I. INTRODUCTION

In recent years Congress has passed legislation aimed at preventing and minimizing damage from hazardous wastes.\(^1\) In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the Act).\(^2\) CERCLA was enacted "to address the increasing environmental and health problems associated with inactive hazardous waste sites" by ensuring that the responsible parties are held accountable for the environmental clean-up costs.\(^3\) Among the Act's various implications is the liability of parent corporations\(^4\) for environmental harms caused by the facilities of their subsidiaries.\(^5\)

In order to determine parent corporation liability under CERCLA, courts must balance congressional intent with the plain language of the statute and traditional principles of corporate law.\(^6\) Consequently, since the passage of the Act, courts have disagreed about the scope of parent corporation liability.\(^7\)

In \textit{United States v. Bestfoods},\(^8\) the Supreme Court responded to the conflict among the circuits over the liability of parent corporations under

---


\(^4\)A parent corporation is a "[c]ompany owning more than 50 percent of the voting shares, or otherwise a controlling interest, of another company, called the subsidiary." \textit{BLACK'S LAW DICTIONARY} 1114 (6th ed. 1990).

\(^5\)Although CERCLA does not specifically include parent corporations as responsible parties, the language of the statute permits their inclusion. Under the Act, "any person who . . . owned or operated any facility" may be liable for the cleanup of a hazardous substance. 42 U.S.C. § 9607(a)(2) (1994).

\(^6\)See Brown, supra note 3, at 820.

\(^7\)Compare United States v. Kayser-Roth Corp., 910 F.2d 24, 27-28 (1st Cir. 1990) (imposing CERCLA liability on a parent corporation which exercised pervasive control over its subsidiary), with Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82 (5th Cir. 1990)(declining to extend CERCLA liability to parent corporations for the violations of their wholly-owned subsidiaries).

\(^8\)524 U.S. 51 (1998).
CERCLA. In a unanimous decision, the Court held that (1) parent corporations are indirectly liable for the environmental harm caused by their wholly owned subsidiaries only when the corporate veil can be pierced, and (2) parent corporations can be held directly liable when they actively participate in and exercise control over a subsidiary's facility.

II. BACKGROUND

As noted above, recent decisions regarding the liability of parent corporations under CERCLA have not been consistent. Fortunately, the Supreme Court's decision in United States v. Bestfoods has shed some light on the extent of this liability.

A. CERCLA

CERCLA is a comprehensive statute "enacted in response to the serious environmental and health risks posed by industrial pollution." CERCLA is a strict liability statute, which imposes joint and several liability where the environmental harm caused is indivisible. The statute provides a cause of action for the recovery of costs expended in response to harm caused by hazardous substances. Liability under CERCLA is imposed

---

9"We granted certiorari to resolve a conflict among the Circuits over the extent to which parent corporations may be held liable under CERCLA for operating facilities ostensibly under the control of their subsidiaries." Id. at 60 (citations omitted).

10Id. at 63-64.

11Id. at 67-68.

12See supra note 7.

13Bestfoods, 524 U.S. at 55 (citation omitted). "Congress enacted CERCLA in reaction to the discovery of abandoned and inactive hazardous substance disposal sites . . . ." Deborah A. Hotel & Michael R. Jeffcoat, Caught in the Web: CERCLA Owner or Operator Liability of Lenders, Shareholders, Parent Corporations, and Attorneys, 6 S.C. ENVTL. L.J. 161, 162 (1997). Two of these sites are the Valley of the Drums and Love Canal. Brown, supra note 3, at 819. The Valley of the Drums, located in Kentucky, was contaminated by thousands of barrels of hazardous waste that leaked into the ground. Id. at 819 n.2. More than eighty deadly chemicals were dumped at Love Canal, a site originally dug to connect the Niagara River and Lake Ontario. Id. at 819 n.3.


15Pursuant to CERCLA, the President promulgates a National Contingency Plan to direct actions and prescribe procedures to respond to hazardous waste contamination. Hotel & Jeffcoat, supra note 13, at 162. The President delegates authority to the Environmental Protection Agency (EPA), which may act to clean up a site with revenue from the Hazardous Substance Superfund. Id. The government replenishes the Superfund through recovery actions against responsible parties. Id. In addition, private parties who clean up a contaminated site can file civil actions to recover costs from responsible parties under CERCLA. Id. at 163.
when (1) there is a release or threatened release of a hazardous substance from a facility, 16 (2) response costs are incurred as a result, and (3) the responsible party falls within one of the four categories defined under the Act. 17

One of the four categories of persons that are liable for environmental harms encompasses "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." 18 "Person" as defined under the Act includes individuals and corporations. 19 Under CERCLA, an "owner or operator" is defined as "any person owning or operating [a] facility." 20 This circular definition of operator under CERCLA provides little guidance to the

16 Under CERCLA, "facility" is broadly defined as "any facility of any kind," located in, on, or under any land or waters within the United States or any facility subject to the jurisdiction of the United States. 42 U.S.C. § 9601(17)-(18) (1994).

17 Id. § 9607(a). CERCLA states, in relevant part:
(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
(1) the owner and operator of a vessel or a 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 owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

18 Id. § 9607(a)(2). Other covered persons include: the owner and operator of a vessel or a facility, any person who arranged for disposal or treatment of hazardous substances, and any person who accepts any hazardous substance for transport. Id. § 9607(a).

19 Id. § 9601(21). Under CERCLA the term "person" also means a "firm, . . . association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." Id.

courts. Therefore, courts must look to the language of the statute and corporate law principles to determine parent corporation liability under the Act.

B. Corporate Law Principles

In order to understand the current conflict over parent corporation liability under CERCLA, a brief overview of some corporate law principles is warranted. A general concept of corporate law is limited liability, which protects corporate shareholders from corporate liability through the existence of the corporate veil. Under this principle, the extent of a shareholder's liability is limited to the amount he or she invested in the corporation. If the corporate veil is pierced, however, shareholders can be held personally liable for the acts of the corporation.

At common law, the principles of limited liability are applicable to parent corporations. In general, a parent corporation's liability is limited to the amount it invested in the subsidiary. If the corporate veil is pierced, however, "a parent can be liable for the actions of its subsidiary." Generally, courts will allow the corporate veil to be pierced "if the subsidiary was formed to perpetrate a fraud or if the parent [corporation] is found to have controlled the subsidiary."

C. Owner Versus Operator Liability

Under CERCLA, a parent corporation can be liable for environmental harms caused by a subsidiary either directly as an operator or indirectly as

---

21See FMC Corp. v. Department of Commerce, 29 F.3d 833, 843 (3d Cir. 1994). Although Congress did not directly address the issue of liability for corporate shareholders, CERCLA has been interpreted to include parent corporations. John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 404-05 (1st Cir. 1993).

22See Brown, supra note 3, at 820.


24See Brown, supra note 3, at 823.

25See Brown, supra note 23, at 267-68.

26See id. at 267.

27See Brown, supra note 3, at 823.

28See Brown, supra note 23, at 267. When the corporate veil is pierced, courts disregard the corporate form of the subsidiary and impose liability on the parent corporation. Brown, supra note 3, at 821.

29See Brown, supra note 23, at 268 (footnote omitted).
standards

9. the Idaho
their
Part
Schiavone
corporation
incorporate
based
broader
CERCLA's
interpretations,
protect
management
CERCLA
activities
comes
polluting
an
1999

Dissolved
standard
owner
82-83
992
"capacity
1986).
"considering
CERCLA);
(considering
and
parent
management
CERCLA
found
it
broad
the
law.
They
believe
liability
under
CERCLA
"is
based
on
mere
status
as
an
owner
operator
... rather
than
actual
conduct
or
activities
at
a
site;
the
harm
need
not
be
foreseeable." They
reject
a
broad
approach
to
parent
liability
and
recommend
that
courts
incorporate
elements
of
limited
liability
into
their
analysis
of
parent
corporation
liability
under
the
Act.38

31 Id. Although the Supreme Court later rejected this analysis of operator liability, see infra
Part III.B, it still helps to make the initial distinction between operator and owner liability.
(further defining "owner or operator" in the case of lenders not participating in management).
33 Some courts have attached CERCLA operator liability to parent corporations based on
their "capacity to control" the subsidiary. See Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D.
Idaho 1986). The "capacity to control" approach is not prevalent and commentators have denounced
the standard for its lack of regard for the corporate form. Stewart & Campbell, supra note 30, at 9.
34 Stewart & Campbell, supra note 30, at 8.
35 Stewart & Campbell, supra note 30, at 10.
D. Conflict Among the Circuits

The circuits have been in conflict over the scope of parent corporation liability under CERCLA. At least one court has held that a parent corporation is not liable for the acts of its subsidiary where the parent was not active in the subsidiary and was only acting within its role as an investor. Some courts have found "operator" liability based on a parent corporation's "capacity to control" the subsidiary. Other courts have held parent corporations liable based on actual participation in or control over the facility. Still others have declined to hold parent corporations responsible for environmental harm caused by their subsidiaries. These courts argued that the legislative history does not indicate any intent by Congress to alter basic tenets of corporate law. They reasoned that had Congress intended such an extension of corporate liability, it could have expressly provided for it in the statute.

39See, e.g., John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 408 (1st Cir. 1993) (holding that a parent corporation may be liable as an operator where the requisite level of corporate involvement is established); Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82 (5th Cir. 1990) (holding that CERCLA does not impose direct liability on parent corporations for violations of their wholly owned subsidiaries).
41See supra note 30.
42See, e.g., Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993) ("[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."); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) (holding that "a parent corporation may be held liable as an operator of its subsidiary's business only when it 'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary'") (quoting Jacksonville Elec. Auth. v. Eppinger & Russell Co., 776 F. Supp. 1542, 1547-48 (M.D. Fla. 1991), aff'd, 996 F.2d 1107 (11th Cir. 1993)); United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990) (stating that "if to be an operator [under CERCLA] . . . requires active involvement in the activities of the subsidiary").
44See Cordova Chem. Co., 113 F.3d at 579; Joslyn, 893 F.2d at 82.
45See Cordova Chem. Co., 113 F.3d at 579-80 (citing Joslyn, 893 F.2d at 83).
E. The "Actual Control" Test

A number of courts have employed the "actual control" test to establish direct liability of a parent corporation. Under this standard, a parent corporation is liable as an operator of a hazardous waste facility when it exercises substantial control over its subsidiary. Because this standard imposes direct, rather than derivative, liability on a parent corporation, it does not consider the factors required to pierce the corporate veil. Therefore, "[t]he actual control test imposes liability which would not be consistent with 'traditional rules of limited liability for corporations.' Courts have utilized this standard because it "balances the benefits of limited liability with CERCLA's remedial purposes." In addition, the standard "ensures that a parent corporation who is active within certain areas of its subsidiary's activities is not encouraged to ignore the hazardous waste practices of the subsidiary."

F. Legislative History

Early statutes enacted by Congress to solve hazardous waste problems failed due to their focus on prevention and exclusion of remedial measures. Through CERCLA, Congress attempted to correct its past legislative mistakes. According to the Supreme Court, "[t]he remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." Congress' broad remedial intent is evidenced by

---

46See supra note 30. This standard was formulated by the First Circuit. Brown, supra note 3, at 830. In Kayser-Roth, the First Circuit determined that operator liability applied to a parent corporation that exercised actual control over the activities of its subsidiary. Id. See also United States v. TIC Inv. Corp., 866 F. Supp. 1173, 1182 (N.D. Iowa 1994), aff'd in part, rev'd in part, 68 F.3d 1082 (8th Cir. 1995) (holding that "CERCLA policy dictates a finding of liability where the parent has gone beyond an investment relationship with the subsidiary and has exerted actual control over the subsidiary's activities").

47See United States v. USX Corp., 68 F.3d 811, 822 (3d Cir. 1995).

48See id.

49FMC Corp. v. Department of Commerce, 29 F.3d 833, 834 (3d Cir. 1994) (quoting Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993)).

50Lansford-Coaldale, 4 F.3d at 1221.


52See Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989). One example noted by the Supreme Court is the Resource Conservation and Recovery Act of 1976. Id.

53See id. CERCLA is curative, whereas RCRA is preventative. B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1202 (2d Cir. 1992).

54Union Gas Co., 491 U.S. at 21.
the Act's recovery action for private parties who voluntarily clean up hazardous waste sites.55

Most courts believe that "CERCLA must be construed liberally to effectuate its . . . goals."56 Other courts have been reluctant to expand CERCLA's language beyond its ordinary meaning; these courts impose liability according to the intent expressed by Congress in the words of the statute.57 Under the plain language of the statute, operator liability attaches when a person "actually supervises the activities of [a] facility."58

When determining parent corporation liability under CERCLA, courts must interpret Congress' intent toward common law principles. "Congress enacted CERCLA against the backdrop of this common law pedigree favoring limited liability for parent corporations unless the corporate veil is pierced."59 Therefore, courts look for a statutory basis "to support the conclusion that Congress intended to impose liability on those who control the corporation's day-to-day activities."60

III. ANALYSIS

In United States v. Bestfoods,61 the Supreme Court addressed the debate over the liability of parent corporations under CERCLA.62 The Court held that a parent corporation may incur derivative, as well as direct, liability for acts of a subsidiary's facility that result in environmental harm.63

A. The Factual and Procedural History

In 1989, the United States filed an action under § 107(a)(2) of CERCLA to recover costs incurred from the cleanup of industrial waste released at a site near a chemical manufacturing plant in Muskegon,

55See id. at 21-22.
56B.F. Goodrich Co., 958 F.2d at 1198. See also United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) ("CERCLA is a remedial statute which should be construed liberally to effectuate its goals."); General Elec. Co. v. AAMCO Transmissions Inc., 962 F.2d 281, 285 (2d Cir. 1992) ("It was Congress' intent that CERCLA be construed liberally in order to accomplish [its] goals.").
57See, e.g., Jacksonville Elec. Auth. v. Bernuth Corp., 995 F.2d 1107, 1110 (11th Cir. 1993) (relying on CERCLA's "plain language" to find liability only where a person "play[s] an active role in the actual management of the enterprise").
58Id.
59Brown, supra note 23, at 268.
60United States v. USX Corp., 68 F.3d 811, 822 (3d Cir. 1995).
62Id.
63Id. at 55.
Michigan. The soil and groundwater at the site were significantly polluted due to the intentional and unintentional dumping of hazardous substances.

The federal Environmental Protection Agency (EPA) began a cleanup of the Michigan site by 1981 and estimated remedial costs into the tens of millions of dollars. In 1989, the United States filed an action under CERCLA to recover those costs, naming five defendants as responsible parties: Cordova Chemical Company of Michigan (Cordova/Michigan); Cordova Chemical Company of California (Cordova/California); Aerojet-General Corporation (Aerojet); CPC International, Inc. (CPC); and Dr. Arnold Ott.

From 1957 to 1965, the Ott Chemical Company (Ott I), a Michigan corporation, owned and operated the site. Ott Chemical Company (Ott II), a wholly owned subsidiary of CPC, owned and operated the site from 1965 to 1972. In 1972, Ott II sold the site to Story Chemical Company, who owned and operated the site until it went bankrupt in 1977. Cordova/California, a wholly owned subsidiary of Aerojet, then purchased the Michigan site from a bankruptcy trustee.

1. The District Court

The United States District Court for the Western District of Michigan held that, under CERCLA, a parent corporation may be held liable as an operator both directly and indirectly. The district court adopted the

64Id. at 57-58.
65Bestfoods, 524 U.S. at 56. Before 1957 when chemicals were first manufactured at the site, the quality of the groundwater beneath the site was excellent. CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 555 (W.D. Mich. 1991), aff'd in part, rev'd in part, United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir.), cert. granted sub nom. United States v. CPC Int'l, Inc., 522 U.S. 1024 (1997), and vacated sub nom. United States v. Bestfoods, 524 U.S. 51 (1998). Contamination at the site came from several sources. Id. at 555-56. The primary source was the use of unlined lagoons for chemical waste disposal. Id. at 556. Other sources of contamination included the burial of leaking chemical drums, chemical spills from trains, and overflows of chemical waste at a cement-lined basin. Id.
66Bestfoods, 524 U.S. at 57.
69Id. at 555.
70Id.
71Id.
72Bestfoods, 524 U.S. at 57.
73Id. at 58.
"actual control" standard utilized by other courts to determine direct parent corporation liability under CERCLA.\textsuperscript{74} Under the court's analysis, a parent corporation can be held directly liable as an operator only when the parent actively participates in and exercises control over the subsidiary during the disposal of hazardous waste.\textsuperscript{75} The court found CPC liable as an operator because it "actively participated in and exerted significant control over Ott II's business and decision-making."\textsuperscript{76}

In addition, the court held that a parent corporation can be liable under the statute when the corporate veil is pierced according to state law.\textsuperscript{77} The court, however, also acknowledged the limitations placed on CERCLA liability by traditional corporate law concepts.\textsuperscript{78}

2. The Sixth Circuit

The Sixth Circuit rejected the analysis of the district court\textsuperscript{79} and held that a parent corporation is liable only when the corporate veil is pierced under state law.\textsuperscript{80} The court did not find CPC liable, stating:

While [several] factors reveal a parent that took an active interest in the affairs of its subsidiary, they do 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 a fraud or other culpable conduct required before a court can pierce the veil.\textsuperscript{81}

\textsuperscript{74}CPC Int'l, Inc., 777 F. Supp. at 573.
\textsuperscript{75}Id.
\textsuperscript{76}Id. at 574.
\textsuperscript{77}Id.
\textsuperscript{78}CPC Int'l, Inc., 777 F. Supp. at 574.
\textsuperscript{80}Cordova Chem. Co., 113 F.3d at 580.
\textsuperscript{81}Id. at 581. The factors considered by the district court included, inter alia, participation in and control of the subsidiary's decision making, complete ownership of the subsidiary, and membership on the subsidiary's board of directors. Id. (citing CPC Int'l, Inc., 777 F. Supp. at 575).
B. The Supreme Court

The Supreme Court granted certiorari to resolve the conflict among the circuits over the liability of parent corporations under CERCLA for environmental harms caused by facilities under the control of their subsidiaries.\(^8\) The unanimous Court held:

[A] parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may [not], without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary. . . . But a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility.\(^8\)

1. Derivative Liability

The Court acknowledged the general corporate law principle that a parent corporation is not liable for the acts of its subsidiary\(^8\) and noted that "nothing in CERCLA purports to reject this bedrock principle."\(^8\) The Court stressed that the statute fails to speak to the issue and, as a result, the common law principle must prevail.\(^8\) The Court, however, also acknowledged that a parent corporation may be liable for the actions of its subsidiary when the corporate veil is pierced.\(^7\) Under this analysis, the Court held that only when the corporate veil is pierced can a parent corporation be responsible for the actions of its subsidiary under derivative CERCLA liability.\(^8\)

---

\(^8\)Bestfoods, 524 U.S. at 60.
\(^8\)Id. at 55.
\(^8\)See supra Part II.B.
\(^8\)Bestfoods, 524 U.S. at 62.
\(^8\)Id. at 63. The Court stated: "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" Id. (quoting United States v. Texas, 507 U.S. 529, 534 (1993)) (second alteration in original).
\(^7\)Id. at 62.
\(^8\)Id. at 63-64.
2. Direct Liability

The Supreme Court next analyzed direct parent corporation liability under CERCLA. The Court acknowledged that "nothing in the statute's terms bars a parent corporation from direct liability for its own actions in operating a facility owned by its subsidiary." The Court noted that the rules of limited liability do not apply to direct operator liability under CERCLA.

The Court went on to define actions sufficient to constitute direct parental operation. In its analysis, the Court looked to the "ordinary or natural meaning" of the word "operator." The Court "sharpened" CERCLA's definition, stating that "[a]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

3. "Actual Control" Test

The Supreme Court rejected the district court's application of the "actual control" test of parental operation. Several courts had employed this test to determine whether the parent corporation "actually operated the business of its subsidiary." The Court rejected the test because of "its fusion of direct and indirect liability." The Court emphasized that the analysis of direct liability of a parent corporation as an operator must be

---

89Bestfoods, 524 U.S. at 64-67.
90Id. at 64.
91Id. at 64-65.
92Id. at 66-67.
93Bestfoods, 524 U.S. at 66 (citation omitted). "Here of course we may again rue the uselessness of CERCLA's definition of a facility's 'operator' as 'any person... operating' the facility, which leaves us to do the best we can to give the term its 'ordinary or natural meaning.'" Id. (citations omitted).
94Id. at 66-67.
95Id. at 68.
97Bestfoods, 524 U.S. at 67.
based on the relationship between the parent corporation and the subsidiary's facility: direct liability must be derived from the parent's interaction with, and operation of, the subsidiary's facility, not the subsidiary itself.98

The Supreme Court upheld the court of appeals ruling that "a participation-and-control test looking to the parent's supervision over the subsidiary, especially one that assumes that dual officers always act on behalf of the parent, cannot be used to identify operation of a facility resulting in direct parental liability."99 The Court, however, rejected the Sixth Circuit's narrow interpretation of the word "operator."100 The Court recognized that Congress' use of "the verb 'to operate' . . . meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities."101

4. Examples of Direct Liability

The Court described examples of activities that would be sufficient to find direct liability of a parent corporation as an operator of a polluting facility.102 The first example, identified by the Sixth Circuit, occurs "when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of a joint venture."103 The second example occurs when a "dual officer or director . . . depart[s] so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility."104 Another example provided by the Court, and applicable to the present case, occurs when "an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility."105

The Court pointed out that an agent of CPC, G.R.D. Williams, may have engaged in actions sufficient enough to find direct parental operation.106 G.R.D. Williams was an employee of CPC; "he was not an employee,

98 Id. at 69-70. For example, in the present case, direct liability must be derived from an analysis of the relationship between CPC and the Muskegon facility.
99 Id. at 70-71.
100 Bestfoods, 524 U.S. at 71. The Supreme Court felt that the circuit court "stopped short when it confined its examples of direct parental operation to exclusive or joint ventures." Id.
101 Id. (citation omitted).
102 Id. at 71-72.
104 Bestfoods, 524 U.S. at 71 (citation omitted).
105 Id.
106 Id. at 72.
officer, or director of Ott II and thus, his actions were of necessity taken only on behalf of CPC.107 According to the district court's analysis, Williams "actively participated in and exerted control over a variety of Ott II environmental matters"108 and "issued directives regarding Ott II's responses to regulatory inquiries."109

The Supreme Court remanded the case to the district court to consider direct liability of CPC consistent with the Court's opinion.110 According to the Supreme Court, the district court should reevaluate the role of Williams and of any other officer who may have "operated" the facility.111

IV. EVALUATION

In United States v. Bestfoods, the Supreme Court addressed the confusion among courts regarding parent corporation liability under CERCLA. The Court's holding has many implications for parent corporations, subsidiaries, and the public. In its decision, the Supreme Court closed some doors for parties seeking recovery for costs expended in the clean-up of hazardous waste. Unless Congress amends the statute to specifically address parent corporation liability under CERCLA, the Supreme Court's interpretation in Bestfoods will control parent corporation liability under the Act.

A. Who Is Impacted by the Bestfoods Decision?

1. Parent Corporations

The Supreme Court's holding in United States v. Bestfoods will impact all of society, including parent corporations connected with polluting facilities. Although the Supreme Court's decision may limit liability of parent corporations, it does not free them from all liability under CERCLA. The Court rejected the actual control test utilized by the district court because it fused direct and derivative liability concepts.112 The Court, however, declined to go so far as to preclude parent corporations from any

107Id. (citation omitted).
109Id. at 575.
110Bestfoods, 524 U.S. at 73.
111Id.
112Id. at 67.
CERCLA liability. Even with the rejection of the actual control test, the Court provides examples of situations where direct operator liability would be applicable under CERCLA.\(^{113}\)

The Supreme Court remanded the case to the district court on the issue of CPC's liability as an operator of the polluting facility. The Court noted, "[A]ctivities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability."\(^{114}\) Such an analysis protects the norms of the corporate relationship.\(^{115}\) A parent corporation, however, can still face liability under CERCLA. The Supreme Court determined that CPC may be liable because one of its agents, a CPC employee "with no hat to wear but the parent's hat," was involved with environmental activity at the facility.\(^{116}\)

In its analysis, the Sixth Circuit addressed a concern that unlimited liability would "deter private sector participation in the cleanup of existing sites."\(^{117}\) CERCLA creates other problems for parent corporations. CERCLA is a strict liability statute, which imposes liability based on status rather than on culpability. In addition, CERCLA applies retroactively.\(^{118}\) A parent corporation, therefore, may face liability for past conduct that resulted in contamination.

As the Supreme Court pointed out, the plain language of the statute provides that:

any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. . . . If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability.\(^{119}\)

---

\(^{113}\)See supra text accompanying notes 102-05.

\(^{114}\)Bestfoods, 524 U.S. at 72 (alteration in original) (quoting Lynda J. Oswald, Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control, 72 WASH. U. L.Q. 223, 282 (1994)).

\(^{115}\)Id. at 71.

\(^{116}\)Id. at 71-72.


\(^{118}\)United States v. Olin Corp., 107 F.3d 1506, 1513 (11th Cir. 1997).

\(^{119}\)Bestfoods, 524 U.S. at 65 (citations omitted).
In assessing liability under the Act, courts must remember that the statute was enacted "to ensure 'that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.'"\textsuperscript{120}

As one court pointed out, "a parent's exercise of authority in areas seemingly unrelated to waste disposal may directly affect the subsidiary's handling of its waste disposal problems."\textsuperscript{121} For example, budgetary or cost-cutting demands by a parent corporation may compel a subsidiary to save money in the "high cost area of hazardous waste disposal."\textsuperscript{122} In its rejection of the actual control test, the Supreme Court may have precluded courts from finding liability in such cases.\textsuperscript{123}

2. Subsidiaries

In expressly limiting the liability of parent corporations under CERCLA, the Supreme Court's decision will have a great impact on the liability of subsidiaries under the Act. Before the Supreme Court addressed the issue of parent liability under CERCLA, a number of the district and circuit courts utilized the "actual control" test to determine direct operator liability.\textsuperscript{124} This enabled parties to file actions under CERCLA against parent corporations rather than their subsidiaries.\textsuperscript{125} The Supreme Court's rejection of the actual control test will inevitably result in more claims against subsidiaries. Unfortunately, some subsidiaries will suffer great economic harm because of the increased exposure to liability. The Supreme Court's decision, however, will serve as a deterrent to subsidiaries who may have been able to avoid liability under the actual control test.

As noted above,\textsuperscript{126} the Supreme Court's analysis fails to consider that a parent corporation may inadvertently control a subsidiary's disposal activities. Policies established by the parent corporation may control acts of the subsidiary. A parent corporation may choose to ignore the disposal practices of its subsidiary, even when it has the ability to control them. As

\textsuperscript{120}General Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 285 (2d Cir. 1992) (quoting S. REP. NO. 96-848, at 13 (1980)).


\textsuperscript{122}Id. The court also pointed out that budgetary demands by a parent corporation may constrain a subsidiary's ability to secure an improved waste disposal system. Id.

\textsuperscript{123}Such indirect control of a subsidiary's hazardous waste disposal practices has been cited as support for the actual control test. Id.

\textsuperscript{124}See supra note 42.

\textsuperscript{125}For examples, see cases cited supra note 42.

\textsuperscript{126}See supra notes 121-23 and accompanying text.
a result, subsidiaries may face increased liability for actions taken under the influence of parent corporations.

B. Public Policy Considerations

Although the Supreme Court was correct in rejecting the actual control test, courts should not take this rejection too far. CERCLA is a remedial statute which "must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup."127 Unfortunately, it is also a poorly drafted statute.128 One commentator has even referred to CERCLA as "a mess."129

By limiting parent corporation liability under CERCLA, courts may leave society facing greater environmental harm. One reason parties have sought recourse under CERCLA from parent corporations is that "[i]n 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."130 Liability under CERCLA was "intended to serve as an incentive for the sound treatment and handling of hazardous substances."131 Although the courts are not legislatures, they need to compensate for Congress' sloppy drafting by interpreting statutes in the best interest of the public.

One commentator, John Brown, discussed three policy considerations against direct parent corporation liability under CERCLA.132 First, the responsibility for authorizing parent corporation liability under CERCLA rests with Congress, not with the courts.133 Second, other sources, such as taxpayers and insurance companies, can finance clean-ups without

128Courts and commentators agree that CERCLA is not well written. See Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993). CERCLA is "notorious for its lack of clarity and poor draftsmanship." Id.
129Jay Sandvos, CERCLA Arranger Liability in the Eighth Circuit: United States v. TIC Industries, 24 B.C. ENVTL. AFF. L. REV. 863, 863 (1997). Sandvos also noted that, like the statute itself, decisions under CERCLA have been ambiguous and contradictory. Id. "The quagmire of CERCLA interpretation and enforcement stands as an ironic metaphor for the toxic waste sites CERCLA is meant to address." Id. (footnote omitted).
131FMC Corp. v. Department of Commerce, 29 F.3d 833, 840 (3d Cir. 1994).
132Brown, supra note 3, at 825.
133Id.
abandoning the principle of limited liability. Finally, imposing liability on parent corporations can increase consumer prices and litigation expenses.

In addition, Brown offered three policy considerations in support of direct parent corporation liability under CERCLA. The first consideration is Congress' intent that CERCLA be interpreted broadly. Second, direct parent corporation liability recognizes the separateness of the subsidiary. Finally, parent corporations have more control over the actions of their subsidiaries than taxpayers or insurance companies.

Although Congress, not the courts, is responsible for enacting legislation, its statutes are not always clear. When Congress fails to speak directly to an issue, courts must look to the plain meaning of the statute as well as the legislative history. As the Supreme Court has noted, "[T]he remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." Parent corporations can be held directly liable as operators under CERCLA without disrupting the common law principle of limited liability. Finally, taxpayers should not have to bear the cost of environmental cleanup when the corporations responsible for the release of hazardous waste are available for suit under CERCLA.

C. Legislative Intent

In United States v. Bestfoods, the Supreme Court was careful not to interpret CERCLA either too broadly or too narrowly. The Court rejected the "actual control" standard utilized by a majority of the lower courts but acknowledged that parent corporations can still be liable under CERCLA.

An analysis of the language utilized by Congress in identifying potentially responsible parties indicates an intent that owner and operator liability should be interpreted broadly. Under CERCLA, "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" qualifies as
a responsible party.\textsuperscript{142} In contrast, the language used to describe arranger and transporter liability is much more specific.\textsuperscript{143} For example, in order to be liable under CERCLA as a transporter, a person must accept a hazardous substance for transport to a "site[] selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs."\textsuperscript{1144} In determining Congressional intent, courts must analyze the statute as a whole. In doing so, it is clear that Congress intended the term "operator" to be interpreted broadly enough to include parent corporations.

D. The Role of the Courts

Until Congress speaks specifically to the issue of parent corporation liability under CERCLA, courts must continue to interpret the existing statute. One commentator has suggested courts utilize a "reason to know of" standard when determining direct parent liability under CERCLA.\textsuperscript{145} This standard is consistent with both the policy behind CERCLA and the corporate law principal of limited liability.\textsuperscript{146} Under this standard, a parent corporation would be liable as an operator "only when it has knowledge of, or 'reason to know of' the subsidiary's hazardous waste disposal practices and is actually involved in those disposal practices."\textsuperscript{1147} A parent corporation can still be liable for clean-up costs when it does not participate in the subsidiary's disposal practices if it had reason to know of the practices.\textsuperscript{148}

A standard such as the "reason to know of" standard protects both parent corporations and the goals of CERCLA. It recognizes that, in general, parent corporations are not responsible for the acts of their subsidiaries. This standard also recognizes the need to hold responsible those parties who have contributed to environmental harm. As noted by the courts, "CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act."\textsuperscript{1149}

In cases such as \textit{Bestfoods}, courts must determine whether "actions directed to the facility by an agent of the parent alone are eccentric under

\begin{flushright}
\textsuperscript{143} \textit{Id}. § 9607(a)(3)-(4).
\textsuperscript{144} \textit{Id}. § 9607(a)(4).
\textsuperscript{145} \textit{See} Brown, supra note 3, at 846 (footnote omitted).
\textsuperscript{146} \textit{See id}.
\textsuperscript{147} \textit{Id}. at 847 (footnote omitted).
\textsuperscript{148} \textit{See id}.
\end{flushright}
accepted norms of parental oversight of a subsidiary's facility.' On remand, the district court must determine if CPC is directly liable as an operator under CERCLA. The actions of one of CPC's agents, G.R.D. Williams, may have been sufficient to establish operator liability. Williams, CPC's governmental and environmental affairs director, became heavily involved in environmental issues at the facility. The court must determine whether the actions of Williams, or any other CPC agent, were sufficient to establish operator liability under the standard established by the Supreme Court, which balances the principles of corporate law with the intended purposes of CERCLA.

V. CONCLUSION

In United States v. Bestfoods, the Supreme Court settled some of the conflict among the lower courts over liability of parent corporations under CERCLA. The Court established that parent corporations are not indirectly liable as owners under CERCLA for the acts of a subsidiary unless the corporate veil may be pierced. Nonetheless, the Court recognized that under CERCLA a parent corporation can be directly liable as an operator if it takes action to operate the facility. Although the Court offered examples of situations where direct liability would apply to a parent corporation, the lower courts must realize that the list is illustrative and not exhaustive. CERCLA is a broad remedial statute, enacted "to make those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." Courts must interpret CERCLA so that its goals are advanced. In United States v. Bestfoods, the Supreme Court demonstrated its intention to read CERCLA as broadly as possible without compromising common law principles of corporate law. In determining parent corporation liability under CERCLA, the courts need to balance the broad remedial intent of CERCLA with a sufficient recognition of general principles of corporate law.

Catherine Ann Hilbert

---

150 Id. at 72.
151 Id. at 72-73.
152 Id. at 72.
153 Bestfoods, 524 U.S. at 73.