have sliced through the corporate entity and have imposed both derivative . . . and direct liability on officers and shareholders of corporations.").

92. This problem has been observed by many. See Aronovsky & Fuller, supra note 42, at 435 (stating that a subsidiary may have the capital to avoid alter ego exposure for the parent, "but not [be] solvent enough to participate meaningfully in remediation efforts . . . . Alternatively, a subsidiary may have sufficient resources to pay its fair share of clean-up costs, but not enough to cover either the shares of other parties or . . . the costs resulting from joint and several liability."); Dent, Jr., supra note 61, at 169 ("One who contributes only a fraction of a release may have to pay a much larger share, or even the entire cost, of a cleanup. . . . CERCLA defendants can also incur substantial litigation costs, even if the defendant is exonerated." (footnotes omitted)); Alison Watts, Insolvency and Division of Cleanup Costs, 18 Int'l Rev. of L. & Econ. 61, 62 (1998) ("[A] small dumper with deep pockets (a company whose overall wealth is significant compared to potential liability from a waste site) could be asked to pay for all cleanup costs"); Heidelberg, supra note 42, at 911 ("CERCLA's weak causation requirements, combined with its permitted imposition of joint and several liability on a broad range of parties, can expose parties having only a tangential relation to acts which caused harm to the full financial burden of site response costs totaling millions of dollars." (footnote omitted)). The legal intricacies and policy considerations underlying CERCLA's joint and several liability scheme are explored fully in Oswald, supra note 62.

93. Indeed, the defenses provided for in the statute are extremely limited in their applicability, making the pervasive strict liability scheme underlying CERCLA partic-
• CERCLA's retroactivity may impose liability on a parent for errors of subsidiaries that occurred long before CERCLA was passed.94

• The high cost of the average CERCLA remedy means that a finding of liability for a parent corporation could have a significant financial impact on the parent's overall economic health.95

Given the "high stakes" nature of CERCLA liability, courts and commentators have struggled to determine when, where, how, or if parent corporations should bear the blame for the actions of their subsidiaries.96 In so doing, they have amassed a confusing array of competing theories.

94. For a fuller discussion of the retroactivity provisions of CERCLA and their impact on CERCLA's liability schemes see infra notes 343-54 and accompanying text.

95. See, e.g., Gregory P. O'Hara, Minimizing Exposure to Environmental Liabilities for Corporate Officers, Directors, Shareholders and Successors, 6 Santa Clara Computer & High Tech. L.J. 1, 2 (1990) ("Because environmental liabilities can be so expansive and extensive, it is imperative that every high technology company remain constantly vigilant against transgressions within its organization, and implement prophylactic measures to avoid succeeding to the environmental liabilities of another corporation it subsequently acquires."); Oswald, supra note 62, at 303 n.8 ("The EPA estimated the average costs (in 1988 dollars) associated with a Remedial Investigation and Feasibility Study (RI/FS) and design and implementation of a remedy at a National Priority List (NPL) site to be $1.3 million for the RI/FS, $1.5 million for remedial design, $25 million for remedial action, and $3.77 million for the present value of operation and management of the site remedy over 30 years.") (citing 57 Fed. Reg. 4824, 4829 (1992)); Ram Sundar & Bea Grossman, The Importance of Due Diligence in Commercial Transactions: Avoiding CERCLA Liability, 7 Fordham Envtl. L.J. 351, 355-56 (1996) ("Since the cost of cleaning up Superfund sites under CERCLA has, in some instances, exceeded $30 million, falling within CERCLA's broad PRP category can be very expensive."); Carley, supra note 60, at 258 ("Given the enormity of the cost of an environmental cleanup, a finding of corporate liability can result in financial ruin for even stable and financially sound companies."); see also Lawrence, supra note 65 ("Estimates of hazardous waste cleanup costs now reach $500 billion nationwide, or $2,000 for every man, woman, and child in the United States.").

96. Interestingly, this is a problem not only in federal cases interpreting CERCLA but also in cases involving the state counterparts of CERCLA. See, e.g., David L. Yas, "Uninvolved" Corporation Can Avoid 21E Costs: No Cleanup Liability Unless "Actual" Power, Mass. Law. Wkly., June 30, 1997, at 1 (discussing complexities of parent/subsidiary liability under Massachusetts environmental laws).
III. **Pre-Bestfoods Theories for Pinning the Blame & Piercing the Veil**

Although parent corporations were never explicitly mentioned in CERCLA, courts have not completely insulated them from liability for the actions of their subsidiaries.\(^{97}\) Rather, courts have disagreed over what theory should give rise to such liability and, relatedly, what the scope of that liability should be. Prior to *Bestfood's* clarification, courts approached this issue by adopting one of four basic approaches.\(^{98}\) (1) direct “operator” liability for “actual control”; (2) di-


\(^{98}\) This differs from analysis of the behavior of individuals within corporations that may lead to responsibility for violations of CERCLA. There, it has been suggested that there are three theories of liability predicated on either the individual’s “authority . . . to control the waste disposal activities of the business,” or “the individ-
rect "operator" liability for "capacity to control"; (3) indirect "owner" liability for piercing the veil under state law; or (4) indirect "owner" liability for piercing the veil under federal common law. While discussion of the prevailing liability theories is not the major thrust of this Article, some background is necessary to understand the state of law at the time the court decided Bestfoods. These brief descriptions of the primary lines of thought and the presentation of several representative cases will illustrate the contours of the four pre-Bestfoods theories for pinning the blame and piercing the veil.

99. Some commentators have reached the conclusion that the outcome of most, if not all, of the relevant cases would be quite similar regardless of which standard the courts adopt. See, e.g., Oswald & Schipani, supra note 42, at 263 ("A close reading of the burgeoning case law on CERCLA violations reveals . . . that courts have not interpreted the language of CERCLA in such a broad manner. Rather, careful analysis of the fact patterns of these cases discloses that courts have simply held liable parties that could have been held liable under traditional corporate law doctrine."); Strasser & Rodosevich, supra note 8, at 495 (discussing view that CERCLA liability cases are inconsistent and arguing that "[w]hile many perceive Superfund liability to constitute a mindless search for deep pockets . . . . [T]his perception arises from a tendency by courts and counsel to separate cases into rigid, poorly chosen categories, and . . . this perception is incorrect upon a studied examination of the case law."). In addition, several commentators have argued quite persuasively that despite all the concern, the case law suggests no real departure from traditional corporate law principles. For example, Riesel and Srolovic have argued that:

CERCLA liability has generally been placed on shareholders in factual circumstances where the corporate veils could be pierced under traditional alter ego doctrines. . . . [C]ommentators who analyzed the cases placing CERCLA liability on . . . shareholders found that, based on the facts, traditional doctrines have not been abrogated and perhaps best explain the results reached by the courts. This adherence to common law principles under the rubric of CERCLA may be described as old common law wine in new federal bottles.

Riesel & Srolovic, supra note 37, at 72-73. But see Dadswell, Jr., supra note 42, at 475-82 (noting how some courts and commentators argue that liability may be found outside of traditional corporate standards); McMahon & Moertl, supra note 67, at 29 (noting that courts have used CERCLA to avoid traditional corporate law doctrines).

100. See infra Part III.

A. Direct "Operator" Liability for "Actual Control"

The majority liability theory\(^{102}\) held that a parent corporation should be held accountable under CERCLA when the parent exercised such a degree of control over the subsidiary's conduct and decision-making that the parent satisfied the definition of "owner" or "operator" and, thus, could be held directly liable. This was the "majority view" in that direct liability theories were favored over indirect veil-piercing theories, and also in that this more restrictive requirement of direct liability was more often accepted than the "capacity to control" test. CERCLA itself imposed liability on those who were "owner[s] and operator[s] of a vessel or a facility,"\(^{103}\) or who "owned or operated any facility at which . . . hazardous substances were disposed of."\(^{104}\) Thus, cases adopting this majority view accepted the notion that by dominating a subsidiary,\(^{105}\) the parent itself could be directly transformed into an owner or operator, thereby avoiding the need to pierce the corporate veil.\(^{106}\)

Not surprisingly, a form of direct liability was advocated by the EPA. In a 1984 Enforcement Memorandum,\(^{107}\) the EPA established that a parent corporation could be held liable through traditional veil-piercing.\(^{108}\) However, the EPA also advocated use of direct operator liability "when the shareholder controlled or directed the activities of

\(^{102}\) See Brown, supra note 22, at 829 ("A majority of the cases examining a parent corporation's liability under the direct liability theory have adopted the narrower actual exercise of control test."); Chandler & Grosser, supra note 42, at 23 ("The majority of federal circuit courts have ruled that if the corporate owner exercises sufficient control over the corporation it may be liable under CERCLA for environmental contamination caused by the corporation.").


\(^{104}\) Id. § 9607(a)(2).

\(^{105}\) A common criticism of this approach is that it is difficult to determine what types of activities will result in courts classifying a parent as an operator. See, e.g., Dent, Jr., supra note 61, at 159-60 ("Although this standard seems more restrained than the capacity-to-control test, its scope is even more vague. It is unclear, for example, whether 'active control' includes the routine activities of parents, such as electing directors, consulting with managers, and monitoring performance, or whether greater involvement is required."). This remains a problem even in the wake of Bestfoods.

\(^{106}\) This theory of direct liability for operators is discussed more fully in Brown, supra note 22, at 821 ("Under the 'direct liability' theory, courts determine whether the parent corporation can be directly liable under the plain language of CERCLA. This requires that courts determine whether the parent has exercised sufficient control over its subsidiary to classify the parent as an 'operator' under CERCLA section 107.").; Aronovsky & Fuller, supra note 42, at 437 ("At a certain point, investors who control the hazardous waste activities of their corporate investments themselves become 'operators.'").

\(^{107}\) Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, United States Environmental Protection Agency, to Assistant Administrator for Solid Waste and Emergency Response, Associate Enforcement Counsel for Waste, Regional Administrators, and Regional Counsels (June 13, 1984) (on file with the author).

\(^{108}\) See id. at 5-10.
The EPA's adoption of a broad view is not surprising. What is more important is the manner in which courts adopted this view as well.

_United States v. Kayser-Roth Corp._ has often been perceived as the landmark case advocating direct liability for actual control. The direct liability rule, as taken from _Kayser-Roth_, was that when a parent dominates a subsidiary through its involvement in the subsidiary's affairs—particularly environmental matters—the parent could be held directly liable. _Kayser-Roth_ held that there was, at least in the view of the First Circuit, no legal bar to such direct liability. _Kayser-Roth_ and its progeny failed to make clear, however, any bright-line description of parental involvement that was likely to lead to direct liability.

The _Kayser-Roth_ court relied, to some extent, on _United States v. Northeastern Pharmaceutical & Chemical Co._, _New York v. Shore Realty Corp._, and _Riverside Market Development Corp. v. International Building Products, Inc._ Those three cases did not deal with the direct liability of parent corporations for the actions of their subsidiaries but rather with the liability of individual owners for the actions of the corporations which they controlled. By analogy, the _Kayser-Roth_ court used these cases to demonstrate the ways in which those who own corporations could exercise a level of control high enough to have brought them within the realm of "owner" liability.

109. Id. at 3.

110. But see McKane, _supra_ note 42, at 1680-81 (arguing against assigning any legal weight to the E.P.A. enforcement memorandum).

111. 910 F.2d 24 (1st Cir. 1990).


114. 759 F.2d 1032 (2d Cir. 1985).


116. _Shore Realty_ dealt with the personal liability of an individual under CERCLA for the actions of a corporation in which he was an officer and shareholder. 759 F.2d at 1037. The court held that "an owning stockholder who manages the corporation . . . is liable under CERCLA as an 'owner or operator.'" Id. at 1052. The court found it unnecessary to pierce the corporate veil to impose this liability because the individual defendant could be directly liable. _Id_. As in _Kayser-Roth_, however, _Shore Realty_ did not articulate a clear standard as to what specific conduct lead to its imposition of liability.
Certainly, there were important distinctions that arose between corporations as owners and individuals as owners. However, the central premise of these cases—that a corporate owner who played an active role in managing that corporation could be directly liable—was at the heart of Kayser-Roth and its progeny. Unfortunately, Kayser-Roth lacked a clear-cut test for such liability.

Through the years, other cases also dealt with direct liability in the parent-subsidiary corporate context. These cases, like Kayser-Roth, established that one need not pierce the corporate veil to find liability. In Schiavone v. Pearce,117 for example, although the primary issue for the Second Circuit to consider required interpretation of indemnification agreements,118 the decision turned on an analysis of parental liability. Noting the “perceived tension between direct liability and liability based on veil-piercing,”119 the court endorsed the direct liability rule and stated that an “interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and purpose of the legislation.”120

In Northeastern Pharmaceutical, the court again found two individual shareholders liable as owners and operators. 810 F.2d at 745. Those shareholders, however, were also employees and officers of the defendant corporation. Id. at 743-44. Thus, it is unclear whether it was truly their capacity as shareholders that resulted in their direct liability. This lack of clarity underscores the need to establish which “hat” defendants wear before liability will be assessed. It is unclear in Northeastern, for example, whether the individual defendants would have been liable if they were not also officers and directors. The helpful contribution that Northeastern makes, however, is its statement that “personal liability is distinct from the derivative liability that results from ‘piercing the corporate veil.’” Id. at 744. Hence, although this case does not clarify what type of individual conduct will result in direct liability, it does establish that direct liability is a possibility.

Finally, Riverside Market Development Corp. dealt with the liability of an individual defendant who was a majority shareholder and officer of the liable corporation. 931 F.2d at 328. The court affirmed the district court’s finding that the individual defendant did not meet the definition of “operator.” Id. at 329-30. The court explained that he “spent very little time at the [facility], and no evidence [indicates] that such visits would have provided [him] with the opportunity to direct or personally participate in the improper disposal . . . . [H]is participation in plant operations were limited to reviewing financial statements and attending meetings . . . .” Id. at 330. The court was clear in its view that this conduct was insufficient to lead to direct liability. While this court established the validity of the direct liability theory, it did, like the previous two cases, leave open two essential questions:

(1) What type of conduct would have led to a different outcome under the direct liability test; and

(2) Was the individual a defendant because of his role as a shareholder or because of his capacity as an officer?

117. 79 F.3d 248 (2d Cir. 1996). For further discussion of Schiavone, see Hottel & Jeffcoat, supra note 36, at 174-75.
118. Schiavone, 79 F.3d at 251.
119. Id. at 253.
120. Id. The court recognized that finding the parent corporation liable “may not be consistent with traditional rules of corporate liability.” Id. at 253-54 (citing United States v. USX Corp., 68 F.3d 811, 822 (3d Cir. 1995)). In the view of the court, how-
Similarly, *John S. Boyd Co. v. Boston Gas Co.*\(^{121}\) dealt, in part, with a parent corporation’s responsibility for its subsidiary’s CERCLA liabilities. The First Circuit followed the *Kayser-Roth* theory that a parent corporation could be directly liable as an “operator” based on the trial court’s inquiry into “the relationship between the parent and subsidiary, in order to reveal the requisite level of corporate involvement.”\(^{122}\) Although the court found that the level of parental involvement justified the trial court’s imposition of direct liability,\(^{123}\) no easily understood rule was articulated.

Likewise, the direct liability standard was employed by the Third Circuit in *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*\(^{124}\) There, the court provided one of the better discussions of the direct liability theory. First, it drew a clear distinction between direct liability for a parent as an “operator” of a subsidiary and indirect liability as an “owner.”\(^{125}\) The court, justifying its use of the “actual control” test and commending the lower court’s use of that standard, explained that under this standard, “while the longstanding rule of limited liabil-

\(^{121}\) 992 F.2d 401 (1st Cir. 1993).
\(^{122}\) Id. at 408.
\(^{123}\) Id. In part, the facts that justified that conclusion were that the parent corporation, NEES, and the subsidiary, Lynn Gas, had a number of interactions:

NEES continually maintained a presence among the officers and directors of Lynn Gas. The president of Lynn Gas was also the president of NEES’ gas division; he was appointed by the chairman of NEES and reported directly to NEES officials. NEES selected the directors of Lynn Gas, and a senior officer of NEES approved Lynn Gas’s budget. Lynn Gas needed approval for all expenditures over $5,000. NEPSCO provided extensive services to Lynn Gas, such as controlling the checking account, handling the purchase of the oil used in peak shaving, and maintaining Lynn Gas property. NEPSCO employees were also well represented among Lynn’s officers and directors.


\(^{125}\) See *Lansford-Coaldale*, 4 F.3d at 1220, in which the court stated:

There is general agreement that under CERCLA, “owner” liability and “operator” liability denote two separate concepts and hence require two separate standards for determining whether they apply. Under CERCLA, a corporation may be held liable as an owner for the actions of its subsidiary corporation in situations in which it is determined that piercing the corporate veil is warranted. Operator liability, in contrast, is generally reserved for those situations in which a parent or sister corporation is deemed, due to the specifics of its relationship with its affiliated corporation, to have had substantial control over the facility in question.

\(^{126}\) (citations omitted). The court in *Lansford-Coaldale* explicitly rejected any direct liability based on veil piercing theories. Id. at 1225.
ity in the corporate context remains the background norm, a corporation cannot hide behind the corporate form to escape liability in those instances in which it played an active role in the management of a corporation responsible for environmental wrongdoing.\textsuperscript{126} These distinctions were useful. The court, however, still had to confront the practical question of whether the relationship between parent and subsidiary was one that would allow imposition of direct liability. The court grappled with this issue\textsuperscript{127} and concluded by vacating the lower court’s opinion and remanding the case for a fuller analysis of the factual basis for liability, \textit{vel non}.\textsuperscript{128}

\textit{Jacksonville Electric Authority v. Bernuth Corp.}\textsuperscript{129} also addressed the issue of imposing direct liability on a parent corporation. The Eleventh Circuit, like the Third Circuit, found that the direct liability theory was the appropriate standard. Although the court ultimately agreed with the lower court that there was insufficient evidence to establish that the parent was the operator,\textsuperscript{130} the opinion provided some valuable insight into the factors that courts should consider when determining whether a parent should be liable for the acts of its subsidiary. Adopting guidance from \textit{Levin Metals, Corp. v. Parr-Richmond Terminal Co.},\textsuperscript{131} the court reaffirmed that a parent “must play an active role in the actual management of the enterprise.”\textsuperscript{132} Although the court reviewed a fairly extensive list of ways in which the parent was involved with its subsidiary,\textsuperscript{133} it declined to find pa-

\begin{itemize}
\item \textsuperscript{126} Id. at 1221. The court contrasted the advantages of this view with what it perceived to be the disadvantages of the “authority-to-control” test. In the court’s view, the latter test “may unduly penalize the corporation for a decision by that corporation to benefit from one of the well-recognized and salutary purposes of the corporate form: specialization of management.” Id.
\item \textsuperscript{127} Id. at 1222-24 (providing information relating to the relationship between the parent and the subsidiary).
\item \textsuperscript{128} Id. at 1212-13.
\item \textsuperscript{129} 996 F. 2d 1107 (11th Cir. 1993). For further discussion of \textit{Jacksonville} and its reasoning, see Mitchell, Jr., supra note 42, at 78-80; Worden, supra note 42, at 78-86.
\item \textsuperscript{130} \textit{Jacksonville}, 996 F.2d at 1110-11.
\item \textsuperscript{131} 781 F. Supp. 1454 (N.D. Cal. 1991). The test required that the shareholder: (1) “actually participated in the operations of the facility ... [o]r in the activities which resulted in disposal” or (2) “actually exercised control over, or was otherwise intimately involved in the operations of, the corporation immediately responsible for the operation of the facility.” Id. at 1456 (citations omitted).
\item \textsuperscript{132} \textit{Jacksonville}, 996 F.2d at 1110.
\item \textsuperscript{133} The court described the relationship between Tufts, the parent, and Eppinger, the subsidiary, as:
\begin{itemize}
\item (1) Tufts owned all or almost all the stock in Eppinger;
\item (2) Tufts dictated the terms of employment of Eppinger’s President ... and other executive officers;
\item (3) Tufts’ creation of a profit sharing plan for the Eppinger officers;
\item (4) Eppinger’s distribution of dividends in excess of net earnings during Tufts’ period of ownership, which allegedly contributed to a situation where the equipment at the wood preserving facility was not properly upgraded and replaced;
\item (5) Tufts’ receipt of reports at Trustee meetings on the status of Eppinger’s operations;
\item (6) Tufts’ alleged hiring of William Cook as Director, Vice-President, and General Manager of Eppinger;
\item (7) statements by
\end{itemize}
rental liability. The court focused its concern on ensuring that it did not use the mere “indicia of a parent-subsidiary relationship” as a basis for a finding of liability. Beyond that, however, the court declined to say why it believed that the facts offered were merely such indicia and nothing more.

City of New York v. Exxon Corp., a pre-Schiavone case in the Southern District of New York, also sided with the view that favored direct liability. The Exxon court focused on “the degree of control over and actual participation by the corporate officer or shareholder in the affairs of the corporation.” The court also found that there was sufficient control to justify direct liability and that the parent’s control over the subsidiary’s affairs “was pervasive.” What the court found particularly troubling and, therefore, conducive to finding direct liability was the fact that the subsidiary’s “business consisted solely of reprocessing and disposing of wastes.” Unlike other scenarios in which waste disposal might have been a minor and undetected portion of the subsidiary’s operations, here “it [was]...
inconceivable that [the parent] was unaware that [the subsidiary] was dumping hazardous waste.”

Interestingly, the Exxon court went one step beyond many of the direct liability cases and created an explicit affirmative duty for parents to be aware of and prevent their subsidiaries’ environmental misadventures. The obvious advantage of this approach was that it eliminated any incentives for willful blindness. However, its disadvantage was, again, its lack of clear guidance as to what factors should be considered in judging parental liability.

As these opinions and other lower court opinions illustrate, such a rule gave a great deal of discretion to the courts and resulted in a

143. Id.; see also id. at 552 (finding that parent’s “characterization of itself as a detached, unaware parent holding company concerned with no more than its subsidiary’s financial condition, until faced with concrete evidence of its illegal dumping activities...is simply untenable”).

144. See id. at 552 (finding that parent “had an affirmative duty to ensure that its subsidiary was properly protecting the public from the environmental health and safety hazards inherent in reprocessing...and disposing of...wastes. [The parent] cannot escape direct liability under CERCLA by invoking the protection of the corporate veil and by professing ignorance of the illegality of [the subsidiary’s] activities.” (footnote omitted)).

145. As discussed below, infra Part V.C., the core of this Article’s dissatisfaction with much of the current law regarding assessment of liability against parent corporations is the danger of encouraging willful blindness and detachment.

146. For example, although General Electric Co. v. Aamco Transmissions, Inc., 962 F.2d 281 (2d Cir. 1992), dealt with the liability of oil companies for the environmental problems of their service station tenants rather than the classic parent/subsidiary issue, the court similarly analyzed when control over the activities of another entity can result in liability. The court reiterated the broad remedial goals of CERCLA, id. at 285, and then went on to state that even with the broad remedial goals of CERCLA: Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for the disposal of hazardous substances. Accordingly, . . . it is the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA’s liability provision.

Almost all of the courts that have held defendants liable as arrangers have found that the defendant had some actual involvement in the decision to dispose of waste. . . .

The few courts that have held an entity responsible as an arranger in the absence of actual involvement have found that nexus between the potentially liable party and the disposal of hazardous substances to be some obligation to arrange for or direct their disposal. Id. at 286 (citations omitted). Thus, the court strongly endorsed a view of direct liability. Under the facts of this particular case, the court declined to find liability because “the undisputed facts demonstrate that the oil companies had no obligation to exercise control over the manner in which their dealers disposed of waste motor oil.” Id. at 287. However, defining precise standards is a difficult task for a court to do. Thus, the court declined or was unable to articulate such standards.

level of ambiguity that made it difficult to predict when the courts would depart from traditional corporate principles of limited liability and find direct liability for a parent.\textsuperscript{148} This expansive reading, however, was in accord with CERCLA's broad remedial goal of placing the burden of clean-up on parent corporations who were arguably more responsible for the contamination than the public at large.\textsuperscript{149}

\textsuperscript{148} See, e.g., Brown, supra note 22, at 825 (arguing that "Congress, not the courts, should authorize holding parent corporations liable for the hazardous waste violations of their subsidiaries").

\textsuperscript{149} See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (refusing to "interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise"); United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988) (explaining that CERCLA's goal is to ensure "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created[,]" and noting that "[i]f this goal would be frustrated if the mere act of incorporation were allowed to impede the recovery of response costs"); see also Allen, supra note 42, at 55 ("A scheme that imposes categorical liability on parent corporations helps meet the goal of preventing depletion of the Superfund. Parent corporations offer an additional deep pocket to help fund cleanups."); Aronovsky & Fuller, supra note 42, at 422-23 ("The leading objective of CERCLA is decisive action to begin the process of remediating the nation's leaking hazardous waste sites. One of the fundamental policies underlying CERCLA is to accomplish this goal, to the maximum extent possible, at the expense of private responsible parties rather than the taxpayers."); Newton, supra note 84, at 319 ("Most courts that interpret CERCLA look to the statute's remedial goals and impose an expansive direct liability scheme to ensure that those parties benefiting from improper waste disposal practices pay to clean up resulting hazardous waste sites."); Strasser & Rodosevich, supra note 8, at 498 ("Emphasizing the remedial nature of the statutory cleanup scheme, courts have willingly extended liability well into the periphery of debatable statutory coverage, leaving individuals and businesses with wholly unanticipated liability."); Brown, supra note 22, at 825 ("Congress intended that CERCLA be given broad interpretation, and CERCLA does not preclude a parent corporation's liability for the environmental waste violations of their subsidiary.... [T]he entities best suited to prevent the harm should be burdened with the costs of clean-up instead of other sources, such as other PRPs, taxpayers and insurance companies, who can have little or no control over the subsidiary corporation's waste management activities."); Chandler & Grosser, supra note 42, at 23 ("CERCLA is a remedial statute and should be construed broadly to include all culpable parties."); Farmer, supra note 42, at 780 ("Courts have indicated that because CERCLA is remedial in nature, its liability provisions must be liberally construed."); Heidelberg, supra note 42, at 917-18 ("Courts have consistently rejected constitutional arguments against CERCLA's broad imposition of liability, reasoning that the need to control the hazardous waste problem justifies an essentially ad hoc imposition of liability on solvent parties with some connection to disposal sites."); Lawson, supra note 42, at 733 ("Courts reason that the statute's goals and remedial nature warrant ignoring the corporate form."); Rosenberg, supra note 42, at 29 ("[C]ourts often support the sweeping interpretations urged by environmental agencies and place more emphasis upon CERCLA's broad remedial purposes than traditional limitations on corporate liability.").
B. Direct "Operator" Liability for "Capacity to Control"

This liability theory was, perhaps, the most frightening prospect for parent corporations. This permutation of direct liability would hold a parent company liable not merely when it actually controlled the environmental activities of its subsidiary, but also when it had the authority or capacity to control the subsidiary's actions—whether it did so or not. This test was more popular among district courts than appellate courts, and it imposed something akin to strict liability on parent corporations. It is clear, therefore, that this was an approach favored by the government. It not only broadened the circle of potentially responsible parties available to fund a cleanup, but it also provided no easy excuses for those parents who remained willfully blind.

Idaho v. Bunker Hill Co., one of the earlier liability cases, was a leading "capacity to control" case from the District of Idaho.

150. The theory is frightening primarily because of the difficulty in delineating the end of or limit to the liability it might impose. Farmer, supra note 42, states: The capacity to control test, if taken to its logical conclusion, would place liability on all parent corporations because the parent corporation always may control the affairs of its subsidiary should it so choose. However, there is reason to doubt whether the courts advocating a capacity to control standard are seriously suggesting a per se rule of liability for the corporate parent. Id. at 790; see also Kamie Frischknecht Brown, Note, Parent Corporation Liability for Subsidiary Violations Under 107 of CERCLA: Responding to United States v. Cordova Chemical Co., 1998 B.Y.U. L. Rev. 265, 282 ("[T]he authority to control test...is too broad. ...[O]perator liability is imposed so long as the parent corporation had the capability to control its subsidiary, even if it was never utilized.").

151. This may be a difficult test to apply because it requires very subjective analysis of shareholder conduct. See Wallace, supra note 42, at 855 ("It is when liability assignments under CERCLA are not based on the active, personal participation of a corporate manager or shareholder that the truly difficult questions arise."). On the other hand, it bears some resemblance to strict liability which makes it easier to apply.

152. See Brown, supra note 22, at 826 ("Numerous federal district courts have recognized the capacity to control test as the requisite level of involvement; however, no federal appellate courts have recognized the capacity to control test in the parent/subsidiary context.").

153. See, e.g., Dent, Jr., supra note 61, at 159 (observing that liability for parents' capacity to control "would nearly always lead to liability because, by definition, a parent can control its subsidiary"); Hood, supra note 17, at 128 ("Strict liability for parent shareholders is the de facto position of the EPA..."). But see Dent, Jr., supra note 61, at 181 ("Strict liability extends only to owners and operators. It does not extend to controlling persons.").

154. See McMahon & Moertl, supra note 67, at 31 ("The EPA and the Department of Justice (DOJ) have strongly argued for imposition of direct liability based upon the individual's power and capacity to control, rather than the individual's actual involvement.").


156. For additional discussion of the Bunker Hill decision, see Heidt, supra note 8, at 166; Brown, supra note 22, at 827-88; Dadswell, Jr., supra note 42, at 475-77; Farmer, supra note 42, at 781-82; Hood, supra note 17, at 127-28; Rallison, supra note 76, at 614-17; Wolfer, supra note 42, at 987-89.
Although the case has been criticized for its vagueness as to whether it was following an owner or an operator theory, it defined the rough contours of a capacity to control standard:

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

In its decision, the Bunker Hill court was mindful of the danger that "'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator." The court, however, did not clarify where the line should be drawn in capacity to control cases, thus creating a potentially expansive theory of liability without clearly defined limitations. The Bunker Hill court relied on United States v. Northeastern Pharmaceutical & Chemical Co. Although that case dealt with an individual shareholder rather than a corporate one, the Bunker Hill court adopted the Northeastern Pharmaceutical view that the remedial goal of CERCLA required a more expansive view of liability. Bunker Hill then used this remedial goal as justification for an expanded liability rule.

157. See Brown, supra note 22, at 828. Brown states:

[T]he court merely stated that it was holding the parent liable as an owner or operator, in essence using the terms interchangeably. However, . . . operator liability is direct liability, and owner liability is indirect liability. . . . The . . . court's failure to articulate whether it was holding the parent liable as an owner or as an operator when it clearly had to be holding the parent liable as an operator illustrates the confusion among the courts.


159. Id.


161. See Bunker Hill, 635 F. Supp. at 671-72. Quoting Northeastern Pharmaceutical, 579 F. Supp. at 848, the Bunker Hill court stated:

The statute literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste. Such a construction appears to be supported by the intent of Congress. CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, so far as possible, that the parties responsible for the creation of the hazardous waste sites be liable for the response costs in cleaning them up. Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up.

In Nurad, Inc. v. William E. Hooper & Sons Co., the Fourth Circuit employed the capacity to control test in assessing the liability of previous owners and tenants of a contaminated facility. In discussing the liability of the tenants, the court stated unequivocally that "the tenant defendants need not have exercised actual control in order to qualify as operators... so long as the authority to control the facility was present." Actual conduct was relevant as "evidence of the authority to control," but actual control was not required. As the Nurad court held, if the goals of CERCLA were to be achieved, and if parents were to behave in an environmentally responsible way that did not allow unexercised corporate power to be an excuse for non-liability, then a corporation that did not exercise its authority to control should be held responsible.

The Ninth Circuit, in Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., followed the reasoning of Nurad and adopted a similar view in dicta. Without much discussion, the court 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." Again, the Kaiser court, like those before and after it, did not specify how to measure the "capacity" of which it spoke. All that was clear was that the capacity to control did not have to be exercised before the parent should have feared liability as an operator.

The capacity test may be found, in various forms, in other cases including, Quadion Corp. v. Mache, United States v. Carolina Transformer Co., and Robertshaw Controls v. Watts Regulatory Co. These cases are examples of decisions in which courts were persuaded that the parent corporation's "capacity" or "authority" to control was sufficient to impose liability despite the absence of evidence that such

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162. 966 F.2d 837 (4th Cir. 1992) (adopting "capacity" in the lessor-lessee context). For further discussion of Nurad, see Hottell & Jeffcoat, supra note 36, at 175-76; Carley, supra note 60, at 249-50.
163. Nurad, 966 F.2d at 842.
164. Id. (citations omitted).
165. 976 F.2d 1338 (9th Cir. 1992).
166. Id. at 1341 (citation omitted) (emphasis added).
167. 738 F. Supp. 270, 274-75 (N.D. Ill. 1990) (applying capacity to prevent test to close corporation context and stating that court may inquire into "evidence of an individual's authority to control, among other things, waste handling practices... Weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal." (quoting Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1543-44 (W.D. Mich. 1989))). Indeed, the Quadion case borders on adopting the "prevention" test, a test that equates authority to control with the capacity to prevent harm.
168. 978 F.2d 832, 836-37 (4th Cir. 1992) (relying on Nurad to rule that individual shareholders and corporate principals could be liable because they had the authority to control).
capacity or authority was ever actually asserted. Unfortunately, because there is a degree of capacity to control that is "normally equated with parental oversight,"170 drawing distinctions in this realm was quite difficult. In addition, because the courts adopting the "capacity" test often looked to actual control as evidence of capacity to control, the definition ran the risk of becoming circular.171 Thus, it is not difficult to see why the regulated community viewed this test with considerable misgivings, and why it posed significant practical difficulties for enforcement officials.

C. Indirect "Owner" Liability for Piercing the Veil Under State Common Law

The third pre-Bestfoods manner in which courts attached liability to parent companies was via traditional veil-piercing.172 In the view of courts adopting a veil-piercing theory, this conservative approach provided a mechanism for liability when warranted, but it did not require reading any additional elements into CERCLA, nor did it change expectations regarding the nature of the corporate form.173 The more

170. Brown, supra note 22, at 827. This difficulty has been emphasized by those who argue that the liability standard should not be applied this way. See Aronovsky & Fuller, supra note 42, at 442 ("[S]everal courts have taken care to note that normal parent-subsidiary corporate relationships will not give rise to CERCLA liability on the part of the parent.").

171. United States v. TIC Investment Corp., 68 F.3d 1082 (8th Cir. 1995), demonstrates this circular reasoning. The Eighth Circuit noted that "a parent corporation need only have the authority to control, and exercise actual or substantial control, over the operations of its subsidiary to incur direct operator liability for the subsidiary's on-site disposal practices .... " Id. at 1091 (footnote omitted). This weaves together both the "actual control" and "capacity to control" tests and blurs the factual distinctions between them. For further discussion of TIC Investment, see Lawson, supra note 42, at 733-34; id. at 748-64; Poston, supra note 10, passim.

172. See Brown, supra note 22, at 821 (explaining that under this theory, "courts determine whether the subsidiary is merely a 'sham' corporation, meaning that the subsidiary is the 'instrumentality' or 'alter ego' of the parent corporation").

173. See Fry, supra note 42, at 275 ("In a traditionally-governed, existing, and solvent corporation, state law should be applied to determine whether an individual, acting solely as a shareholder, should share CERCLA liability. This approach is appropriate because state law governs internal corporation matters unless Congress specifically enacts a statute to the contrary, and CERCLA contains no provision which modifies this rule." (footnotes omitted)); Dadswell, Jr., supra note 42, at 482 (describing line of cases "holding that CERCLA does not preempt traditional corporate standards. According to those courts, to place liability on parent companies ... the common law standards of corporation law must be obeyed: the corporate veil must first be pierced." (footnotes omitted)). It has also been suggested, however, that perhaps the veil-piercing standard should be a bit different in the CERCLA context than it is elsewhere. See Dent, Jr., supra note 61, at 151 ("The social importance and immense costs of pollution make environmental law an ideal arena for reconsidering theories of limited liability for tort."); McMahon & Moertl, supra note 67, at 29 ("Federal courts, on the other hand, are willing to pierce the corporate veil more easily to implement federal environmental policies."); Menell, supra note 9, at 407 ("[T]he federal government continues to assert the view that the purposes behind CERCLA require a lower threshold for piercing the corporate veil." (footnote omit-
popular and traditional branch of veil-piercing advocates the use of state law. Traditional veil-piercing\(^{174}\) is based on the reluctance of

\(^{174}\) Although veil-piercing requires a very fact-specific analysis, many commentators have, quite correctly, observed that there are certain factors that will often be common to veil-piercing analysis. See, e.g., Bakst, supra note 6, at 326 (“The most common reasons for piercing the corporate veil are: (1) the finding that the corporation is merely an ‘alter ego’ of the shareholders; (2) fraud and misrepresentation; and (3) undercapitalization.”) (footnotes omitted)). Heidelberg, supra note 42, states:

Under the more general formulation of the rule, two basic requirements must be satisfied to disregard the corporate entity. First, there must be such unity of interest and ownership that the separate personalities of the corporation and the shareholders no longer exist, and second, observance of the corporate form under the circumstances of the case would permit fraud or injustice.

The other common formulation of the veil-piercing doctrine is a three-part test which requires a showing of: (1) Control by the shareholders of the corporation, amounting to complete domination . . . ; and (2) such control was used to commit a fraud or wrong which (3) proximately caused plaintiff’s injury.

Id. at 874-75 (footnotes omitted); see also Lawson, supra note 42, at 740-41 (describing, generally, requirements for piercing corporate veil). Much of the jurisprudence on this issue—both on the part of courts and by commentators—draws heavily on a classic 1931 formulation of veil-piercing criteria. This list of factors includes elements that are common to most traditional veil-piercing cases. See Frederick J. Powell, Parent & Subsidiary Corporations § 6 (1931). Powell identifies the following as factors in piercing the veil between parents and subsidiaries:

(a) The parent corporation owns all or most of the capital stock . . . .
(b) The parent and subsidiary corporations have common directors or officers.
(c) The parent corporation finances the subsidiary.
(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
(e) The subsidiary has grossly inadequate capital.
(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
having too low a liability standard for parent corporations, especially as, by definition, "every parent corporation, by virtue of its controlling interest in the subsidiary, has the right to exercise a certain level of control over the subsidiary." Rather, the veil-piercing test strives to eliminate abuse of the corporate form.

In *Joslyn Manufacturing Co. v. T.L. James & Co.*, the Fifth Circuit first established that a parent corporation could be held liable under CERCLA for its subsidiary's activities only if the corporate veil was pierced. According to *Joslyn*, which one commentator has la-

(h) In the papers of the parent corporation... the subsidiary is described as a department or division... or its business or financial responsibility is referred to as the parent corporation's own.

(i) The parent corporation uses the property of the subsidiary as its own.

(j) The directors or executives of the subsidiary do not act independently...

(k) The formal legal requirements of the subsidiary are not observed.

*Id.* In his empirical study, Professor Thompson ranked the factors most likely to lead to veil-piercing and found that:

The group of factors most associated with successful piercing... included several of the traditional conclusory factors: "instrumentality" (97.33%), alter ego" (95.58%), and "dummy" (89.74%). Also in this most successful category were cases involving misrepresentation, present in 169 cases and leading to a piercing result 159 times (94%). If a court found intertwining or lack of substantive separation, it pierced the veil more than 85% of the time. Factors leading less often to a piercing result were undercapitalization (73%) and failure to follow corporate formalities (67%). Still further down the success ladder were judicial citations to domination and control (57%) and overlap of various sorts between the corporation and the shareholder (57%).

Thompson, *supra* note 65, at 1064 (footnotes omitted).

175. Bakst, *supra* note 6, at 334 (footnote omitted).

176. 893 F.2d 80 (5th Cir. 1990). *Joslyn*, by virtue of its being the first and, for a long time, the only significant case espousing this minority view, has been the subject of much scholarly commentary. See, e.g., Geltman, *supra* note 42, at 404-06; Heidt, *supra* note 8, at 157-61; Kezesbom et al., *supra* note 42, at 61-62; King, *supra* note 42, at 137-40; Oswald & Schipani, *supra* note 42, at 306-08; Strasser & Rodosevich, *supra* note 8, at 504-05; Worden, *supra* note 42, at 79-80; Bakst, *supra* note 6, at 336-37; Brown, *supra* note 22, at 831-32. *Joslyn* is also discussed fully throughout Mitchell, *supra* note 42.


The idea to form Lincoln came from Messrs. Tooke and Hayes, who approached Mr. T.L. James. Mr. James [bought] 120 shares of voting common stock of Lincoln and 200 shares of non-voting preferred stock. C.A. Tooke and J.R. Hayes received 40 shares each of the voting common stock of Lincoln for a total of 40 per cent of the Lincoln stock.

*Id.* at 227-28. The problem arose, however, because

[all outstanding stock certificates... were accompanied by endorsements back to James Company... where it shall remain until such time as their earnings from dividends on the stock shall have repaid the par value of the stock.] Since Lincoln never paid any common stock dividends, James Company had control over 100 per cent of Lincoln's stock.

*Id.* at 228. The same month that Lincoln was incorporated, it also purchased the piece of property at issue in the litigation. *Id.* After a lengthy period of operation, marked
beled "one of the most pro-parent decisions ever authored," the mere creation of a subsidiary would not shield the parent from all liability. That liability, however, would arise derivatively and not directly, implicating the parent corporation only if the traditional standard for piercing the corporate veil had been met. As articulated by the Joslyn court, this required a finding that "the corporate entity is used as a sham to perpetrate a fraud or avoid personal liability." As discussed below, the Sixth Circuit followed Joslyn in United States v. Cordova Chemical and selected state veil-piercing as the only basis for parental liability under CERCLA. In Bestfoods, the Supreme Court reversed the narrow view of liability expressed in Cordova Chemical.

There are several arguments to support the minority rule requiring that the veil be pierced before a parent can be liable. This approach was compatible with Congress' silence as to its desire, vel non, to create a new principle of corporate liability. Hence, a pierced veil requirement was a way to extend liability to parents without grafting court-created theories of liability onto CERCLA when nothing in the statutory language did so. It was clear that "[t]he 'normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." A veil-piercing requirement respected this rule. A rule requiring veil-piercing for liability also respected the expecta-
tions of those who set up their business in the corporate form—a form which has as its cornerstone the concept of limited liability. It has long been a fundamental precept of corporate law that “[o]rganization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form.”

The requirement that the veil be pierced supports the traditional view that barring a clear justification for a different approach the state of incorporation is responsible for the internal regulation of corporate affairs. The creation of a new corporate liability theory by the federal courts would have contradicted the traditional corporate law making process.

Yet, despite the justifications behind it, there were several serious flaws with requiring veil-piercing before a parent was held liable. First, under most state standards it has been extraordinarily difficult to pierce the corporate veil. This respected the traditional view that the corporate form should be one of limited liability. This could conflict, however, with CERCLA’s remedial policies—the policies that sought to make polluters pay. In fact, both Joslyn and Cordova declined to find parental liability, illustrating that courts supporting the traditional view found it difficult to hold parents liable. While such caution was in keeping with the tradition of respecting the corporate form, it contradicted CERCLA’s broad remedial goals.

This strict reading and finding of non-liability also ignored Congress’s decision to allow for a finding of liability based on one’s status as an “operator,” as well as an “owner.” Instead, it focused solely on “owner” liability.

In addition, CERCLA is a federal statute whose uniform application may be undermined by variations among state laws. Although there were—and remain—many similarities among the various state standards, there were—and remain—some significant differences

press Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court’s analysis.”).

186. See Brown, supra note 22, at 831-32 (“Imposing direct liability on parent corporations would alter the limited liability protection parent corporations receive.”).
187. Id. at 845 (speculating that the adoption of a strict veil-piercing standard would likely mean “resistance by the EPA and other sources . . . such as other PRPs, taxpayers, and insurance companies, who can have little or no control over the subsidiary corporation’s waste management activities . . . .”); see also Heidelberg, supra note 42, at 930 (“[R]equiring complete domination and control under the traditional piercing doctrine is not consistent with the minimal emphasis CERCLA places on the corporate form, nor with the Act’s preeminent objective of rapid cleanup of contaminated sites financed by those with some connection to the site.”).
188. Empirical evidence seems to offer a rationale for this fear. See Thompson, supra note 65, at 1050 (“The percentage of cases in which courts pierce the veil varies depending on which state’s law is being applied.”).
189. See King, supra note 42, at 144 (“Fifty separate rules of limited liability could undermine CERCLA’s remedial objectives, rendering consistency of application of
among the state standards that should not have been underesti-
mated. For example, in certain cases, whether a state required
fraudulent intent may have had a major impact on liability. Moreover, the fact that veil-piercing tended to be a common law doctrine rather than a statutory one may have added to the potential for in-
consistency. Courts that adopted this liability theory had to be pre-
pared to grapple with these shortcomings.

D. Indirect “Owner” Liability for Piercing the Veil Under Federal
Common Law

This final theory of parental liability attempted to combine the ben-
efits of traditional veil-piercing with the virtues of consistency. The
essential premise of this doctrine was that traditional veil-piercing was
a wise basis for parental liability. Yet, to avoid the inconsistencies
inherent in having over fifty variations on this theme, this theory ad-
vocated the application of a veil-piercing standard developed by fed-
the statute impossible. This conclusion, however, is overbroad. There are nuances
attributable to particular state versions of the rule, but there are general principles of
limited liability that can be extrapolated and applied fairly consistently . . . . “); Strasser & Rodosevich, supra note 8, at 507 (“[C]ourts in the vast majority of parent
liability cases have expressed a preference for a uniform federal common law. Never-
theless, the difference may be more one of analytic rather than practical signifi-
cance.”); Birg, supra note 8, at 795 (“Although the rules between the state and among
the federal courts are not exactly the same, they are similar and employ essentially the
same guidelines. Consequently, whether a court imposes a state standard or federal
standard should not materially affect the outcome of a piercing the veil question.
Nevertheless, a federal standard would encourage consistent guidelines . . . . “); Brown, supra note 22, at 834 (“As a practical matter, it should make little difference
which veil piercing standard is applied, since both [state and federal] contain essen-
tially the same factors.”).

190. See, e.g., Wallace, Jr., supra note 42, at 876 (“The substantial federal interest in
Superfund enforcement, the need for uniformity in a national program, and the exten-
sive financial and administrative involvement of the federal government are classic
considerations that also provide support for the adoption of the federal approach.”); Brown, supra note 22, at 835 (“[C]ourts should articulate one federal test setting forth
the factors to be applied when disregarding the parent corporation’s limited liability
by piercing the corporate veil. One federal test is recommend because the require-
ments for veil piercing vary from state to state.”).

191. For a fuller discussion of the fraud requirement in the CERCLA context, see
Hood, supra note 17, at 105-09. As Hood argues, fraud is more likely to be an ele-
ment required for veil-piercing in the context of a voluntary creditor. Further, CER-
CLA plaintiffs are involuntary creditors, thus diminishing the appropriateness of a
fraud requirement in CERCLA veil-piercing cases. Id.

192. Thompson, supra note 65, states:

The continuing reliance on case instead of statutory law, and a parallel judi-
cial reliance on case-by-case resolution in lieu of far-reaching standards, re-
fl ects the nature of the conduct being regulated. As with insider trading and
much of the law of directors’ fiduciary duties, additional specification may
not be possible without inviting greater abuse . . . .

Id. at 1043.
eral common law rather than one borrowed from state jurisprudence.\textsuperscript{193}

In \textit{United States v. Kimbell Foods, Inc.},\textsuperscript{194} the Supreme Court, in a non-environmental context, ruled that federal common law should apply to "federal programs that 'by their nature are and must be uniform in character throughout the Nation . . .'."\textsuperscript{195} There was a good argument that CERCLA met this standard.\textsuperscript{196} Indeed, in its staunch advocacy for federal veil-piercing, a Massachusetts district court, in \textit{In Re Acushnet River & New Bedford Harbor Proceedings}\textsuperscript{197} explained:

One can hardly imagine a federal program more demanding of national uniformity than environmental protection. Congress did not intend that the ability of the executive to fund the cleanup of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.\textsuperscript{198}

\textsuperscript{193} See Aronovsky & Fuller, \textit{supra} note 42, at 455 ("CERCLA is a national program of compelling national importance. Uniform interpretation of its liability provisions is important to further its objectives. CERCLA enforcement should not be hampered by subordination of its goals to varying state law rules . . ."); Brown, \textit{supra} note 22, at 838 ("A single set of federal factors would minimize the confusion found in the case law by providing uniformity."); Heidelberg, \textit{supra} note 42, at 905-06 (observing that courts "have generally concluded that CERCLA is a federal program that must be uniform in character throughout the nation, that application of state law would frustrate specific objectives of the federal program, and that a federal rule would not significantly disrupt commercial relationships predicated on state law."). Although the court found that the circumstances did not warrant veil-piercing—under either state or federal law—the Third Circuit in \textit{Lansford-Coaldale Joint Water Authority v. Tonolli Corp.}, 4 F.3d 1209 (3d Cir. 1993), employed a federal veil-piercing standard, stating "given the federal interest in uniformity in the application of CERCLA, it is federal common law, and not state law, which governs when corporate veil piercing is justified under CERCLA." \textit{Id.} at 1225.

\textsuperscript{194} 440 U.S. 715 (1979) (discussing uniformity in laws governing federal loan programs).

\textsuperscript{195} \textit{Id.} at 728 (quoting United States v. Yazell, 382 U.S. 341, 354 (1966)).


\textsuperscript{197} 675 F. Supp. 22 (D. Mass. 1987). This case is discussed more fully in Bakst, \textit{supra} note 6, at 337-38; Davidson, \textit{supra} note 113, at 306-09; Heidt, \textit{supra} note 8, at 140-41; Oswald & Schipani, \textit{supra} note 42, at 305-6; Worden, \textit{supra} note 42, at 82-84; Wolfer, \textit{supra} note 42, at 992-93.

\textsuperscript{198} \textit{Acushnet River}, 675 F. Supp. at 31.
This sentiment was echoed in *United States v. Mottolo*, a decision that stated that state corporate entity law "may not be employed to avoid overriding federal legislative policies, and federal courts will disregard it if the interests of public convenience, fairness, and equity so demand." Similarly, in *United States v. Nicolet, Inc.*, the court declined to follow Pennsylvania veil-piercing law and opted, instead, for a federal rule. Although the court conceded that "there would likely be no practical effect whether this Court looks to federal law or Pennsylvania law to decide the alter ego issue," it found sufficient justification for a federal common law rule. This was based on the court's view that there was a strong federal interest in uniformity, and "the application of federal laws would not disrupt commercial relationships predicated on state law." To the extent that this may have intruded on an area of state prerogative, the court was not overly concerned since it observed that "this emerging federal common law draws upon state law for guidance . . . ." Thus, in its view, the state traditions would still have been incorporated—albeit indirectly—into the federal jurisprudence on this question.

Using federal common law would have increased consistency and eliminated forum shopping in which plaintiffs sought to have their

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203. *Id.*

204. See *id.* ("[W]hen a federal statute is silent as to the choice of law to be applied, but overriding federal interests exist, courts should fashion uniform federal rules of decision.").

205. *Id.*

206. *Id.* at 1202.


208. See *Chem-Dyne*, 572 F. Supp. at 809 ("There is no good reason why the United States' right to reimbursement should be subjected to the needless uncertainty and subsequent delay occasioned by diversified local disposition when this matter is appropriate for uniform national treatment."); Heidt, *supra* note 8, at 186 ("To assure national uniformity, the courts must develop uniform federal rules of decision with respect to CERCLA liability."); Brown, *supra* note 22, at 838 ("[A] uniform federal standard would eliminate forum shopping because it would eliminate the benefit of considering each forum's veil piercing standards before deciding where to file suit."); Chandler & Grosser, *supra* note 42, at 25 ("[A] uniform federal standard would eliminate forum shopping by eliminating the benefit of considering each state's veil piercing standards before deciding where to file suit."); Farmer, *supra* note 42, at 787-89 ("[T]he alter ego doctrine is far from uniform across jurisdictions . . . . [A] conse-
case adjudicated in a particular jurisdiction. Such interests motivated courts to adopt this view of veil-piercing. The enthusiasm behind this approach, however, had to be tempered by two factors: federal common law was not yet well developed on this issue, and the creation of federal common law was still a relatively unusual move and not as well established a source of corporate law as state common law.

IV. Supreme Court Guidance in United States v. Bestfoods

When the Supreme Court decided Bestfoods, it helped resolve some of the ambiguities inherent in the lower courts’ diverse rulings on this issue. It also adopted a realistic, functional approach for assessing liability that is generally sound and quite fair to those with varied interests. Unfortunately, however, ambiguities in the Court’s ruling remain. They are likely to lead to new litigation, inefficient cleanups, and continued debate unless and until they are resolved by legislative initiative.

sequence is forum shopping because plaintiffs will take each potential forum’s veil piercing standard into account before filing suit. The need to establish greater uniformity, therefore, is clearly apparent . . . .”); Lawson, supra note 42, at 767 (“[U]niform adoption of the proposal would discourage businesses from locating primarily in jurisdictions with more lenient standards. Where each court of appeals has its own standard of liability, businesses would be free to forum shop and locate in the jurisdiction with the more lenient standard.”).

209. See, e.g., Aronovsky & Fuller, supra note 42, at 450-51 (“[T]hough federal courts are endeavoring to develop common law standards for veil-piercing in CERCLA cases, no single standard can be distilled from the cases decided to date.”); Newton, supra note 84, at 318 (“[T]he federal courts have been unsuccessful in fashioning a federal common law rule to govern shareholder liability under CERCLA.”); Sisk & Anderson, supra note 65, at 571-72 (“[T]he interposition of a new federal common-law rule would upset settled expectations and unfairly deprive commercial actors of their justified reliance on state law . . . .”); Heidelberg, supra note 42, at 883 (“The federal common law formulation of the veil-piercing doctrine is at least as amorphous as state law.”).

210. See Sisk & Anderson, supra note 65, at 553 (describing a “presumption against federal common law”). The authors state:

The incorporation of existing state law has an important advantage . . . . State law, evolved over decades and frequently codified in state statutes, is well developed. It can easily be discovered and applied. By contrast, the creation of new federal common law is a difficult, open-ended, and long-term task. Courts creating new federal common law would be faced with the complicated, confusing, and continuing burden of fashioning the appropriate rule . . . .

Id. at 565 (citations omitted).

211. 118 S. Ct. 1876 (1998), vacating United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997). The change in the defendant’s name reflects the fact that the named defendant, CPC, changed its name to “Bestfoods” shortly before the case was decided. The Supreme Court continued to use the names of the parties as used below to ensure “[c]onsistency[y] with the briefs and opinions below.” Id. at 1882 n.3.
The Supreme Court had long been reticent about ruling on CERCLA matters. Most of the controversies sparked by this statute concern narrow questions of statutory interpretation rather than the broader and more intricate questions with which the Supreme Court generally concerns itself. In addition, many issues that arise under CERCLA are far better suited for legislative clarification than judicial tinkering. The Supreme Court has repeatedly denied certiorari on many CERCLA questions—including the question of parent corporate liability. This silence has meant that "confusion and anxiety . . . reigned for the last decade or so in the murky area of corporate parent liability . . . ."

This issue, however, became too fundamental for the Supreme Court to ignore. Once the Sixth Circuit entered the fray in 1997 by adopting the minority position in United States v. Cordova, the debate explicitly or implicitly crystallized around a number of far-reaching concerns, including:

- What is the proper relationship between remedial federal statutes and long-standing principles of state corporate law?

212. See Nagle, supra note 59, at 1459 (describing the Supreme Court as "unwilling to tackle CERCLA.").

213. See supra note 17 and accompanying text.


215. See Steven Brostoff, U.S. Supreme Court to Decide Superfund Liabilities of Parent Firms, Nat'l Underwriter Prop. & Casualty-Risk & Ben. Mgmt., Dec. 22, 1997, at 4, 4 ("[T]he case is important for all shareholders . . . ."); Joel Glass, Test Shows When Firms Must Pay Price, Lloyd's List Int'l, June 17, 1998, at 9, (calling dispute a "prickly parent-liability issue that for nearly two decades had been a source of controversy"); Lois Kimbol et al., Parent, Successor CERCLA Issues Divide Courts, Nat'l L.J., Dec. 1, 1997, at C3 ("This issue is of significance to corporations and others in evaluating the risks of acquiring companies with environmental concerns, and in assessing residual risks after these companies are sold."); Superfund Case Goes to High Court, Grand Rapids Press, March 22, 1998, at A25 ("Because the Supreme Court could establish a national standard for corporate liability in pollution cleanups, the case is being watched closely. The nation's largest business groups and attorneys general from 29 states have filed briefs in it."); id. ("This case is very significant in the broadest sense. It's one of the few times the Supreme Court has weighed in on some of the thorny liability issues under Superfund.") (quoting Karl Bourdeau, Esq.)); Supreme Court Agrees to Hear Case Deciding Liability at Hazwaste Sites, Hazardous Waste News, Dec. 22, 1997 ("This is only the second case involving CERCLA . . . . The scope of operator liability could change if the [Supreme] Court construes liability broadly . . . . This is a significant issue for a lot of people in the business world.") (quoting Tom Jackson, Esq.), available in 1997 WL 16679785.

216. See Brown, supra note 150, at 265 ("The issue of parent corporations' liability for the environmental violations of their subsidiaries . . . intensified as a result of . . . United States v. Cordova Chemical Co.").

217. As expressed by one commentator, this ambiguity revolved around the fact that "While Congress may have cast a wide net in defining who may be held liable as a responsible person under Superfund, it is not at all clear that Congress intended to jettison a well-established body of corporate law." Mounteer & Myers, supra note 16 (citation omitted).
• How, if at all, should the federal interest in uniform rules of liability bend to the states' traditional interest in regulating corporate law matters?
• How should the benefit of having "the polluter pay" be reconciled with the legal fiction that parents and subsidiaries are different legal entities?
• How could the Court best and most fairly interpret a notoriously ambiguous phrase in CERCLA so as to advance the goals of CERCLA without creating incentives for environmentally harmful management practices?

Hence, Cordova became the vehicle for the Supreme Court to address the question it had long avoided.218 When the Court granted certiorari,219 this generated a good deal of attention220 in the environmental and corporate communities because of the importance of the questions presented. Not surprisingly, the parties in the case expressed different questions to be addressed. The Supreme Court identified the issue as "whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary."221 In its brief, the United States framed the issue quite similarly: "Whether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's facility."222 In contrast, Bestfoods framed the issue more contentiously: "Whether Congress, in providing that a

220. See, e.g., Brostoff, supra note 215, at 4 (reporting the Supreme Court's decision to grant certiorari); Court to Assign Environmental Responsibility; Whose Cleanup Cost: Subsidiary or Parent?, Wash. Post, Dec. 13, 1997, at A13 (discussing the Supreme Court's grant of certiorari); Marcia Coyle, Superfund Liability Case on Docket: Supreme Court to Rule on When Parent is an 'Operator', Nat'l L.J., Mar. 30, 1998, at B1 (previewing oral arguments in Bestfoods, calling it a "case with multimillion-dollar stakes"); Edward Felsenthal, High Court Grants Relief to Firms in Cleanup Lawsuits, Wall St. J., June 9, 1998, at B10 (calling the Bestfoods case a "closely watched dispute"); Superfund Case Goes to High Court, supra note 215 (characterizing Bestfoods as a case in which "[a]t stake is government control of toxic sites and billions of dollars in cleanup costs . . . .''); Supreme Court Agrees to Hear Case Deciding Liability at Hazwaste Sites, supra note 215 (reporting Supreme Court's decision to grant certiorari); Supreme Court Weighs Debate in Case on Oversight of Corporate Subsidiaries, Hazardous Waste News, Mar. 30, 1998 (describing oral arguments in Bestfoods hearing), available in WL 10239757; U.S., Michigan Seek Reversal of 6th Circuit Ruling on Parent Liability, Mealey's Litig. Reps.: Superfund, March 9, 1998, at 3 (summarizing arguments made by United States and Bestfoods in Supreme Court briefs).
222. Brief for Petitioner United States at i, Bestfoods, (No. 97-454).
corporation may be held liable under CERCLA as an ‘operator,’ intended to sweep aside longstanding principles governing the liability of parent corporations for the actions of their subsidiaries and to license the federal courts to develop ad hoc rules of corporate parent responsibility."223

As the Court faced the conflict among the circuits, the disparity of views was well represented by the two lower court opinions.224 The district court had taken the broad view of liability embraced by the majority of circuits—direct liability for actual control. In contrast, the Sixth Circuit had adopted the minority view—a parent could be liable only where the state test for veil-piercing was met.

The factual scenario of Bestfoods was, in many ways, a typical "environmental horror story."225 In brief, as described by the Supreme Court,226 the trouble originated in 1957 when dumping of hazardous substances began at a Michigan chemical plant originally owned by Ott Chemical Company ("Ott I").227 CPC International ("CPC") created a wholly-owned subsidiary, Ott II, to buy the assets of Ott I in 1965—assets that, unfortunately for CPC, included the polluted site.228 During the time that CPC owned Ott II, the pollution continued and CPC and Ott II shared several officers and directors who served both corporations.229 After seven years, the Story Chemical Company ("Story") bought Ott II from CPC—a sale which again included the contaminated site. Story continued to operate a chemical plant on the site until it went bankrupt in 1977.230 When the Michigan Department of Natural Resources inspected the site and discovered the scope of its contamination,231 it faced the unenviable task of finding a buyer for the site.232

Aerojet-General Corporation ("Aerojet") agreed to buy the site from Story's bankruptcy trustees in 1977. Furthermore, Aerojet cre-


224. See Chandler & Grosser, supra note 42, at 14 (describing lower court opinion as one that "highlights the differing opinions on whether Congress intended to alter the common law principles of corporate limited liability").


226. A more detailed description of the underlying events can be found in the lower courts' opinions. See CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 555-70 (W.D. Mich. 1991) (reporting detailed findings of fact); see also United States v. Cordova Chem. Co., 113 F.3d 572, 575-77 (6th Cir. 1997) (recapitulating the relevant facts); Stovall, supra note 218, at 250-57 (describing the nature of environmental harm); Kass & McCarroll, supra note 214 (describing contamination at the site).


228. Id.

229. Id. Specifically, CPC "kept the managers of Ott I, including its founder, president, and principal shareholder, Arnold Ott, on board as officers of Ott II." Id.

230. Id.

231. Specifically, the court noted that inspection "found the land littered with thousands of leaking and even exploding drums of waste, and the soil and water saturated with noxious chemicals." Id.

232. Id.
ated Cordova Chemical Company ("Cordova/California"), a wholly-owned subsidiary, which it created to purchase the property.\(^{233}\) Cordova/California then created its own wholly-owned subsidiary, Cordova Chemical Company of Michigan ("Cordova/Michigan"), which manufactured chemicals on the site until 1986.\(^ {234}\)

Meanwhile, the site had attracted the attention of the EPA, which in 1981 "had undertaken to see the site cleaned up."\(^ {235}\) The proposed remedial plan for handling the contamination would cost "well into the tens of millions of dollars."\(^ {236}\) Four corporate defendants were identified as responsible parties: CPC and Aerojet, the two parent corporations, and Cordova/California and Cordova/Michigan, the two subsidiaries.\(^ {237}\) Two questions were at issue. First, whether the parent company, Aerojet, could be liable for the actions of its defunct subsidiaries, Ott I and Ott II. Second, whether the parent company, CPC, could be liable for the actions of its still-existing subsidiaries, Cordova/California and Cordova/Michigan.\(^ {238}\)

Prior to reaching the Supreme Court, the dispute wound its way through several lower court opinions whose contrasting views represent the major camps in the dispute.\(^ {239}\)

### A. The District Court's Expanded View of Liability

The district court, in *CPC International, Inc. v. Aerojet-General Corp.*,\(^ {240}\) followed the lead of the majority circuits by adopting a fairly

\(^{233}\) Id.

\(^{234}\) Id.

\(^{235}\) Id. Indeed, "[t]he Dalton Township site was ranked 137th among the most contaminated sites in the country." Stovall, *supra* note 218, at 256 n.123.

\(^{236}\) *Bestfoods*, 118 S. Ct. at 1882-83.

\(^{237}\) Id. In addition to the corporate defendants, one individual defendant, Arnold Ott was originally named as a responsible party as well. However, he settled with the government on the eve of the trial, so his role will not be discussed any further. In addition, Ott I and Ott II were no longer in existence at the relevant times so they were not involved in the litigation. *Id.*

\(^{238}\) Several other issues related to, but not directly relevant to, the discussion of parental liability were addressed by the district court but not pursued here. These tangential issues include successor liability, see *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 575-76 (W.D. Mich. 1991), the "innocent landowner defense," see *id.* at 580-81, and the "arranger" liability of the Michigan Department of Natural Resources, see *id.* at 576-77.


broad standard for finding parental liability. Incanting CERCLA's broad remedial goal, the district court found that there are two distinct avenues for parental liability under CERCLA. First, via a theory of "direct" liability, the court held that "CERCLA liability may attach to parent corporations that have acted in a manner that constitutes operation of a facility..." Although the district court acknowledged that it is difficult to determine what actions might constitute such operation and reasserted the general principle of limited liability, it proceeded to adopt a "new, middle ground" in which liability will be assessed against a parent corporation:

only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

In attempting to offer guidance as to "whether a parent corporation operated its subsidiary," the court identified a number of factors, including "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."

Applying this test to the question of liability, the court concluded that the parent, CPC, was liable because of its active involvement in the affairs of its subsidiary, Ott II. After describing CPC's interactions with Ott II, the court found that these interactions amounted to a level of control beyond that of an ordinary parent—a level sufficient to characterize CPC as an active participant and controller of Ott II and, therefore, directly liable as an operator of Ott II's facility. The court focused on the overlapping control by CPC officials and board

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241. The district court's opinion dealt only with the issue of liability. Two other issues—remedy and insurance coverage—were not addressed by the court. Under the order of the district court, the latter two issues were separated from the liability question and are to be dealt with in separate phases. See id. at 554 n.1.

242. See id. at 571 ("In light of CERCLA's remedial goals, the court is obligated to construe the statute's liability provisions broadly to avoid frustrating its legislative purpose.").

243. Id. at 572.

244. Id. (calling this definitional issue a "more difficult question").

245. Id. at 573 ("[T]he statute and its legislative history do not suggest that CERCLA rejects entirely the crucial limits to liability that are inherent to corporate law.").

246. Id.

247. Id.

248. Id.

249. Id.

250. Id. at 574.
members over Ott II, and the court found that such a sharing of governance is sufficient to constitute grounds for direct liability.\(^{251}\) In particular, the court considered:

1) CPC's 100-percent ownership of Ott II; 2) CPC's active participation in, and at times majority control over, Ott II's board of directors . . . ; 3) CPC's involvement in major decision-making and day-to-day operations through CPC officials who served within Ott II management . . . ; 4) the conduct of CPC officials with respect to Ott II affairs . . . ; 5) the function of the CPC development company as another source of policy-making for Ott II; 6) the active participation of and control by CPC officials in Ott II environmental matters . . . ; 7) the active participation of CPC officials in Ott II labor problems; and 8) the financial control exerted by CPC through its approval of Ott II's budgets and major capital expenditures.\(^{252}\)

The district court then applied this same test to the question of Aerojet's direct liability as the operator of the two Cordova companies. It concluded that Aerojet exercised the requisite level of "active participation and pervasive control over the businesses of" Cordova/California and Cordova/Michigan to justify a finding of such liability under CERCLA section 107(a)(2)'s standards for operators.\(^{253}\)

In addition to adopting this "middle ground" approach for direct liability, the court also ruled that a parent may be held liable indirectly as an "owner" of a facility if it meets the traditional state law standard for veil-piercing.\(^{254}\) Under Michigan law, the veil-piercing standard requires a "finding that the subsidiary has been a mere instrumentality of the parent, that the separateness between the corporations has been used to commit fraud or wrong, and that unjust loss or injury to the plaintiff has occurred."\(^{255}\) The court further ruled that veil-piercing is appropriate when a parent is the sole owner, or when one corporation is merely the alter ego of another.\(^{256}\)

Because the district court found the direct liability theory sufficient to hold the parent responsible, it did not find it necessary to reach the question of veil-piercing.\(^{257}\) The court did, however, apply the veil-

\(^{251}\) Id. at 574-75.

\(^{252}\) Id. at 575.

\(^{253}\) Id. at 580. CERCLA section 107(a)(2) states that liability will attach to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2) (1994).


\(^{255}\) CPC Int'l, 777 F. Supp at 574 (relying on Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 112 (6th Cir. 1989); Maki v. Copper Range Co., 328 N.W.2d 430 (Mich. App. 1982)).

\(^{256}\) CPC Int'l, 777 F. Supp. at 574.

\(^{257}\) Id. at 575, 580 (declining to pursue veil-piercing with regard to CPC's relationship to Ott II, and declining to pierce the veil against Aerojet under CERCLA section 107(a)(2)).
piercing standard to assess Aerojet's liability under CERCLA section 107(a)(1) as the parent of Cordova/Michigan—the "present owner" of the contaminated facility. The court found that the veil should be pierced in this case because "Aerojet totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary."258

Thus, the district court offered two distinct theories of liability: one, a traditional veil-piercing theory; and, two, a direct brand of "operator" liability. The case was then appealed to the Sixth Circuit.

B. The Sixth Circuit's Traditional Approach259

In an *en banc* decision, *United States v. Cordova Chemical Co.*,260 the Sixth Circuit reversed the lower court's decision to allow direct liability. The court adopted the less expansive view that liability will only be visited upon a parent if the requirements to pierce the corporate veil are met.261 In so doing, the Sixth Circuit provided a ringing endorsement of what was clearly the minority view.262

The Sixth Circuit had several rationales for its narrow reading. Skeptical of the overuse of "remedial purpose" as a grounds for expanding CERCLA's scope, the court feared that this standard would "snare those who are either innocently or tangentially tied to the facility . . . ."263 In addition, the court remained unconvinced that either the text or the legislative history of CERCLA warranted abandoning

258. *Id.* at 578. The court went on to state that "Cordova/Michigan was a mere instrumentality of Aerojet, lacking any structural or actual independence . . . . The creation of Cordova/Michigan . . . only served as an attempt to shield Aerojet from liabilities . . . ." *Id.*

259. For additional analysis of the Sixth Circuit decision, see Stovall, *supra* note 218, *passim*.

260. 113 F.3d 572 (6th Cir. 1997). Prior to this *en banc* hearing, the Sixth Circuit issued a decision in *United States v. Cordova Chemical Co.*, 59 F.3d 584 (6th Cir. 1995). However, this 1995 opinion was vacated when the rehearing *en banc* was granted. 67 F.3d 586 (6th Cir. 1995). Thus, this Article analyzes only the *en banc* opinion.

261. The court stated:

[W]e reject the district court's 'new, middle ground' as the basis for fixing operator liability and hold that where a parent corporation is sought to be held liable as an operator . . . . based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met.

*Cordova Chem.*, 113 F.3d at 580.

262. See Sarkis, *supra* note 239, at D5 (asserting that *Cordova Chemical* "rejected the 'weight of authority as well as the trend of the law' by ruling that a parent cannot be held directly liable as a CERCLA operator unless 'the parent's name is on the smokestack' or it is so involved . . . . as to warrant veil-piercing . . . . 'This decision . . . . one might have expected to see in the early 1980s but not after 17 years of CERCLA jurisprudence.'" (quoting Lawrence P. Schnapf, Esq.)).

263. *Cordova Chem.*, 113 F.3d at 578.
the limited liability tradition so central to corporate law.\textsuperscript{264} Further, the Sixth Circuit feared that the district court blurred the distinction between "actual operation of the subsidiary's business" and "exertion of power or influence through active participation in the subsidiary's business."\textsuperscript{265} Thus, in the Sixth Circuit's view, there was an important distinction between the parent who "operates" a facility and the parent who "operates" the subsidiary who operates the facility. Because of the difficulties in distinguishing these two scenarios, the Sixth Circuit was reluctant to expand liability in a way it believed to be indiscriminate.\textsuperscript{266} This concern was not insurmountable, but it foreshadowed the precise issue that became the focus of the Supreme Court's attention when it confronted the issue.\textsuperscript{267}

Beyond these legal reasons, the Sixth Circuit also expressed broader concerns that the nebulous nature of a new doctrine might lead to confusion.\textsuperscript{268} In addition, it feared that the "threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites."\textsuperscript{269} The court found, therefore, that only if the corporate veil could be pierced under Michigan law\textsuperscript{270} could a parent corporation be vicariously liable for the misdeeds of its subsidiary.\textsuperscript{271} Applying this standard, the court declined to pierce the veil against either CPC or Aerojet,\textsuperscript{272} and it found that their relationships with the

\textsuperscript{264} Id. at 579 (finding that "nothing in the statute or its legislative history warrants the invocation by courts of vague, expansive concepts . . . which threaten the efficacy of time-honored limited liability protections afforded by the corporate form").

\textsuperscript{265} Id.

\textsuperscript{266} See id.

\textsuperscript{267} See infra notes 285-96 and accompanying text.

\textsuperscript{268} See Cordova Chem., 113 F.3d at 580.

\textsuperscript{269} Id.

\textsuperscript{270} The court stated: Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist . . . [and] adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.

\textsuperscript{Id.} (citations omitted).

\textsuperscript{271} In an attempt to clarify the application of the veil-piercing doctrine, the court went on to state that "[o]rganization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form." \textsuperscript{Id.} (footnote omitted). Such a view would continue to allow the use of the corporation as a liability-shielding device without mandatory veil-piercing.

\textsuperscript{272} The court's analysis confirms the view of those commentators who have argued that liability is less likely to be assessed in circumstances involving veil-piercing than direct liability. See, e.g., Worden, supra note 42, at 82 ("Imposing liability under a piercing of the corporate veil theory is much more difficult than imposing operator liability."); Hood, supra note 17, at 89 ("Fewer shareholders would bear unlimited liability under CERCLA if courts used a veil piercing analysis instead of direct liability."). This counters the assessment of those who have argued that the selection of the test to be used is irrelevant to the outcome.
subsidiaries did not cross the line separating a legitimate parent-subsidiary relationship from one that abused the corporate form.

Specifically, with regards to CPC, the court found that while the factors relied on by the district court showed that CPC took an active interest in the affairs of its subsidiary, they did not indicate such a degree of control that the separate personalities of the two corporations ceased to exist and that CPC utilized the corporate form to perpetuate the kind of fraud or other culpable conduct required before a court can pierce the veil. They do not reveal activity that approaches the level of culpable conduct contemplated by Michigan law as a predicate to disregarding the separate corporate form. There is nothing to suggest that the company acted to subvert justice or with fraudulent intent.

Similarly, with regard to Aerojet, the court ruled that the facts do not establish that Cordova/Michigan was a mere instrumentality of Aerojet in the sense that the separate corporate personalities of the parent and subsidiary ceased to exist. They do not reveal activity that approaches the level of culpable conduct contemplated by Michigan law as a predicate to disregarding the separate corporate form. There is nothing to suggest that the company acted to subvert justice or with fraudulent intent.

Thus, the Sixth Circuit's opinion left state veil-piercing as the only standard under which a parent corporation need fear liability for its subsidiary's activities. It was in light of this restrictive ruling that the Supreme Court granted certiorari.

C. The Supreme Court's Resolution of Bestfoods

On June 8, 1998, the Supreme Court, in a unanimous opinion by Justice Souter, ruled that there are now two theories under which a parent corporation could be found liable for the CERCLA misadven-

274. Id. at 582 (citation omitted).
275. A vigorous dissenting opinion by Judge Ryan sharply criticized the majority's departure from the prevailing legal rule and argued that it overly limited the basis for parental liability. See id. at 586-95 (Ryan, J., dissenting).
276. One commentator has taken a particularly critical view of the Sixth Circuit's reasoning. See Stovall, supra note 218, at 263. Her criticisms are:
First, the court premised its decision on a misinterpretation that CERCLA imposes liability only on culpable parties. Second, the piercing the corporate veil standard severely hinders accomplishment of the statute's remedial purpose. Third, the Sixth Circuit's holding does not comport with the plain statutory language of CERCLA. Fourth, . . . imposing direct liability on parent corporations will not deter private sector cleanups. Fifth and finally, . . . the standard adopted by the district court and a majority of the other circuits will not result in confused interpretation of CERCLA liability law.
277. The fact that the opinion was unanimous should, perhaps, not be surprising since the opinion came in a year in which "[o]f the term's 91 decisions . . . nearly half, 43, were decided by 9-to-0 votes, unanimous in result although not always in reasoning," Linda Greenhouse, Supreme Court Weaves Legal Principles from a Tangle of Litigation, N.Y. Times, June 30, 1998, at A20.
tures of its subsidiaries. Predictably, the Court's decision began with a strong reiteration of the "bedrock principle"278 that, as a general rule, a parent corporation is a legal entity separate and distinct from its subsidiaries. Thus, the parent generally enjoys insulation from its subsidiaries' legal liabilities.279 Because this principle is so firmly ingrained in state law, and because CERCLA did not explicitly reject it, the Court was confident that Congress could not have intended to undermine the principle through mere silence.280 The Court, therefore, correctly approached the CERCLA liability question against the backdrop of this rule.

The Court went on to reason, however, that the doctrine of corporate veil-piercing is equally fundamental as an exception to limited liability.281 Thus, the first of the two circumstances in which the Supreme Court found that a parent could be held liable is the highly unoriginal, though predictable, scenario in which the corporate veil may be pierced under traditional veil-piercing doctrines.282 In such circumstances, the "parent corporation [may] be charged with derivative CERCLA liability for its subsidiary's actions."283 Unfortunately, the Court did not resolve whether this veil-piercing should be accomplished via application of state law or through developing federal common law.284 Once the applicable veil-piercing standard is met,285 however, the parent bears the subsidiary's liability—whether the subsidiary is liable as an "owner" of a contaminated facility or as the "operator" of a facility that it operates but does not own.286

279. See id. ("The Government has indeed made no claim that a corporate parent is liable as an owner or an operator under § 107 simply because its subsidiary is subject to liability for owning or operating a polluting facility.").
280. See id. The court relied, in part, on Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979) ("[S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.").
281. See Bestfoods, 118 S. Ct. at 1885.
282. See id.
283. See id. at 1885-86.
284. See id. at 1885-86 n.9. The Court declined to do so because this issue was not raised by the parties. This silence on such a significant issue is a major shortcoming of the opinion because the differences among the states and between the states and the federal common law are problematic. The Court recognized that "significant disagreement" exists on this issue, but declined to resolve that disagreement. Id. The legislative proposal presented in this Article suggests that the state standard should apply.
285. The Court described veil-piercing as appropriate in those circumstances where "the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." Id. at 1885 (citations omitted).
286. The Court recognized that this position is not without controversy. See id. at 1886 n.10. The Court reasoned:

Some courts and commentators have suggested that this indirect, veil-piercing approach can subject a parent corporation to liability only as an owner, and not as an operator. . . . We think it is otherwise, however. If a subsidiary
This first ground for parental liability is a predictable one. To rule differently and hold that a parent corporation is not derivatively liable via veil-piercing would require either a finding that Congress intended to change this basic premise of state law or that there is something about CERCLA liability that requires freeing parents from such vicarious liability. There is no evidence of such Congressional intent, and the notion of privileging liability for hazardous waste pollution lacks logic and precedent. Thus, the Court had little choice but to rule that parents may be liable under traditional standards for veil-piercing.

The more interesting aspect of the Court's opinion is that it chose not to stop here and side with the minority view that veil-piercing is the only theory to support parental liability. Rather, the Court next focused on the fact that CERCLA section 107(a)(2) allows liability based on status as an "operator" of a facility in addition to status as an "owner." From this perspective, the Supreme Court delineated a second, direct avenue for parental liability as an "operator." This standard of liability does not center on the relationship between the parent and the subsidiary per se, as had the rulings of many of the lower courts that had adopted direct liability. As the Court remarked, "the existence of the parent-subsidiary relationship... is simply irrelevant to the issue of direct liability." Instead, the second source of liability, as delineated by the Supreme Court, asserts that a parent corporation may be liable for the hazardous waste at a facility owned by its subsidiary if the parent corporation itself, or in connection with its subsidiary, acted as the operator of the facility. In that set of circumstances, the parent will be liable not derivatively but directly for its own actions in operating the facility.

This second basis for liability clarified several questions. It established that direct liability will not turn on the parent's legal control of the subsidiary but on its control of the physical facility from which the liability arose. Thus, it is possible for a scenario to arise in which a parent and subsidiary diligently observe corporate formalities to avoid veil-piercing and, nevertheless, the parent may be liable because of its involvement in operating a facility. In the view of the Court, this approach places the inquiry's focus in the proper place—on the physically operable source.
cal control and management of the contaminated facility and not on the paperwork separating legal creations from each other.\textsuperscript{292}

The Court also established that in the common circumstance in which the parent and the subsidiary share common directors and officers, the actions of those officers and directors may not be automatically attributed to the parent.\textsuperscript{293} Because it broadened the potential scope of liability from the narrow view of the Sixth Circuit,\textsuperscript{294} the Court vacated and remanded the case back to the district court to review the relationship between the parent company and the facility in question and not on the less relevant interaction between the parent company and the subsidiary.\textsuperscript{295}

This functional test is well supported.\textsuperscript{296} It struck a balance between competing interests, a balance reflected by the fact that the decision has been called a "mixed blessing."\textsuperscript{297} Some commentators characterized the decision as favorable to the government,\textsuperscript{298} while

\textsuperscript{292} Indeed, this approach bears some similarity to the position advocated by McKane, \textit{supra} note 42, at 1673-77, who suggests that a focus on the day-to-day operation of facilities "provides the specificity necessary to ensure that a finding of operator liability will encourage environmental responsibility and economic efficiency while adhering to CERCLA's language." \textit{Id.} at 1673. This emphasis on facilities was noted in \textit{North Shore Gas Co., v. Salomon, Inc.}, No. 97-2485, 1998 U.S. App. LEXIS 17857, at *14 n.4 (7th Cir. Aug. 5, 1998) ("Of course, \textit{Bestfoods} emphasizes that participation in the activities of the polluting facility, not mere control of the subsidiary, is what results in direct CERCLA liability.").

\textsuperscript{293} \textit{See Bestfoods, 118 S. Ct. at 1888.}

\textsuperscript{294} Interestingly, this had the effect of broadening CERCLA's reach from that chosen by the Sixth Circuit. This is a departure from the traditional scenario in which the Supreme Court demonstrates "disinclination to invoke the remedial purpose canon in environmental cases" which is "striking when contrasted with the corresponding interpretive practices of the federal district and appellate courts." \textit{Watson, supra} note 65, at 261.

\textsuperscript{295} \textit{See Bestfoods, 118 S. Ct. at 1880.}

\textsuperscript{296} For a pre-\textit{Bestfoods} endorsement of a facility-oriented approach such as this, see McKane, \textit{supra} note 42, who states:

\textbf{It is insufficiently shallow to analyze whether a parent corporation is the operator of a subsidiary. To ensure that a PRP parent corporation is a liable party, a court should confirm that the parent is active in the daily management of the facility, not the overall management of the subsidiary. An analysis true to CERCLA's language requires that a parent corporation be the operator of the facility before it can be held liable.}

\textit{Id.} at 1676.

\textsuperscript{297} Andrea Foster, \textit{High Court's Liability Ruling Is a Mixed Blessing}, \textit{Chem. Week}, June 17, 1998, at 8, 8 (calling the \textit{Bestfoods} verdict "a mixed blessing for both the chemical industry and federal environmental enforcement" and noting that the Chemical Manufacturers' Association "has not taken a position in the case because some of its members would fare well under the decision and others would not"). For a similarly ambivalent view on the ruling, see \textit{Parent Companies Aren't Completely Shielded}, Nat'l LJ., June 22, 1998, at B17 (calling the ruling "a middle-of-the-road approach that creates a difficult burden of proof for government lawyers but does not automatically shield a parent company from financial responsibility in disputes over clean-up liability").

\textsuperscript{298} \textit{See Linda Greenhouse, Right of States to Extradite Fugitives is Upheld}, \textit{N.Y. Times}, June 9, 1998, at A18, (characterizing \textit{Bestfoods} decision as "a victory for Fed-
others reported that it would make recovery of cleanup costs more difficult.\footnote{299}

The provision allowing indirect liability through veil-piercing is consistent with long-standing principles of state law and requires little discussion. It will continue to allow the courts to assess damages against parent corporations who abuse the corporate form. However, the provision for direct liability is the Court’s most important contribution. It places the attention where it should be: on the connection between parent companies and contaminated sites, not on the artificial corporate connections between parents and subsidiaries. Relatedly, this approach follows the contours of CERCLA’s words, which confer liability on the “owner or operator” of a “facility,” and not on the more attenuated “owner or operator of one who owns or operates a facility.” This is more in keeping with CERCLA’s primary concern: garnering cleanup costs from all those involved in the operations of the sites that have generated remediation bills which would otherwise be footed by American taxpayers. The decision also discouraged the scenario in which the parent may place ownership of a facility in a thinly capitalized, weak subsidiary and then manage the site for its...
own benefit, ducking behind the corporate veil should anything go wrong.\textsuperscript{300}

Even as the \textit{Bestfoods} decision launches the law's evolution in the right direction, provides some needed uniformity in this area,\textsuperscript{301} and promises to play a significant role in developing the law in the field,\textsuperscript{302} it is plagued with three interrelated problems which demand a legislative solution. The remainder of this article explores these problems and offers a legislative proposal to resolve them.

V. The Aftermath of \textit{Bestfoods}: Questions Unanswered and Problems Remaining for Legislative Repair

The three problems left unresolved by the court's opinion should come as no surprise. These problems are: (1) whether state or federal law should govern indirect liability via veil-piercing; (2) how "operator" should be defined for purposes of assessing direct liability; and (3) how the definition of "operator" may be best applied. They represent complexities that have long plagued the lower courts as they attempted to grapple with this issue. The fact that the Supreme Court itself was unable or unwilling to resolve these questions argues well for the need for a legislative solution. A Congressional solution is needed because only legislation\textsuperscript{303} will be able to address the problem with the level of detail necessary to eliminate the confusion that arises from piecemeal judicial pronouncements on these intricate questions.\textsuperscript{304} Allocating liability requires full discussion of practical and

\textsuperscript{300} In some jurisdictions, this might be grounds for veil-piercing; in other jurisdictions it might not be. However, a direct liability rule such as the one the Court created would eliminate this artificial distinction.

\textsuperscript{301} \textit{See} Connaughton, \textit{supra} note 299 (crediting \textit{Bestfoods} decision as one that "clarifies corporate liability under \textit{CERCLA}, and by analogy the Oil Pollution Act of 1990"); Warren, \textit{supra} note 299, at 7 ("\textit{Bestfoods} resolved the conflict among the circuits in defining the standard for operator liability.").

\textsuperscript{302} The importance of the decision was quickly noted when the ruling was announced. \textit{See} Steve Lash, \textit{Judicial Court Limits Liability of Parent Companies in \textit{CERCLA} Litigation}, Hazardous Waste News, June 15, 1998 ("The nature of the \textit{Bestfoods} ruling has more far-reaching implications for other classes of corporate activities, including cleanup of hazardous waste and liability concerns of the remediation contractors." (quoting Dan Steinway, Esq.), \textit{available in} 1998 WL 10239831; \textit{see also} Greenhouse, \textit{supra} note 277 (calling \textit{Bestfoods} "an important interpretation of the Federal Superfund law on environmental cleanups").

\textsuperscript{303} \textit{See} Mounteer & Myers, \textit{supra} note 16 ("[T]his is not an area in which Congress should acquiesce to judicial interpretations, and... Congress should not let pass the opportunity to provide clearer guidance that can curtail this type of wasteful litigation.").

\textsuperscript{304} \textit{See} Allen, \textit{supra} note 42, at 75 ("[A] solution which grants a great deal of discretion to the courts or to the EPA disserves \textit{CERCLA}'s settlement goal. Therefore, the only plausible solution is a statutory amendment to clarify the scope of liability."); Cooper, \textit{supra} note 239, at 228 ("Differing judicial interpretations of \textit{CERCLA} liability for parent corporations will likely invite Congressional intervention."); Hottel & Jeffcoat, \textit{supra} note 36, at 178 ("[C]ommentators have suggested that Congress amend \textit{CERCLA} to provide clear direction on the limits of owner and operator liabil-
financial issues, not merely legal implications.305 These are fact intensive, empirically studied issues which are better handled by the legislature than by the courts.306 This is particularly true in a highly politicized area307 such as this which involves a reworking of the traditional common law rule on limited liability.308 Thus, although the Supreme Court’s ruling goes a great distance in clarifying some of the underlying issues under the current CERCLA scheme,309 there remains much work for Congress in addressing three problems that endure after Bestfoods. To date, although CERCLA reform has been
addressed by the 105th Congress, none of the proposed amendments offer a solution to these issues.

A. The Indirect "Owner" Liability Problem: Veil-Piercing Standards

The Supreme Court acknowledged that its decision failed to establish whether federal or state veil-piercing standards should govern traditional, indirect parental liability. Because the parties to the litigation had not raised the issue, the Court ducked the question. Perhaps the Court felt justifiably constrained to remain silent as this question was not in dispute. The Court's silence, however, means that an important ambiguity continues to exist. Whether the interest in deferring to state corporate law outweighs the government's and parties' interest in uniformity is a difficult question with serious ramifications. The Supreme Court's silence on this issue requires Congressional guidance as to whether state or federal veil-piercing should be the governing rule and, if a federal standard applies, what the contours of that federal standard should be. Congressional rule-making should address these issues after a full study of the differences among existing judicial tests and an analysis of the ramifications that different approaches may have on the assessment of liability.

B. The Direct "Operator" Liability Standard: Definitional Problems

More problematic than the ambiguity as to veil-piercing law is the Supreme Court's failure to delineate what types of "relationships" between parent and subsidiary would justify labeling the parent as the

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310. Congress entered discussions on Superfund reform somewhat optimistically. See Superfund Negotiators Express Optimism, Cong. Green Sheets, Aug. 5th, 1997, at 18 ("Despite some initial indications of difficulty in House Committee talks, negotiators on both sides of the Hill and at the Environmental Protection Agency express optimism at prospects for Superfund reform in the 105th Congress."). Such reform has not occurred, however, due to conflicts over liability issues, Brownfields redevelopment concerns, and fiscal debates. Some have noted Congress's relative inaction in the environmental arena, sparking concern over Congress's ability to handle the range of environmental perspectives and problems with which it is faced. See Forum: Whatever Happened to Congress?, Envtl. Forum, May/June 1998, at 36, 36-43 (providing various perspectives on Congress's role).

direct “operator” of its subsidiary’s facility.312 The Supreme Court openly acknowledged the “difficulty [that] comes in defining actions sufficient to constitute direct parental ‘operation,’”313 a difficulty exacerbated by the “uselessness of CERCLA’s definition of a facility’s ‘operator . . . .’”314 The “uselessness” that the Court bemoaned stems from CERCLA’s definition of an “owner or operator” of a facility as “any person owning or operating such facility.”315 The obvious circularity of this definition forced the Court to define “operate” by reference to popular dictionaries.316 While not an unprecedented source for definitional authority,317 this approach does not provide a specific, technical and tailored definition of the range of activities that may give rise to a parent’s unwanted reclassification as an “operator” of a facility.318

Using broad language susceptible to varying interpretations, the Court attempted to offer some guidance in this area:

[Under] CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous wastes, or decisions about compliance with environmental regulations.319

This definition is problematic in two important ways which the Court itself acknowledged. Verbs such as “manage,” “direct,” and “conduct” include a variety of activities. A range of practices may be subsumed under these broad categories, and there is very little guidance as to which or what combination of them might trigger liability.

312. This difficulty mirrors the problem previously encountered by lower courts when they attempted to depart from traditional veil-piercing and adopt standards of direct liability. See, e.g., Healy, supra note 42, at 110 (“The judiciary’s failure to identify particular activities justifying imposition of direct liability under CERCLA has made articulating a defensible approach to parent corporation liability difficult.”).
314. Id.
316. See Bestfoods, 118 S. Ct. at 1887 (reviewing definitions of “operate” derived from popular dictionaries).
318. Not surprisingly, this was one of the most difficult issues probed at the Bestfoods oral arguments. See Justices Hear Arguments on “Operator” Liability for Parent Corporations, Mealey’s Litig. Reps.: Superfund, April 6, 1998, at 3. Justice Antonin Scalia, in his attempts to clarify the definitional issue, stated:

What is magic about the word “operate”? I don’t know what there is about the word that makes it different from any other statute. I worry that any standard we apply to this statute ought to be applied to any statute. We normally think that if the subsidiary is operating it, the parent is not operating it, absent some veil-piercing situation.

Id. (quoting from oral argument in Bestfoods, (No. 97-454)).
319. Bestfoods, 118 S. Ct. at 1887.
On the other hand, extremely detailed guidance is not practical given the wide variety of corporate management practices and the inability of a court to create a one-size-fits-all rule applicable as a fool proof handbook on corporate governance and organization.

The Court acknowledged that when CERCLA used the term “operate,” it “obviously meant something more than mere mechanical activation of pumps and valves.” The Court proffered that operation involves “exercise of direction over the facility’s activities.” Implicit in this, however, is the conduct that falls between “mechanic[s]” and “direction.” Unfortunately, the Court made no foray into that realm, and, thus, its opinion offers little concrete definition of the scope of permissible involvement.

Another problem that the court also acknowledged exacerbates this definitional difficulty. Parents will, by definition and law, always have some involvement in the affairs of their subsidiaries—involvement that will, at least indirectly, affect the facilities owned by those subsidiaries. Thus, in making a parent directly liable as an “operator,” it is crucial to distinguish “the normal relationship between parent and subsidiary” from the more involved relationship that would recharacterize a parent as an “operator.” As the Court itself admitted, it is a “critical question” to determine whether the parent’s involvement at the relevant facility was normal or “eccentric.” The Court offered no guidance on this issue, and this is the primary factual question remanded for district court review.

Hence, the second major problem with the Bestfoods decision is that the Court’s provisions for direct parental liability suffer from ambiguity that the Court itself recognized but did not remedy. This indefiniteness is problematic in that it offers little guidance to parent companies who seek clarity as to the scope of their potential liability. Litigation can be expected in the wake of this ambiguous definition because CERCLA liability is a high stakes proposition. The ambiguity provides an incentive for litigation, for both the regulators

320. Id. at 1889.
321. Id.
322. Id.
323. Id.
324. Id.
325. See id. at 1890. Specifically, the district court is charged with reviewing the facts surrounding the parents’ control of the contaminated facility through the activity of its employees. See id. This deference to the lower court in making this difficult decision has, in fact, been praised. See Kass & McCarroll, supra note 214 (“Justice Souter’s opinion is . . . noteworthy for its sensible and proper deference to the fact-finding role of the trial court.”).
326. See supra notes 87-96 and accompanying text (discussing far-reaching consequence of CERCLA liability).
327. See Hottel & Jeffcoat, supra note 36, at 181 (commenting, pre-Bestfoods, that “[i]ncreased certainty in this area would bring about a much needed state of affairs:
and the regulated, to convince district courts to adopt favorable interpretations.\footnote{328}

Thus, the second question left open by the Supreme Court is how to define "operator" in a clear, effective way. This substantial ambiguity demands legislative intervention.\footnote{329}

\section{C. The Direct "Operator" Liability Standard: Incentive Problems}

The Court failed to weigh a third problem that arose in its scheme for assessing direct liability. The Court correctly analyzed parental liability in light of the parent's connection to the contaminated facility rather than its connection to the subsidiary itself. This standard is useful because it disregards artificially created barriers erected by use of a particular corporate form. It looks, instead, to the actual activity of the parent vis-à-vis the physical facility in question. The Court's approach more closely follows CERCLA's language\footnote{330} and uses a functional test to assign liability. This also advances CERCLA's remedial goals by extending liability to a group of parents who, under a strict veil-piercing model, might not be available to fund a clean-up.

This actual control test, however, might have a significant impact on parental willingness to become involved in the operation of their subsidiaries' facilities. Currently, the Court's rule penalizes parents who operate facilities at which contamination occurs. The rule, though, says nothing to the parents who \textit{should have or could have} prevented contamination of their subsidiaries' facilities but ducked liability by distancing themselves from such operations.\footnote{331} To the extent that \textit{Bestfoods}, like direct liability cases before it, based liability on the level of the parent's involvement in the environmental affairs of its subsidiary, the decision gives parents strong incentives to disassociate themselves from the activities of their subsidiaries.\footnote{332} As long as the decreased CERCLA litigation and more settlement of disputes, so that society can direct resources to cleaning up contaminated sites\footnote{328}. \textit{But see} Brostaff, \textit{supra} note 299, at 32 (reporting the sentiment that the "decision should help stave off new litigation" (quoting John Arlington, Esq.)).

\footnote{329} See Kass \& McCarroll, \textit{supra} note 214 ("[D]etermining direct operator liability of a parent is still a very difficult exercise.").

\footnote{330} See \textit{supra} notes 55-58 and accompanying text.

\footnote{331} See McKane, \textit{supra} note 42, at 1681-82 (describing problems that arise with parent corporations that are willfully ignorant).

\footnote{332} Although most of the commentary in this area was written pre-\textit{Bestfoods}, the same parental involvement concerns that were raised in a direct liability scheme focusing on the parent-subsidiary relationship can be applied to the assessment of such liability in the parent-facility context as established in \textit{Bestfoods}. For discussions of the ways in which direct liability rules may put parent corporations in an unenviable Catch-22 situation when making decisions about involvement in their subsidiaries' facilities, see Cooper, \textit{supra} note 239, at 228 ("In theory, imposing liability is intended to encourage parent corporations to pay more attention to the environmental compliance of their subsidiaries. In effect, however, fear of CERCLA liability under a control theory may actually force parent corporations to distance themselves from their subsidiaries' affairs."); Menell, \textit{supra} note 9, at 409 ("[T]he doctrine of limited liability
default rule remains unchanged—no liability for parents who do not "operate" a subsidiary's facility but liability for those that do—the prudent and logical advice for a parent corporation is to shun all unnecessary involvement with their subsidiaries' facilities.333 This rule biases investment decisions in favor of projects that pose excessive environmental risks."; Newton, supra note 84, at 314 ("Corporate shareholders, officers, and lenders encounter a threat of personal liability under CERCLA which they would not face under tort law or traditional corporate law doctrine. These entities may develop a hands-off approach to operations connected to hazardous sites in order to distance themselves from potentially great liability under the Act." (citing Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1544 (W.D. Mich. 1989)); id. at 336 ("Most case law continues to discourage beneficial involvement by those with the opportunity to participate in hazardous waste decisions. Current standards for CERCLA liability promote the ignorance of shareholders, corporate officers, and lenders concerning environmental operations and discourage involvement in corporate environmental decision making."); Snook, supra note 83, at 438 ("In environmental cases, courts reward shareholder/directors for their complete noninvolvement with company matters . . . ."); Brown, supra note 22, at 847 (describing need to "prevent parent corporations from escaping liability by shielding themselves from any knowledge about their subsidiary's disposal practices"); Chandler & Grosser, supra note 42, at 23 (fearing that expanded liability "encourages corporate owners to focus on insulating themselves from the corporation's actions rather than taking steps to avoid polluting the environment"); Crawley, supra note 1, at 243 ("The scope of the parent's involvement in the acts of the subsidiary is a key factor in determining whether to hold the parent corporation liable under a voluntary assumption of duty."); King, supra note 42, at 151 ("Although the parent may be able to take some actions to abate the contamination, it cannot because its further participation in the subsidiary's environmental problems will exacerbate any defense the parent may have against liability. Instead, the parent will seek to prevent liability, or mitigate its impact, through restructuring its relationship with the subsidiary . . . ."); McKane, supra note 42, at 1664 ("An exercise of control approach also creates perverse incentives that impede the accomplishment of CERCLA's goals . . . . A parent corporation is more likely to be held liable if it pays more attention to its subsidiary's activities. . . . This trigger of liability discourages a parent from exercising supervision over a subsidiary, especially in environmental matters."); Rallison, supra note 76, at 623 ("Although extending shareholder liability may better serve CERCLA's remedial purpose . . . . it may also, through unfair application, thwart the prospective purpose by tacitly encouraging minimal disposal or clean-up efforts."); Wolfer, supra note 42, at 999 ("It may be desirable to hold a parent liable for the subsidiary's polluting acts if it becomes so involved in the subsidiary's daily operations that it was in fact an operator within the meaning of CERCLA. The opposing argument is that this will encourage a hands-off approach to operating a subsidiary."); Rosenberg, supra note 42, at 29-30 ("An exercise of control by the parent over a subsidiary's environmental compliance or waste disposal activities significantly enhances the risk of parental liability, as does the existence of procedures allowing a parent to approve or reject specific expenditures related to waste disposal or other environmental matters . . . .").

333. A number of commentators have, in pre-Bestfoods assessments, offered detailed advice on how a cautious parent should distance itself from its subsidiary and ensure that its relationship will be sufficiently aloof to avoid liability. These strategies, by and large, were written to advise parents on how to avoid liability when that liability focused on the corporate relationship between parent and subsidiary rather than on the functional relationship between parent and facility that is established in Bestfoods. Nevertheless, the analogy is apt, and the advice is surprisingly consistent. For example, Menell, supra note 9, states:

By adequately capitalizing the subsidiary, avoiding direct oversight of operations (especially hazardous waste decisions), ensuring proper record-keeping,
not siphoning excessive funds from the subsidiary, and observing the corporate formalities of the subsidiary, the parent corporation would have a strong claim to protection from creditors of the subsidiary corporation under traditional veil-piercing doctrine.

Id. at 404-05 (emphasis added). Further, Worden, supra note 42, states:

[It] is imperative that the parent minimize its exercise of control over those affairs of the subsidiary which invite CERCLA scrutiny. The parent should ensure that decisions regarding environmentally sensitive disposals and releases are made by the subsidiary's officers or board . . . . The parent should allow the subsidiary discretion when hiring or appointing those . . . who will make lower level decisions regarding the subsidiary's environmental conduct. The subsidiary . . . should be vested with the authority to determine the location of any such environmentally sensitive releases, and should be allowed discretion to choose the manner [of disposal]. . . . The parent should avoid the temptation of forcing the subsidiary to request final approval of all significant expenditures by the subsidiary for environmental purposes.

. . . [W]hen environmental clean-up becomes a concern, the parent should entrust the subsidiary to determine the manner in which to contain the hazardous or contaminated material. When it comes to coordinating the clean-up efforts with government officials, the contact should be made by the subsidiary.

Id. at 87. Similar guidance may be found in Snook, supra note 83, at 441. Snook advises shareholders of a closely held corporation to do the following in an effort to avoid CERCLA liability:

1. Avoid involvement with disposal decisions.
2. Do not use one's position as a shareholder to coerce the officers or directors of the company into making decisions, particularly with respect to hazardous waste disposal.
3. To the extent possible, obtain excess personal liability or other insurance that will cover environmental liability.
4. If state law permits, attempt to obtain indemnification from the corporation for any acts undertaken on the corporation's behalf as an officer or director.

Id. Such expanded liability may also influence the nature of the advice that corporate attorneys are now required to give their corporate clients.

The recent expansion of environmental liability requires corporate lawyers to broaden the range of factors that they consider in rendering legal advice on corporate structure. The expansion of environmental liability requires corporate lawyers to take an active role in devising strategies to prevent and reduce environmental risks. . . . Both professional and social responsibilities require corporate lawyers to look beyond traditional risk-shielding strategies in order to more effectively serve the interests of their clients and communities.

Menell, supra note 9, at 401-02. However, Rosenberg, supra note 42, at 31, suggests some potentially “safe” oversight that a parent might choose to exercise without risking liability:

A broadly-worded policy statement emphasizing the parent's commitment to environmentally sound practices may reflect favorably on the parent in litigation and is itself unlikely to be the basis of liability, so long as the policy's implementation is left to the subsidiaries . . . .

It is also useful to require that each subsidiary include a discussion regarding its compliance with environmental regulations in its regular reporting to its parent. While a court could draw inferences of control from this—or any other—reporting requirement, that risk is outweighed by the value of such a reporting requirement both as a means of focusing the subsidiary's attention on the importance of environmental matters and demonstrating to the subsidiary that the issue is important to the parent.
might also induce parents to shed subsidiaries that pose financial risk—a move that may have negative consequences for fiscal and environmental responsibility. The Bestfoods court did little to address this problem.

It would be over-simplistic to assume that Bestfood's expansion of liability to parents operating subsidiaries' facilities will, automatically or necessarily, lead to parental irresponsibility or raise the specter of under-funded, irresponsible subsidiaries stumbling blindly from one environmental crisis to another. Thus, before proceeding, it is essential to take a realistic look at five factors that will either prevent the much-feared parental irresponsibility or mitigate its effects even with an expanded rule allowing direct assessment of parental liability:

1. A parent corporation owns its subsidiary, either in whole or in part. Thus, it has a natural financial interest in seeing its subsidiary avoid the environmental wrongs that could, potentially, bankrupt the subsidiary and cost the parent its investment in the subsidiary and its expectation of future earnings generated by the subsidiary. This self-interest, if nothing else, should encourage a parent to make efforts to prevent its subsidiary from incurring the debilitating expense of CERCLA liability. If the parent corporation can—through advice, intervention or interaction—prevent an environmental incident at its subsidiary's facility, it has a financial incentive to do so regardless of the CERCLA rule.

334. See Farmer, supra note 42, at 804 (“[P]olicy-makers should reject adopting an unlimited parent corporation liability approach because of the potential for negative effects on the American economy and corporate structure. One particularly compelling reason is the likelihood that industries with potentially high environmental liabilities would splinter into smaller, less financially responsible firms.”); Rallison, supra note 76, at 620 (“[E]xpanding CERCLA's strict liability to shareholders may actually encourage some shareholders to act irresponsibly. For example, a corporate shareholder may well find that divestment, an impossibility for some corporations, is the only way it can fully insure against liability.”).

335. For example, Aronovsky & Fuller, supra note 42, suggest that to further the goal of risk reduction, parent corporations should: “[1] institute procedures for monitoring on a regular basis the environmental activities of its subsidiaries . . . . [2] [E]nsure the implementation of prudent hazardous substance handling procedures at the subsidiary level . . . . [3] [R]equire environmental audits at the subsidiary level before allowing a subsidiary to close any business acquisition or real estate transaction.” Id. at 468-69. This advice differs from that discussed earlier in this Article, see supra note 332, which dealt with ways in which the parent can avoid responsibility for contamination. The approach here tries to reduce the likelihood that such contamination will occur. As noted in King, supra note 42, at 152, protecting the parent's investment can be an effective vehicle for private monitoring of the subsidiary. Id.; see also Rosenberg, supra note 42, at 31 (“[E]xtensive control over a subsidiary's environmental affairs can, of course, improve a subsidiary's environmental compliance and perhaps prevent contamination that could require remediation.”). For a similar assessment of the parent's incentive to reduce the likelihood of harm, even at the cost of increasing its likelihood of liability should such harm occur, see Oswald, Corporate Parent Liability, supra note 42, stating:
The hard choice—or potential "lose-lose situation"—parents face is between getting involved and thereby reducing the chances of contamination versus adopting a hands-off approach which may increase the chances of contamination, but which reduces the parent's likelihood of responsibility. Regardless of which choice is made, it should be noted that the parent corporation has a financial self-interest in avoiding a CERCLA claim arising at one of its subsidiary's sites. This self-interest may motivate environmental responsibility.

2. In a large, publicly-held corporation with huge subsidiaries, it may be manageable for the subsidiary company to conduct the functions necessary for maintaining effective environmental compliance. A large subsidiary may itself have the necessary resources for a full program of aggressive environmental compliance. While this may not be true in a smaller corporate family with poorer subsidiaries, in a large corporate enterprise the subsidiaries may more effectively manage their own environmental affairs as they are more familiar with their own needs. Thus, the subsidiary may often be the party that can best fulfill CERCLA's objectives, which include: "creating incentives for safe behavior by those parties who possess the greatest knowledge about the risks associated with their wastes and who are in the best position to control disposal decisions." In situations such as these, a parent's distance from its subsidiary will not, by definition, always have a dev-

Of course, the best way to minimize the liability of the parent corporation is to minimize the liability of the subsidiary. Even if the parent is successful in avoiding liability itself, it nonetheless has a substantial investment in the subsidiary which it undoubtedly wishes to protect. By instituting sound risk management procedures at the subsidiary level, the parent can reduce the likelihood that either it or its subsidiary will be held liable under the environmental statutes.

Id. at 265. Menell, supra note 9, states: "[L]awyers recommending the adoption of risk-insulating corporate structures may be ignoring, distracting attention from, or miscounting important benefits of organizational restructurings that internalize environmental risks. Changes in corporate structures and employee incentives that increase oversight of environmental risks will reduce the expected costs of accidents and regulatory compliance." Id. at 411-12.

336. Dadswell, Jr., supra note 42, at 487.
337. It is the upstreaming of these liabilities that may prove to be too expensive. For a more optimistic "spin" on this potential, see Aronovsky & Fuller, supra note 42, at 468 ("[A] parent can acknowledge the possibility of direct liability and seek to reduce the risk that hazardous waste disposal practices of its subsidiary could give rise to CERCLA liability for both entities."); Crawley, supra note 1, at 262 ("[L]iability may provide an incentive for corporations to voluntarily assume a greater role in protecting the environment."); id. at 263 ("Faced with potential liability for the environmental transgressions of its subsidiaries, a parent corporation may choose to implement a centralized program of environmental compliance designed to discover and correct hazards before injury or harm occurs.").
338. Newton, supra note 84, at 338. But see Crawley, supra note 1, at 260 ("[A] parent corporation likely may possess knowledge and experience superior to that of its subsidiaries.").
stating impact on the subsidiary's ability to maintain an effective hazardous waste disposal program.

3. If a parent corporation owns all the stock in a subsidiary—or, even a majority of the stock—it will have substantial control over the selection and removal of the subsidiary's management through the legitimate exercise of its voting rights. This should provide some incentive for the management of the subsidiary to be careful about environmental affairs. Thus, in a sense, the liability rule chosen will not affect the manner in which parent corporations may exercise control via voting and will offer incentives for the subsidiary's management to behave in an environmentally responsible way.

4. To the extent that a parent corporation and its subsidiary are closely connected in the minds of the public, a serious environmental misadventure at a subsidiary's facility may reflect poorly on the parent. This will be true in terms of public relations costs, negative publicity, backlash from investors, and other collateral consequences of connection to a contaminated site owned by a subsidiary. To have an impact on the parent, such an incident would have to be large enough to inspire public attention, and the parent's connection to the subsidiary would have to be well-publicized. In addition, this will most likely apply only to large companies with a public identity. However, this may be an indirect "check" on the most egregious forms of misbehavior, a check unaffected by technical issues of legal liability.

5. Finally, any rule that expands liability may be a positive incentive for corporations to develop new methods or technology for reducing the hazards of wastes or decreasing the generation of such wastes. Because this new ruling expands liability, it may make those in the position to incur new liability more likely to contrib-

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339. See McKane, supra note 42, at 1646 ("Limited liability even reduces the parent corporation's incentive to participate in management. . . . It does not, however, reduce the quality of the subsidiary's decisionmaking because the managers of a subsidiary still have a strong incentive to perform well. If the subsidiary performs poorly, some managers may lose their jobs.").

340. In addition, the subsidiary's management may fear that poor performance by the subsidiary will have an impact on their job security, thus increasing incentives for sound management.

341. For an example—albeit not a CERCLA example—of a classic environmental case in which the sins of a subsidiary were visited on its parents in the venue of public opinion, see Blumberg, supra note 42, at 334. Blumberg provides the following description of the notorious Exxon Valdez incident:

"The Exxon Valdez environmental disaster resulted from the negligence of a tanker subsidiary of an integrated international oil company. With public indignation at a very high level, Exxon, the parent corporation, was concerned with the impact of the catastrophe on consumer attitudes. Accordingly, the parent corporation did not choose to contest its liability for the negligence of its subsidiary."—Id.
ute to solutions to the hazardous waste problem. Although not guaranteed to happen, this potential beneficial side effect of a more expansive liability rule should not be overlooked. This expanded liability may be responsible for "promoting incentives for new ideas and trends in safe disposal." 342

Hence, the negative impact that the Court's holding may have on a parent's involvement in the subsidiary's environmental activities must be viewed in the context of other incentives that do favor parental involvement. It is true that the direct liability rule adopted by the Court in Bestfoods runs the risk of placing parent corporations between the proverbial Scylla of incurring CERCLA liability and the Charybdis of surrendering beneficial oversight of their subsidiary's activities. At the same time, however, the impact of the rule may be less problematic when the multiplicity of factors motivating corporate behavior are considered.

Therefore, as Congress attempts to solve this problem it should avoid the temptation to follow either extreme view in the debate. It should not eliminate direct liability in the hope that this is the only way to encourage fearless parental assistance to subsidiaries. On the other hand, Congress should also avoid indiscriminate expansion of liability. A more balanced view is needed.

Assessing CERCLA liability against parents is so complex because of an additional intractable problem: CERCLA's goal is fundamentally different from that of all other major environmental statutes. It is remedial rather than regulatory. 343

... This dichotomy is problematic

342. Stevens, supra note 60, at 574. For an analogous argument in the context of expanded liability for individual corporate officers, see Cronk & Huddleston II, supra note 97, at 688-89 ("The most environmentally favorable route that corporate officers could take in response to personal liability is the route leading to technological advances in waste disposal . . . . Personal liability may very well be the mother of reform.").

343. See New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985) (recognizing that "CERCLA is not a regulatory standard-setting statute such as the Clean Air Act . . . . Rather, [under CERCLA] the government generally undertakes pollution abatement, and polluters pay for such abatement through tax and reimbursement liability."); see also Michael D. Green, Successors and CERCLA: The Imperfect Analogy to Products Liability & an Alternative Proposal, 87 Nw. U. L. Rev. 897, 900 (1992) ("RCRA is designed to address and regulate the primary behavior of those currently and prospectively involved in the generation, transportation, storage, treatment, and disposal of hazardous wastes. By contrast, the liability provisions of CERCLA are predominantly retrospective and compensatory in nature."); Lynda J. Oswald, Bifurcation of the Owner & Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control, 72 Wash. U. L.Q. 223, 229 (1994) (explaining that "CERCLA is a remedial statute . . . [that was] designed primarily to rectify environmental problems posed by hazardous waste produced and abandoned in the past, rather than operating prospectively to prevent future problems."); Oswald, supra note 6, at 585-86 ("CERCLA is a remedial statute, designed to rectify the problems presented by hazardous substances produced and abandoned in the past."); Oswald, Corporate Parent Liability, supra note 42, at 244 ("CERCLA is a remedial statute, designed to rectify environmental problems posed by hazardous waste produced and abandoned in the
because it creates a scheme in which the interests of CERCLA may be at odds with those found in other statutes. To date, CERCLA, and the allocation of parental liability under it, has not been addressed in context with a view to how CERCLA should be interpreted to advance the goals of the entire scheme of environmental regulation.

Most environmental regulatory statutes are proactive and seek to prevent environmental harm from taking place. The vast majority of environmental statutes are premised on the notion that their function is to provide incentives for corporations to conduct themselves in environmentally responsible ways. Thus, these statutes can mandate detailed regulation of the ways in which parents or subsidiaries act precisely because they are designed to govern actions—present and future. Through relatively sophisticated and complex regulatory schemes, most environmental statutes set discharge standards, establish monitoring requirements, mandate record keeping, provide for penalties, and create complex sets of regulations governing the conduct of potential polluters. The philosophy behind these statutes,
and the enforcement efforts made pursuant to them, is that environmental harm is often preventable. These statutes encourage (or, viewed more negatively, coerce) regulated entities to take those actions that will best preserve environmental integrity.\(^3\)

Thus, if CERCLA were a regulatory statute, the difficult task would be to define a regulatory allocation of parental responsibility that would reduce the likelihood of environmental harm, mandate that approach, and assess penalties for noncompliance. Careful study and review should clarify what type of corporate organization and conduct best improve the environment, and the statute could be tailored to foster such conduct.\(^4\) This conduct might include undergoing environmental audits,\(^5\) hiring environmental consultants, providing employee training on environmental issues, offering incentives for environmentally safe practices, instituting penalties for employee carelessness, adopting corporate policies and guidelines for waste management, institutionalizing commitment to safe disposal of hazardous wastes, recycling wherever possible, and coordinating compliance efforts within units of a corporate entity.\(^6\)

Cheryl Hogue, Record $76.7 Million in Criminal Fines Leads EPA Accomplishments for FY 1996, BNA Daily Env't Rep., Feb. 26, 1997, at D2 (reporting that E.P.A. initiated 548 criminal cases in fiscal year 1996, filed 1186 administrative actions, took 1280 civil judicial actions, and conducted about 18,000 inspections).


347. The prevailing view today seems to encourage fairly extensive oversight of environmental practices. For example, Wheeler & Fox, supra note 343, state:

Because virtually nothing can be discharged into the environment without some type of permit or detailed reporting and monitoring requirements, the only way to minimize environmental risk is to first identify the specific business activities that are regulated and then carefully evaluate the requirements and implications of the applicable regulatory programs.

Id. at 496; see also Oswald, Corporate Parent Liability, supra note 42, at 265 (encouraging "instituting procedures for periodic monitoring of environmental activities of the subsidiary, implementing of sound environmental practices at the subsidiary level, and requiring environmental audits before the subsidiary completes any business acquisition or real estate transaction"); Noonan, supra note 42, at 751 (arguing that "threat of liability should encourage parent corporations exerting managerial control over their subsidiaries to implement safer, more effective procedures").

348. See Crawley, supra note 1, at 226-27 ("American businesses have shifted from viewing environmental expenditures first as an 'expensive annoyance' to viewing them as a normal 'cost of doing business,' and finally to viewing them as an 'essential component' of a healthy corporate image. The best approach to minimizing environmental risk involves an aggressive compliance program . . . . Often the best step in such a program is the environmental audit."). For an early analysis of the benefits, both environmental and business, of conducting environmental audits, see Courtney M. Price & Allen J. Danzig, Environmental Auditing: Developing a "Preventive Medicine" Approach to Environmental Compliance, 19 Loy. L.A. L. Rev. 1189 (1986).

349. Analyses of the advantages of compliance efforts and the many and varied ways corporate entities may increase compliance are beyond the scope of this Article.
Alas, the task is not so straightforward when CERCLA is the statute at issue. Unlike most regulatory schemes, CERCLA's goal is not to regulate ongoing or future conduct but to remedy past problems. This fundamental distinction between CERCLA's goals and the goals of other environmental statutes has not been addressed by the courts in their analysis of parent liability.

In the vast majority of instances, CERCLA cases grapple with parental liability for past conduct. Thus, to the extent that CERCLA looks backwards, it offers no opportunity for parents to change their behavior based on the liability rule chosen. It is primarily the Resource Conservation and Recovery Act ("RCRA"), not CERCLA, that controls ongoing disposal conduct. Some provisions of CERCLA influence present conduct, and that influence should not be underestimated. As a general matter, however, CERCLA focuses on retroactive liability rather than incentives to improve present conduct.

350. See Hearings on H.R. 3000, supra note 36 (statement of Carol M. Browner, Administrator, U.S. Env't Protection Agency) ("We estimate that over 90% of all waste at National Priority List (NPL) sites is attributable to pre-1987 activity... ").

351. See Rallison, supra note 76, at 587-88. Rallison writes:
CERCLA aims to clean up existing hazardous waste sites. CERCLA's effect, however, is not merely remedial. Its liability provisions, in conjunction with those of RCRA, provide significant incentives to current and future waste producers, transporters, and disposal site owners and operators to control the hazardous wastes they produce, transport, dispose of, or store. CERCLA, therefore, works both to clean up existing hazardous waste sites and discourage the irresponsible disposal of such waste in the future.

Id.

352. For a thoughtful discussion and analogy to tort law as to how rules governing past conduct may influence ongoing conduct, see Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509 (1986), who states:
Although behavior prior to the rule change in tort law cannot be altered after the fact, transition policy can nonetheless influence such behavior ex ante... [F]irms making initial construction and product design decisions will have made earnings projections that took into account expected liabilities... Transition policy that exempts or otherwise gives relief to past investments confers... immunity. Thus, when the risk of tort liability depends in important ways on the evolution of tort law... the expectation that future evolution in the law will be made applicable to harms arising... prior to the announcement of new rules will have a desirable effect on behavior.

Id. at 599-600.

353. See Green, supra note 343, at 901 ("To be sure, CERCLA does have a residual deterrent role... To the extent that RCRA and other statutes fail to control completely current disposal of hazardous substances, CERCLA liability, like tort liability, should play a deterrent role... Yet, virtually all of CERCLA's current application is to activity that occurred before it was enacted and which therefore could not have been deterred by the statute."); Healy, supra note 42, at 85 ("Congress thus intended to impose a new standard of care for hazardous substance disposal activities, without addressing in detail the fact that this standard would be applied retroactively in many cases."); Oswald, supra note 6, at 603 n.94 ("The deterrent effect of strict liability under CERCLA is limited by the retroactive nature of CERCLA liability."); Hood, supra note 17, at 135 ("The chief culprit is the argument that strict liability for parents will prevent them from organizing undercapitalized subsidiary corporations for the purpose of engaging in environmentally risky activity. Considering that the
This means that CERCLA’s ability to affect current and future conduct has its limitations. The task of creating rules that influence current and future conduct should thus be undertaken primarily in the other environmental statutes.

As a result, when legislating the parental liability rule for CERCLA, the issue of the incentive effects may be less significant than in the context of regulatory statutes. While CERCLA’s function is remedial, a rule must be designed that will advance the remedial goals by making it relatively simple to hold responsible parents liable. CERCLA requires a full search for parties who may be able to pay for a cleanup that is in accord with solid principles. At the same time, however, this remedial purpose must be advanced in such a manner that does not encourage conduct which undermines the regulatory efforts of other statutes. Thus, the approach that Congress takes to allocate liability must concern itself with a number of potentially conflicting goals in answering the third of the questions left unanswered after Bestfoods. The legislative approach outlined in the remainder of this Article attempts to advance these goals, while recognizing that they may be fundamentally at odds.

VI. LEGISLATIVE ANSWERS TO THE BESTFOODS QUESTIONS

In crafting a legislative response to Bestfoods, the central goal is to answer the three specific issues left unanswered by the Court’s ruling: (1) whether state or federal law should govern indirect liability via veil-piercing; (2) how “operator” should be defined for purposes of assessing direct liability; and (3) how the definition of “operator” may

shareholder conduct at issue in CERCLA cases is usually well in the past, this argument for strict liability falters.”).

354. See Jerry Taylor, Salting the Earth: The Case for Repealing Superfund, Regulation, 1995, at 53. Taylor states:

[It] has been suggested that the very brutality of Superfund liability has served as a vital deterrent to potential polluters. That ignores the fact, however, that Superfund focuses on past actions. The Resource Conservation and Recovery Act already dictates in minute detail the management of hazardous wastes from cradle to grave and stipulates its own onerous set of cleanup requirements for those that step out of line. Thus, Superfund probably does little to influence present corporate behavior.

Id. at 59.

355. For an earlier attempt to establish goals for a direct liability policy, see Aronovsky & Fuller, supra note 42, in which the authors state:

[A] parent corporation or an individual shareholder should be directly liable as an “operator” under CERCLA . . . if that investor (1) has the capacity to control the hazardous waste practices of a corporation, (2) has exercised the means of such control, and (3) either has knowledge of the hazardous waste practices of the corporation or has reason to know of those practices. This standard is consistent with the language of CERCLA, promotes sound public policy, and protects appropriate objectives of the doctrine of limited liability.

Id. at 461.
be best applied. However, it is also important to view these issues in the context of other reforms to CERCLA's liability scheme since such reforms may well affect how these solutions will play out.\textsuperscript{356} For example, if the retroactive liability principle should be undone, the question of incentive will become more important as fewer CERCLA cases will involve conduct that took place long before the statute. Likewise, if the joint and several liability scheme is altered, the amount that might be recoverable from parents of relatively small contributors will be less. This may make parents less fearful of risking intervention in the affairs of subsidiaries because the stakes will be lower. Thus, while this legislative proposal deals solely with parental liability questions, the actual impact of the proposals may change should any other changes in the liability landscape occur.\textsuperscript{357}

The legislative response outlined below has two parts. The first addresses the question of \textit{indirect liability} and the veil-piercing concern left unanswered. The second grapples with the two far more complex questions involving \textit{direct liability} and its application.\textsuperscript{358} Before discussing the specifics of the proposal, it is important to begin with a series of broad principles to guide legislative action in this area. Although there are many worthwhile goals that might be valuable to pursue, six principles are particularly crucial. These principles include:

1. Ensuring that the liability scheme selected does not conflict with (and, where possible, supports) the goals of other environmental statutes which attempt to influence conduct by forward-looking regulation.
2. Requiring parents who had culpable pasts vis-à-vis their subsidiaries to pay for the damage done by their subsidiaries' facilities, while at the same time respecting traditional corporate law limits on liability as much as possible.
3. Reviewing CERCLA to assess its potential prospective impact and tailoring a prospective liability scheme based on that impact.


\textsuperscript{357} Silecchia, \textit{supra} note 49, identifies the potential issues for debate in CERCLA reauthorization as:

- retroactive liability; alterations of the "joint and several liability" scheme;
- liability exemptions for some small polluters; Brownfield's redevelopment initiatives; administrative reforms to reduce Superfund transaction and litigation costs; insurance liability debates; caps on sites added to the NPL; limits on the amount of wildlife restoration awards against PRPs; significant federalism questions governing the relationship between the federal government and the states in handling Superfund matters; and the ever-present budgetary debates, to name but a few.

\textit{Id.} at 389-90.

\textsuperscript{358} See Oswald, \textit{supra} note 343, at 227.
4. Retaining a focus on the actions of the parent corporation in the actual operation of the facility rather than on its formal legal or financial relationship to the subsidiary.

5. Ensuring that the ability of the government to find funds to clean up hazardous waste sites is not unduly hampered by overly restrictive liability rules that shield responsible parties who should be assisting in cleanups.

6. Clarifying the corporate activity that could give rise to liability so that parent corporations and the government are clear as to the applicable standards, and, thus, unnecessary litigation can be reduced.

It is in light of these six principles that Congress should do its work.

A. Creating a Sound Standard for Indirect "Owner" Liability

The first task for Congress is to clarify the veil-piercing standard that should apply to assessing vicarious liability against a parent corporation. Clearly, veil-piercing should continue to be available as a way to assess liability against parents, albeit derivatively. There is nothing in the nature of hazardous waste clean-up that makes it so different from other liabilities that veil-piercing would be an inappropriate remedy should a parent abuse the corporate form.359 The central question is whether that standard should be a federal or state one.

The interest in uniformity is strong,360 and courts that adopt a federal standard raise justifiable concerns about ensuring consistency and guarding against forum-shopping, inequity, and outcomes that may vary based not on liability but merely on geographic location. Nevertheless, Congress should endorse traditional state veil-piercing standards rather than the adaptation of a federal standard.361

The primary reason behind this conclusion is that using state standards respects the traditional notion that CERCLA does not displace the common law, it incorporates it.362 Adopting a state standard respects this underlying presumption of CERCLA. Also, applying state veil-piercing law best respects the expectations of parents and subsidiaries who rely on a long tradition of state law as the applicable rule.

359. See Oswald, supra note 343, at 281-82 ("Neither the Act's statutory language nor public policy considerations dictate that piercing in the CERCLA context should differ from piercing in any other context . . . . Rather, the question should be whether the parent would be held liable for any liability of the subsidiary, whether environmental in nature or not.").


361. See Dennis, supra note 360, at 1512 (providing an argument in support of using a state standard).

362. See id. at 1447 (describing congressional intent to defer to state law on a number of still open issues).
These parties make decisions and take risks on the basis of expectations generated by state law. To the extent possible, these expectations should be honored.

In addition, state common law in this area is far better developed than its federal counterpart. A well-developed body of law is essential for ensuring that there is clarity and straightforward understanding of the parameters of permissible parental conduct. Common law on this issues in the states has had decades to develop. Federal common law, by contrast, is much less developed, which fosters precisely the ambiguity and uncertainty that is likely to lead to inconsistent outcomes and further litigation.363

While the interest in uniformity should not be disregarded, and while a state-specific approach may, concededly, give rise to some occasions in which inconsistent outcomes will result, this risk is acceptable. The variations that result from differing state veil-piercing standards may well be replaced by the variations resulting from differing circuit standards as separate circuits try to create a body of federal veil-piercing law.364 Such a process would take years to become as well-articulated as state standards, resulting in much variety, particularly in the early years. The notion that a federal common law will be applied consistently is overly optimistic. Hence, if there is to be variation, it should, at the very least, respect expectations and provide a greater level of predictability.

More importantly, many of the cases and commentators advocating a federal standard out of concern over state-to-state inconsistency were operating under the presumption that there might be only one avenue of assessing liability—the indirect, vicarious way. If veil-piercing were the only way under which a parent could be held liable, then the need for uniformity would be greater. Bestfoods and this legislative proposal, however, envision a second alternative—a uniform federal standard for direct "operator" liability. This federal statute, if enacted, is likely to become the primary means of imposing parental liability. This will operate against a backdrop of state veil-piercing standards that will act only as a supplement to direct liability, but is unlikely to serve as the primary tool for recovery against parents.

The language of CERCLA, therefore, should be amended to clarify that when derivative veil-piercing is the basis of a parent’s liability, it should be done in accord with established principles of state law. Congressional clarification of this might prompt various states to study and reevaluate their veil-piercing standards. This is well within the states’ prerogative. However, the contours of veil-piercing law

363. Id. at 1510 ("[N]ew federal rules of liability would create a tremendous amount of confusion and uncertainty . . . .")
364. Id. at 1466 ("[T]he search for a uniform rule of piercing the corporate veil under CERCLA is likely to be frustrated by the diversity of the twelve circuit courts, as well as by the equitable nature of the remedy.").
should remain within the control of the states, leaving federal law to grapple with its proper role: establishing a sound standard for direct liability.

B. Creating a Sound Standard for Direct "Operator" Liability

In articulating the way in which a parent corporation may be liable as the “operator” of a facility, the legislature must first craft a clear definition of what it means for a parent to “operate” a facility and then determine how to apply that definition in a way that is consistent with CERCLA’s remedial goals and with the environmental improvement goals of the regulatory statutes.

The first task is outlining a definition of “operating” that provides sufficient clarity and retains the Bestfoods focus on the relationship between the parent and the facility rather than the one between the parent and the subsidiary. Ideally, the test should be a functional one that determines who controlled the operations of the affected site by assessing the central features of “operate” and clearly delineating them in the statute.

Fortunately, Congress is not without guidance in creating a more detailed definition. Rather, Congress can borrow from recent amendments it made to CERCLA which clarified the scope of lender liability. The debate surrounding the extent to which lenders should be liable for the hazardous wastes found on sites they held was a fierce one. Like the debate over parental liability, courts were not able to resolve that debate effectively without legislative intervention.365

Although the intricacies of that debate are beyond the scope of this

365. The notorious decision in United States v. Fleet Factors Corp., 901 F.2d 1550, 1557-59 (11th Cir. 1991), which created the confusing “capacity to influence” test for lenders, helped bring the dispute to a head and forced non-judicial intervention. First, the EPA attempted to respond to Fleet Factors by issuing a final rule. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344, 18,345-46 (1992) (to be codified at 40 C.F.R. pt. 300). This attempted to offer some standards that offered a bit of protection to lenders and secured creditors. Id. at 18,344. This was an unsuccessful effort, however, and in Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), the D.C. Circuit vacated the EPA’s rule. Id. at 1109. It found, in essence, that the EPA had usurped the role of the courts by ruling on CERCLA liability issues. Id. at 1107-08. The court also found that the EPA was venturing into Congressional turf by impermissibly promulgating a “quasi-legislative effort to implement the statute.” Id. at 1108. Following this loss, the EPA reissued the rule. However, rather than calling it a rule, the EPA released it in the form of a September 22, 1995, “Policy Memorandum,” that stated the enforcement policy that the EPA and DOJ intended to pursue in this area when they exercised their discretion. Nonetheless, this offered still-tenuous and uncomprehensive guidance, and it led to the tender liability amendments discussed in the text that follows. For further discussion of this legislative-administrative-judicial wrangling, see Ben A. Hagood, Jr., Congress Clarifies Lender Liability for Polluted Property, 8 S.C. Law. 24, 24-27 (1997); Joseph M. Macchione, Comment, Lender Liability Under CERCLA in Light of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996: Does the Act Spell Lender Relief or Continued Heartburn?, 16 Temp. Envtl. L. & Tech. J. 81, 83-92 (1997).
what resulted from it were the lender liability amendments, formally known as the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act. In these amendments, Congress defines what it means for a lender to “participate in management” of a facility. Although the interests of lenders and parents are different, the analogy is apt. In addition, while “participate in management” is semantically different from “operate,” the definition used for “participate in management” in the lender liability context is quite helpful in defining what it means to “operate” in the parental sense.

Specifically, Congress should include the following language—taken directly from the lender liability standard—and establish that for a parent to be considered an operator, it must be a parent who:

a. Is “actually participating in the management or operational affairs of [the] vessel or facility;” AND EITHER
b. “[E]xercises decision making control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility;” OR
c. “[E]xercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

[i] for the overall management of the vessel or facility encompassing day-to-day decision making with respect to environmental compliance;

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369. Indeed, this comparison has been drawn before. See Sheh, supra note 366, at 710-11 (describing similarities between liability concerns of shareholders and corporate parents and lenders). Sheh explains that:

[A]n investigation into “owner” liability for lenders is similar to conducting the test for piercing the corporate veil with respect to shareholders and parent companies. . . . Thus, imposing liability on lenders under an “owner” theory is necessarily similar to piercing the corporate veil based on mere ownership of an interest in the corporation.

Id. at 712.


371. Id. § 9601(20)(F)(ii)(I).
[ii] over all or substantially all of the operational functions\textsuperscript{372} . . . of the vessel or facility other than the function of environmental compliance.”\textsuperscript{373}

This borrowed definition has several features to recommend it. First, and most importantly, it is more specific than the \textit{Bestfoods} definition of operation and, thus, offers greater guidance to the regulated community by outlining a specific set of activities that constitute “operation.” While no definition can foresee all potential activities at a facility, this one delineates a number of activities in more detail than \textit{Bestfoods}. This will be helpful to the regulated community as well as to the courts that may be called upon to work with this definition.

The focus on the facility places the emphasis where it should be. It forces courts to inquire into the actual process of environmental decision making. This is consistent with \textit{Bestfoods’} and CERCLA’s focus on environmental protection and not on semantic or technical questions of corporate form. Thus, a corporate parent who, in fact, operates will not be able to claim otherwise just because—in theory—it and its subsidiary are legally separate.

In addition, although parents and lenders have differing interests and roles, there is a distinct advantage in using one definition for both. Having a consistent definition for “operation” and ”management” for both classes may foster faster development of a consistent body of case law as both lenders and parents seek to clarify ambiguities. This will advance the goal of predictability and consistency as cases begin to build on each other from a solid foundation that will not require courts or parties to draw complex analogies between differing provisions.

The definition is not a perfect one. It will take time for the precise meaning of the definition to become apparent since the language still

\textsuperscript{372} “Operational function” is further defined as including “a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.” \textit{Id.} § 9601(20)(G)(v).

\textsuperscript{373} \textit{Id.} § 9601(20)(F)(ii)(II). In the text of the statute, Congress explicitly drew a distinction between the “operational functions” of a facility and the “financial or administrative functions” of the facility. \textit{Compare id.} § 9601(20)(G)(v) (defining “Operational function” as one of a “facility or plant manager, operations manager, chief operating officer, or chief executive officer”), \textit{with id.} § 9601(20)(G)(ii) (defining “Financial or administrative function” as one of a “credit manager, accounts payable officer, personnel manager, comptroller, or chief financial officer, or a similar function”). Congress stated that the latter would not constitute participation in management. Congress should retain this distinction so that the focus continues to be a functional focus on activities rather than on the more attenuated issues of finance or administration. To some extent, the three types of functions—activities, finance, and administration—are intertwined. For example, a parent who controls financial functions and allocates no budgetary authority for environmental compliance efforts has affected the functioning or malfunctioning of the operational functions. However, this is not particularly problematic since the first option—decision making with respect to environmental compliance—would cover that circumstance.
remains necessarily broad. In addition, it is also necessary to clarify the way in which the terms “manage” and “operate” may differ and to work toward consistency so that the two definitions are uniform.

Furthermore, Congress must determine whether there should be exclusions from the definition. The Lender Liability Act specifies particular types of parental intervention that do not constitute participation in management. Many of those exclusions do not neatly apply to the parental context where the issue of operation is simpler. In the context of parental liability, the definition of operation should exclude two types of activities from the law governing what it means for a parent to “operate.” The two activities that

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374. This ambiguity has been criticized by those critiquing the lender relief legislation. See Macchione, supra note 365, at 106 (stating that this definition “may prove marginally useful. Because the list provides only extreme examples of ‘participation,’ its usefulness is questionable at best”).

375. A review of dictionary definitions for “manage” and “operate” indicates some differences in the way in which those two terms are commonly understood, as well as some circularity. See Webster’s Third New International Dictionary 1372 (1986) (defining “manage” as “to control and direct” and “to direct or carry on business or affairs, supervise, administer”); id. at 1580-81 (defining “operate” as “exert power or influence” and “to manage and put or keep in operation whether with personal effort or not”).

376. Anticipating this problem, Macchione, supra note 365, writes:

Another foreseeable problem with the list is its use of ecumenical terms and phrases such as control “comparable to that of a manager” or overall management “encompassing day-to-day decision-making” or “assumed or manifested responsibility” over “substantially all” operational functions. Use of such language brings to light numerous questions.

Id. at 106 (footnotes omitted).

377. Specifically, the new lender liability provision of CERCLA provides:

[The term “participate in management” does not include—

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections . . . ;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance . . . ;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest . . . ;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit . . . ; or

(IX) conducting a response action under section 9607(d) of this title . . . .

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).]

should not constitute "operation" and, thus, not create parental liability are:

(1) any activities at the facility in question that were solely in response to an emergency that threatened human health or the environment as long as that response was undertaken in accord with applicable laws; or

(2) receiving information or reports from the facility that were disclosures required as a matter of law.

These two exceptions ensure that a parent will not be deemed as operating a facility merely as a result of intervening to prevent a serious harm or as a result of conducting any minimal monitoring required by environmental, corporate, or securities laws. These exclusions may require occasional refinement, but they should only include activities that involve lawfully conducted emergency actions or actions that fulfill legal supervisory obligations.

This proposed definition fleshes out the vague rubric proposed by the Supreme Court so that the contours of "operation" in the parental capacity become clearer. The more difficult part of the challenge comes in legislating how this definition should be applied so that it achieves the set of six legislative goals outlined above.378

Adopting the "operate" definition outlined above will expand liability beyond the veil-piercing rule. Without unduly expanding corporate liability, it will allow courts to reach into parental pockets where veil-piercing might not. This furthers the remedial goals of CERCLA. At the same time, however, the definition should not be applied in a way that creates a negative incentive for current or future environmental behavior. The only way to achieve these potentially inconsistent goals is to apply the definition differently when the liability involves past conduct versus when it applies to present or future conduct.

When the litigation concerns activities that occurred solely in the past, there is little concern for incentives. The goal in past-action cases should be to apportion liability in a way to achieve a goal that is solely remedial. The definition outlined above can be applied to past conduct by simply looking at the parent's relationship to the subsidiary at the time of the activity in question. If the parent played a role that met the definition of operator at the time of contamination, then it should be liable as such. If its actions did not rise to that level, then it should not be liable unless and until the alternative veil-piercing standard is met. There are many advantages of applying the definition in this way. Primarily, it is consistent with CERCLA's goals. If a parent operated a subsidiary's facility, then it should be liable for the clean up. The definition of operate is not so draconian as to capture

378. See supra pp. 189-90.
innocent actors—it requires fairly substantial involvement at a level parents are not likely to achieve inadvertently.

The proposed definition may undermine some parents' liability expectations to the extent they relied on a strict veil-piercing standard. Yet, a functional analysis that solely examines the parents' conduct would require even the most indignant parent to acknowledge—privately, if not on the record—that the conduct in which it engaged did meet the lay definition of operation. To the extent that there is an element of shattered expectations in this definition, it is less so than the change in expectations caused by the retroactive nature of CERCLA as a whole. The nature of a remedial statute and the principle that one's past deeds can result in liability that was not previously apparent are both concepts with which the regulated community should be familiar.

In solely addressing past conduct, the question of incentives is irrelevant. Hence, the definition can be freely applied in reviewing past conduct to discern the nature of the parent-facility relationship without worrying that the definition will provide incentives for misconduct or a "hands-off" approach. Certainly, the older the conduct, the harder it will be to undertake the factual inquiry needed to determine the true nature of the parent-facility relationship. Evidentiary questions aside, applying this rule to past conduct requires a straightforward review of conduct that can no longer be modified.

The more difficult issue is the application of the rule to continuing conduct, since in such situations the issue of incentives is more important. First, the effective date of the new definition must be ascertained. Second, the legislature must be willing to follow a different definition for conduct that occurs on or after that date. Persuading Congress may be difficult because it will mark a departure from CERCLA's general scheme that regards past, present and future conduct in the same light. However, once Congress is willing to make that distinction, the next task is to discern how to apply the definition of "operator" to the conduct of parents on or after the effective date of the new rule. The basic structure of the definition should be maintained, but with several modifications to ensure that it will not unduly encourage parents to adopt a hands-off approach. As explained above, there are factors that will mitigate or neutralize the impact of any liability rule on parental conduct. In addition, other regulatory statutes—primarily RCRA—are available to regulate the ongoing operation of facilities.

379. See supra pp. 181-84.
380. For a fuller discussion, see Geltman, supra note 42, at 408-12 (analyzing shareholder liability for hazardous waste disposal under CERCLA, RCRA, state statutes, contractual theories, securities laws, and the Racketeer Influenced and Corrupt Organization Act).
However, to the extent that current and future conduct will be affected by this new definition, Congress should apply the same definition and supplement it with a statutory "carrot" and "stick" to encourage parental intervention. The "carrot" could be a system, used in other environmental enforcement contexts, in which the parent who voluntarily engaged in oversight of a subsidiary's facility would be treated more leniently in the event of an environmental incident. Reduced penalties for violations that become apparent as a result of voluntarily undertaken conduct exist in many other areas of environmental enforcement. There, it is recognized that engaging in environmentally beneficial conduct not otherwise required—for example, conducting audits, or voluntarily reporting oneself—can have negative consequences on a corporation which may cause the corporation to avoid such conduct. Thus, in making decisions to prosecute

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381. The task here is to strike that delicate balance that will result in the exact amount of parental oversight that is optimal. For a discussion of the difficulty in doing so, see Dent, Jr., supra note 61, at 178 (“To absolve those who are negligent gives rise to too many accidents and excessive engagement in risky activities. To impose liability on those who are prudent, however, promotes excessive caution, underutilization of desirable activities, and inadequate spreading of costs. The proper goal is reasonable prudence.”).


383. See, e.g., infra note 384 (discussing EPA and Department of Justice ("DOJ") policies that recommend reduced penalties in certain circumstances); see also supra note 382 (citing sources that discuss the effects of voluntary compliance efforts).

384. For example, the EPA issued a policy outlining the favorable light in which it would view efforts at voluntary self-policing when making decisions as to which cases to recommend for prosecution. See EPA, Incentives for Self-Policing, 60 Fed. Reg. 66,706 (1995). The final policy statement established that the EPA will “generally not recommend criminal prosecution” of those who police themselves “through an environmental audit” in which they discover a violation or through “an objective, documented, systematic procedure or practice reflecting the regulated entity’s due diligence in preventing, detecting, and correcting violations.” Id. at 66,711. Similarly, the DOJ policy establishes that a DOJ decision to prosecute may be mitigated if the target can answer the following questions affirmatively:

Was there a strong institutional policy to comply with all environmental requirements? Had safeguards beyond those required by existing law been developed and implemented to prevent noncompliance from occurring? Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance? Were there procedures and safeguards to ensure the integrity of any audit conducted? Did the audit evaluate all sources of pollution (i.e., all media) including the possibility of cross-media transfers of pollutants? Were the auditor’s recommendations implemented in a timely fashion? Were adequate resources committed to the auditing program and to implementing its recommendations? Was environmental compliance a standard by which employee and corporate departmental performance was judged?
or sentence,\(^3\) these voluntary actions are given some weight in mitigating consequences.\(^3\) Similarly, while a parent may not be required to manage its subsidiary's facilities, it should be encouraged by the "carrot" that will mitigate its CERCLA liability should there be a mishap.

The problem with incorporating such a reward into the statute is that it would introduce an element of fault into the statute which otherwise imposes strict liability. Eliminating strict liability has often been proposed as a potential CERCLA reform. Until that is done, however, parents who meet the new statutory definition of "operator" should not be treated differently from other responsible parties. Thus, this proposal does not suggest that reduced liability for parents be a formalized carrot. Rather, it should be a factor that the EPA considers in negotiating CERCLA settlements with parents who voluntarily undertook the beneficial environmental management of their subsidiaries' facilities.

Another option is to use a "stick" to prod parents into overseeing their subsidiaries' environmental management programs. This "stick" would require parents to engage in oversight and penalize them if they did not. This has the benefit of eliminating blind eyes and placing the earnest overseer and the negligent parent on equal footing. As noted in the judicial context, "a liability rule which imposes an affirmative duty upon parent corporations to take reasonable steps to ensure that their subsidiaries have the financial resources to cover their environmental liabilities is a preferable alternative legal regime for deciding these claims."\(^3\) Such a rule would increase parental oversight and actively involve parents in the management of their subsidiaries as

\(^3\) See, e.g., Advisory Working Group on Environmental Offenses: Proposed Sentencing Guidelines for Organizations Convicted of Environmental Offenses (1993) (on file with the Fordham Law Review). The Environmental Offenses, a draft of sanction proposals prepared for submission to the United States Sentencing Commission, would provide for mitigation of sentencing for those who engage in voluntary: "(1) Line Management Attention to Compliance; (2) Integration of Environmental Policies, Standards and Procedures; (3) Auditing, Monitoring, Reporting, and Tracking Systems; (4) Regulatory Expertise, Training and Evaluation; (5) Incentives for Compliance; (6) Disciplinary Procedures; (7) Continued Evaluation and Improvement; and (8) Additional Innovative Approaches." Id. § 9D1.1(a). Although only a proposal, this also reflects the desire to offer "carrots" to those who act beyond the minimum requirement.

\(^3\) In the civil context, voluntary, non-required compliance efforts can yield significant benefits in the reduction of civil penalties. See, e.g., Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,707-08 (1995) (describing penalty reductions for those with voluntary compliance or audit plans in place).

\(^3\) Farmer, supra note 42, at 772 (footnote omitted).
they would gain no advantage by remaining afool. However, using such a “stick” ignores the legal principle behind separation of parents and subsidiaries.

The “carrot” of informal mitigation should accompany a second smaller carrot: a “safe harbor” of specific environmental oversight activities that will not constitute management. These oversight activities should be limited and arrived at only after studying what practices are most likely to result in good conduct by the subsidiary. These may include: parents asking their subsidiaries to report on their facilities’ operations each year; or, requiring that the parent sponsor a training program for the facility’s environmental managers. Whatever these activities are, they should be listed as a “safe harbor” in the statute or its accompanying regulations so that a responsible parent knows that it may engage in a range of specific, environmentally-oriented practices and not be defined as an “operator” for liability purposes.

The smaller “stick” should be a set of rules that require a minimum amount of oversight by the parent, with a penalty assessed against the parent for failing to do so. This minimal oversight may be as simple as requiring the subsidiary to certify to the parent annually that it is in compliance with environmental regulations. This is not an intrusive requirement, and it would mandate at least some parental involvement in the affairs of its subsidiaries and perhaps motivate the parent to engage in further supervision if it discovers problems. Furthermore, even a minimal scheme of parental accountability may motivate the subsidiary’s managers to exercise a higher degree of environmental responsibility over its facilities.

In summary, this legislative proposal would ask Congress to build on the Bestfoods ruling to clarify and moderate parental liability rules. Although indirect veil-piercing liability would not be contemplated as the primary means of assessing liability, Congress should, to the extent courts do employ such a liability standard, clarify what state common law governs.

Direct liability is contemplated as the primary avenue through which parents will be liable for their subsidiary’s facilities. Congress should retain the Bestfoods focus on the parent-facility relationship rather than the parent-subsidiary one. This approach should be clarified by expanding and elaborating on the definition of what it means for a parent to “operate” a facility. This can be accomplished by adopting the definition of “management” currently found in the Lender Liability Amendments. Armed with this definition, courts can then assess parental liability for past conduct by measuring the past parent-facility relationship and holding a parent liable if its past in-

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388. This differs from the two exceptions outlined in the definition of operation because these “safe harbors” specifically encourage compliance and include discrete activities. The two exclusions—responses to emergencies or making legally required disclosures—are not voluntary acts that parents must be encouraged to do.
volvement meets this newly defined standard. To the extent that a responsible parent is facing potential liability for current or future conduct, courts should use this same definition with two modifications. First, immunize certain environmentally beneficial oversight activities from the definition. Second, require a minimal level of parental oversight, with penalties for noncompliance. Although this does not guarantee a resolution to all of the competing interests involved, this approach will go further toward reconciling the competing interests than the current law does. Equally important, it will do so with legislation rather than with the less appropriate and ill-suited judicial pronouncement. Congress must, in the near future, address CERCLA reauthorization and grapple with the issue of parental liability.

Conclusion

The “mists of metaphor” are difficult to navigate. Courts have tried to negotiate the complex issue of parental liability through those mists with much confusion and little success. The Supreme Court’s recent pronouncement in Bestfoods helped clarify the issue of CERCLA parental liability. It offered a good starting point for further clarification in that complex area where environmental policy and corporate jurisprudence collide. The Bestfoods decision also offers guidance to those grappling with a number of related and no less intricate problems. Congressional modification, however, is needed to build

389. But see Hottel & Jeffcoat, supra note 36, at 178 (“Members of Congress have recently sponsored several pieces of legislation to amend and reauthorize CERCLA. However, none of these bills provide any significant clarification of the circumstances in which a parent corporation or a shareholder can be deemed liable as a CERCLA owner or operator.” (footnote omitted)).

390. The decision has been recognized as “an important, and overdue, step in helping the courts—and environmental counsel—focus at last on the relevant issues in this complex field.” Kass & McCarroll, supra note 214.

391. Any legal development has repercussions that influence the progress of the law in areas not originally contemplated. This is particularly true, however, with Bestfoods, as it implicated decision-making in several other areas.

For example, in its decision in Donahey v. Bogle, 129 F.3d 838 (6th Cir. 1997), vacated and remanded sub nom. Donahey v. Livingstone, 118 S. Ct. 2317 (1998), the Sixth Circuit addressed the issue of whether a sole shareholder of a corporation could be liable under CERCLA absent circumstances warranting veil-piercing. See id. at 843. The Sixth Circuit initially ruled that the defendant sole shareholder would not be liable “[b]ecause there are no facts present that would justify such veil-piercing . . . .” Id. This decision, however, was vacated and remanded to be decided in light of the standard articulated in Bestfoods which will, presumably, require a broader reading of potential liability.

Similarly, the Seventh Circuit, in Truck Components Inc. v. Beatrice Co., 143 F.3d 1057 (7th Cir. 1998), barred the attempt of a subsidiary to hold its parent liable for the pollution caused by the subsidiary. This complex issue can only benefit from clarification of the relative responsibilities of parents and subsidiaries.

Another recent decision, East Bay Municipal Utility District v. Department of Commerce, 142 F.3d 479, 480-81 (D.C. Cir. 1998), dealt with the difficult issue of “opera-
on that effort and provide further guidance to future travelers through the "mists of metaphor."

tor" liability for the federal government, and the degree to which it may be held liable as an operator or arranger for contaminated sites with which it was allegedly connected. There, the court grappled with many of the same definitional questions that are involved in the parental liability context. See id. at 484-85. Thus, again, a sound rule and some careful guidance would assist in the resolution of related disputes involving the federal government.


Other questions also have the potential to be affected by continued development of the law in the parent-subsidiary context. For example, the applicability of limited liability in the context of other business forms is still questionable and could benefit from further development of the law. In addition, the liabilities of the predecessors, successors, and fiduciaries are also in need of further development. Although these particular issues are beyond the scope of this Article, they illustrate, in part, the potential impact of Bestfoods in the further development of law in this area, and the need for further clarification of those areas in which the Bestfoods opinion is undeveloped.