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I. OVERVIEW

Prior to the United States Supreme Court Decision in United States v. Bestfoods1 on June 8, 1998, there had been a decade of confusion and anxiety over parent corporation liability2 under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).3 The ruling in Bestfoods makes it much more likely that future decisions will be uniform, balanced, and precise with regard to parent corporation liability for its subsidiary’s illegal discharges.4 The resolution of corporate parent

liability under CERCLA is important because there are a large number of hazardous waste disposal sites covered by CERCLA which are owned and operated by poorly capitalized subsidiary corporations that have well capitalized parent corporations. The defining the standard by which a parent may be held liable, due to the parent's good capitalization, will allow the government to replenish the Superfund under which CERCLA operates. Thus, facilitating increased cleanup activities at hazardous sites.

The intent of this note/comment is threefold. First, this note/comment provides an opportune tangent into the intricacies of CERCLA as it applies to the modern industrial polluter and parent corporation liability. Second, a detailed description of the *Bestfoods* case and its history will put a very obscure principle, which is fundamental to the resolution of environmental woes in a clean and understandable context. By looking into the arguments of both sides of the case it will become clear why and how the United States Supreme Court reached its decision and what issues were left unresolved. The preceding history of the case will demonstrate the lack of uniformity between courts in considering the issue of parent corporation liability under CERCLA. In conclusion, this note/comment will enumerate the political, social, environmental, legal, and economic ramifications of the Court's ruling in *Bestfoods*.

II. INTRODUCTION

There is no area of law more fundamental to our human existence than environmental law. However, environmental issues are often overlooked because they threaten the capitalist's primary goals of attaining wealth and economic growth. After three hundred years of exploiting the once fertile United States and several years of depleting its energy still further by dumping synthetic chemicals, there are apples that taste like tennis balls, oranges that taste like cardboard, and pears that taste like sweetened Styrofoam. But alas, where certain evils could be abolished with a "stroke of the pen, chemical pollution [can] not." The United States has hundreds

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7. See id.


10. GORE, supra note 8, at xix.
of hazardous waste disposal sites and an estimated 10,000 sites which will eventually be considered Superfund sites.\textsuperscript{11}

With haste,\textsuperscript{12} Congress passed CERCLA in 1980 after many highly publicized abandoned hazardous waste disposal sites were found throughout the United States.\textsuperscript{13} Many of these sites had already damaged the environment and human health “through the contamination of drinking water supplies” and protein digestion in livestock.\textsuperscript{14} The main objective of CERCLA is to clean up the nation’s hazardous waste sites\textsuperscript{15} by imposing liability broadly on all parties who may have been potentially responsible for the disposal of the waste.\textsuperscript{16} CERCLA allows The Environmental Protection Agency (“EPA”) to bring actions to recover damages for past and future cleanup costs.\textsuperscript{17} These cleanup costs can run into “the tens of millions of dollars for each site.”\textsuperscript{18}

CERCLA is essentially a strict liability statute requiring only: a release of hazardous substances, at a facility, which causes injuries to the plaintiff\textsuperscript{19} and a defendant who is a responsible party as defined by the Act.\textsuperscript{20} There is no need for culpability to be held liable under CERCLA.\textsuperscript{21} However, the statute is “not [a] model of legislative draftsmanship,”\textsuperscript{22} as it provides no direct means of imposing parent corporation liability for the illegal acts of their subsidiaries.\textsuperscript{23} Nevertheless, nothing in CERCLA precludes parent liability either.\textsuperscript{24} Allowing parent corporations\textsuperscript{25} “to escape CERCLA liability undermines the [entire] purpose of the Act”\textsuperscript{26} because the parent

\begin{itemize}
\item \textsuperscript{11} Aronovsky, \textit{supra} note 6, at 421–24.
\item \textsuperscript{12} \textit{Harvard Liability}, \textit{supra} note 5, at 987.
\item \textsuperscript{13} Aronovsky, \textit{supra} note 6, at 425.
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.} at 422.
\item \textsuperscript{16} \textit{Harvard Liability}, \textit{supra} note 5, at 986.
\item \textsuperscript{18} Joel Glass, \textit{Test Shows when Firms Must Pay Price}, \textit{LLOYD’S LIST INT’L}, June 17, 1998, at 9.
\item \textsuperscript{19} The plaintiff may be a normal citizen or a state or federal appointed enforcement bureau. 42 U.S.C. § 9659 (1994).
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{22} Brief for Respondent Bestfoods at 2, United States v. Bestfoods, 118 S. Ct. 1876 (1998) (No. 97-454).
\item \textsuperscript{23} Aronovsky, \textit{supra} note 6, at 422.
\item \textsuperscript{24} \textit{Id.} at 437.
\item \textsuperscript{25} Parent corporations are so called because of their control through ownership of the corporate stock of their subsidiary. United States v. Bestfoods, 118 S. Ct. 1876, 1884 (1998).
\item \textsuperscript{26} \textit{Harvard Liability}, \textit{supra} note 5, at 987.
\end{itemize}
corporations usually have the deeper pockets and can more adequately reimburse the aggrieved party under the Act. The difficulty in identifying the responsible parties under the Act has been enunciated in the varying decisions across the United States regarding parent liability under CERCLA.

Since CERCLA’s enactment, many courts have built an increasingly “confused web” of statutory interpretation regarding parent liability. Before the Bestfoods ruling, the First, Second, Third, Sixth, and Eleventh Circuit Courts of Appeals all differed on what standard to apply in order to find parent corporation liability. Indeed, the case law relied upon in Bestfoods reflects the widely divergent view that courts take in regard to parent corporation liability; some require a piercing of the corporate veil, while others require only a small degree of control by the parent over the subsidiary. In addition, there is widespread conflict between jurisdictions whether to apply state corporate law or to develop a federal corporation law

27. See id.
28. Aronovsky, supra note 6, at 425.
29. Bestfoods, 118 S. Ct. at 1884 n.8 (1998) (citing an exhaustive number of cases which illustrate the divergent views that different circuits hold in relation to parent corporation liability under CERCLA).
framework for use in interpreting CERCLA liability.\textsuperscript{33} While the \textit{Bestfoods} decision resolved many of these conflicts, other conflicts still persist.\textsuperscript{34}

The \textit{Bestfoods} case has been closely monitored by environmental, maritime, insurance, legal, and aviation groups.\textsuperscript{35} In \textit{Bestfoods}, Justice Souter held that a parent corporation could be held liable for the illegal discharges made by its subsidiary in either of two ways.\textsuperscript{36} First, a parent can be held liable under CERCLA for acts of its subsidiary through direct operator status.\textsuperscript{37} Thus, if the parent controls the subsidiary's polluting facility, it will be held liable, but a parent is not liable when it controls only the operations of the subsidiary's business.\textsuperscript{38} The parent is essentially liable for its own acts as operator of a subsidiary owned facility.\textsuperscript{39} The second way in which a parent can be held liable is indirect or derivative liability.\textsuperscript{40} Indirect liability occurs through a process called piercing the corporate veil. If and only if the corporate veil can be pierced may a parent be charged with derivative or indirect liability under CERCLA.\textsuperscript{41} The \textit{Bestfoods} decision also addresses specific factors that can be applied in evidencing either a piercing of the corporate veil or direct operator liability.\textsuperscript{42} It is critical to understand that there is a significant difference between liability through the corporate veil and liability through direct operator status under CERCLA.\textsuperscript{43} This definitive ruling settled a long standing area of confusion and may lead to uniformity in court decisions, but there may be derogatory consequences in light of the rules promulgated in \textit{Bestfoods}.\textsuperscript{44}

\begin{itemize}
  \item \textsuperscript{34} See Kass, \textit{supra} note 2, at 3.
  \item \textsuperscript{35} Glass, \textit{supra} note 18, at 9.
  \item \textsuperscript{36} United States \textit{v. Bestfoods}, 118 S. Ct. 1876, 1886–87 n.12 (1998).
  \item \textsuperscript{37} \textit{Id.} at 1881.
  \item \textsuperscript{38} \textit{Id.} at 1886.
  \item \textsuperscript{39} \textit{See id.}
  \item \textsuperscript{40} \textit{Id.} at 1885–86.
  \item \textsuperscript{41} \textit{Bestfoods}, 118 S. Ct. at 1885–86.
  \item \textsuperscript{42} \textit{Id.} at 1888.
  \item \textsuperscript{43} Sidney S. Arst Co. \textit{v. Pipefitters Welfare Educ. Fund}, 25 F.3d 417, 420 (7th Cir. 1994).
  \item \textsuperscript{44} \textit{Bestfoods}, 118 S. Ct. at 1876.
\end{itemize}
III. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

The Comprehensive Environmental Response, Compensation, and Liability Act is not as comprehensive as its title suggests. While CERCLA covers not less than ninety-four pages in the United States Code, including definitions, response authorities, liability, presidential delegation of powers, and pollution insurance, it does not address something as fundamental to the remediation of hazardous waste sites as parent corporation liability. Neither, the legislative history nor the text of the statute provides indications that Congress intended or did not intend parent corporation liability for the acts of subsidiaries. In general, the legislative history for CERCLA is relatively sparse, and its provisions are vague. Nevertheless, the statute and its legislative history are complete enough to allow courts to employ an effective statutory construction scheme starting with the language in the statute itself. The language in CERCLA is lengthy and complex. Therefore, a brief discussion of the statute is warranted in order to put Bestfoods and other parent corporation liability cases into the proper perspective.

The main objective of CERCLA is to take decisive action to cleanup or otherwise make benign the nation's leaking waste sites. It is remedial legislation that protects the environment and public health by imposing retroactive liability. The statute was designed to be comprehensive and gives the President broad power to mandate that private parties and government agencies alike remediate hazardous waste sites. The President automatically delegated most of his authority to the EPA in 1981.

CERCLA not only imposes costs on those who are actually responsible for contamination, damage, injury from chemical poisons, and environmental harm, but it is also designed to encourage voluntary cleanup by private

46. See Amicus Brief of United States Business and Industrial Council in Support of Respondents at 18, Bestfoods (No. 97-454).
50. Aronovsky, supra note 6, at 422.
54. Bestfoods, 118 S. Ct. at 1882.
Congress' intent was to limit the defenses that might exist under state law with regard to the environment and to abrogate indemnity agreements which hinder holding responsible parties liable. CERCLA's final goal is to prevent the actual discharge of waste in the first place by implementing a "national hazardous substance response plan," and putting potentially liable parties on notice of impending CERCLA claims if no remedial action is taken at the site.

CERCLA created a "Superfund" into which monies are deposited to help cleanup the sites that pose the most environmental danger. The EPA's job is to recover past and future costs associated with the cleanup plan for each site in order to replenish the Superfund. Each site typically requires tens of millions of dollars to implement a long-term cleanup plan. The key to CERCLA is to pay for environmental cleanup at the expense of private responsible parties instead of taxpayers. The CERCLA Superfund receives a stipend from the government each year in excess of eight billion dollars, which is mainly derivative from taxes on the oil and gas industry. However, the estimated cost of cleaning up the possible 10,000 national Superfund sites is three hundred billion dollars. For this cost related reason, only a very small number of sites are acutally being detoxified, and less than eleven percent of those sites are being funded by private responsible parties. The remaining ninety percent of the cost is "being shouldered" by the government, i.e. the taxpayers.

Courts have required several elements to establish liability under CERCLA. The site, which is the subject of the action, must be considered a facility. There must have been a release or threatened release of hazardous

57. Id. § 9607(c).
58. Id. §§ 9605(a), (c).
59. Id. § 9611.
61. See Glass, supra note 18, at 9.
62. Aronovsky, supra note 6, at 422-23.
63. See id. at 425.
65. Aronovsky, supra note 6, at 424.
66. See id.
67. Id. at 425.
materials which occurred at the facility.69 Such release must have caused the plaintiff to incur costs to respond to the release.70 Additionally, the defendant must be a responsible party as defined by CERCLA.71

The terms "release" and "facility" have been broadly interpreted by courts so that they never pose a significant obstacle to the imposition of liability.72 Under CERCLA, a facility is defined as:

Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft or [ ] any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.73

This broad definition has led to little or no leeway in arguing that one's site is not a facility. Courts have clarified that a facility is only the immediate area where the hazardous waste has "come to be located" and not the entire property on which the waste is located.74 Likewise, disposal occurs not only through active human conduct, but also refers to passive movements of hazardous waste through soil, metal, bodies of water, or other means.75 The critical determination in CERCLA liability lies in identifying the responsible party as defined by the act.

The idea of holding responsible parties liable does not impute a necessity of culpability.76 CERCLA casts a wide net to help pay the costs of cleaning up the environment.77 The act is "sweeping" in that every party that may be potentially involved in the disposal of hazardous materials should be forced to contribute to cleanup efforts at the site in question.78 Even some of

69. See id.
70. Id.
72. Aronovsky, supra note 6, at 429.
75. See, e.g., id. at 845.
76. Id. at 846.
77. Amicus Brief of United States Business and Industrial Council in Support of Respondents at 21, Bestfoods (No. 97-454).
the several states have been held liable under the statute for their actions in releasing already deposited waste during public works projects.\textsuperscript{79}

CERCLA lists the persons who may be held liable for the cleanup costs associated with a polluted site.\textsuperscript{80} Those persons include any prior owner or operator of the facility whose involvement coincided with the release of the hazardous substance, any present owner or operator of the facility, any person who arranged for the disposal or transport of the hazardous substance from the facility, and any person who, by contract or otherwise, actually transported or disposed of the materials.\textsuperscript{81} The liability for these owners, operators, arrangers, and transporters arises from their definite and real relationship with the facility where the dangerous materials were released into the ecosystem.\textsuperscript{82} A person is defined to include corporations.\textsuperscript{83} To operate a facility means to direct the workings of or to manage the facility.\textsuperscript{84}

It is readily apparent that CERCLA was created to hold liable any entity that was remotely connected with the illegal discharge of hazardous waste into the environment. By holding past and present owners, operators, transporters, and arrangers jointly and severally liable for toxic discharges, CERCLA attempts to maintain a safety net of cleanup funds.\textsuperscript{85}

The comprehensiveness of the responsible party section under CERCLA is important to understand. Even an entity that owns a non-operational facility is liable under CERCLA if toxic discharges were made before the facility went offline.\textsuperscript{86} A tenant who exercises control and authority over a facility can be held liable as well as the owner of the facility that the tenant rents.\textsuperscript{87} It follows then that no parties who were affiliated with the polluting facility in some way can escape liability after a release of hazardous substances is facilitated.

This assessment, however, is incorrect because there is an entire body of corporate America that can escape liability based on their status as a

\begin{itemize}
  \item \textsuperscript{79} See, e.g., Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989).
  \item \textsuperscript{80} 42 U.S.C. § 9607(a) (1994).
  \item \textsuperscript{81} Id. § 9607(a)(1)-(3).
  \item \textsuperscript{82} Amicus Brief of United States Business and Industrial Council in Support of Respondents at 4, \textit{Bestfoods} (No. 97-454).
  \item \textsuperscript{83} 42 U.S.C. § 9601 (21) (1994).
  \item \textsuperscript{84} Petitioner’s Brief at 20, \textit{Bestfoods} (No. 97-454) (internal quotations omitted) (quoting \textsc{Oxford English Dictionary} (2d ed. 1989)).
  \item \textsuperscript{85} CPC Int'l, Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549, 554 (W.D. Mich. 1991) (holding CERCLA a joint and several liability statute unless defendant proves that the harm is divisible).
  \item \textsuperscript{86} See Petitioner’s Reply Brief at 8, United States v. Bestfoods, 118 S. Ct. 1876 (1998) (No. 97-454).
  \item \textsuperscript{87} See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992).
\end{itemize}
CERCLA does not impose direct liability on parent corporations for illegal discharges made by their subsidiaries. Likewise, an officer of a corporation that is liable under CERCLA is usually immune from the statute except where that officer plays a role in the polluting activities of the corporation. It is up to the courts to interpret CERCLA to determine under what conditions a parent will be held liable based on CERCLA, federal, and state laws.

CERCLA’s inherent limitations often confine its ability to remedially enforce its provisions and obtain funds from potentially liable sources. The Act does not require that federal law be used in interpreting its provisions. This leads to enforcement difficulties when trying to hold a parent liable for the acts of its subsidiary because corporation law is derived from state power and state common law. The law presumes that long established and familiar principles of state law will govern unless a federal statute provides otherwise. CERCLA, therefore, does not cast the widest net available to remedy environmental woes because the traditional corporate form protects parent companies. The phrase “corporations will be held liable” does not suggest that the same corporation’s shareholders will be held liable. Therefore, when CERCLA’s text states that a “corporation” may be held liable, it does not require that the parent corporation, the corporation’s principal shareholder, will be held liable. It may be reasonably concluded, then, that CERCLA’s direct text does not tamper with traditional state notions of limited liability for corporations. This may explain why CERCLA has been “subjected to a myriad of legal attacks since its enactment [,]” regarding when and to what extent parent corporations may be held liable for violations of its provisions.

CERCLA provides one limited defense to those parties who are innocent purchasers of contaminated property. The defense provides that

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89. Id.
91. See Amicus Brief of the Washington Legal Foundation in Support of Respondents at 4, Bestfoods (No. 97-454).
93. Id. at 534.
95. Respondent’s Brief at 20, Bestfoods (No. 97-454).
98. See Aronovsky, supra note 6, at 427.
there will be no liability for an otherwise liable party if "an act or omission of a third party other than an employee or agent of the defendant" resulted in an illegal release, which was caused solely by that third party, and the otherwise liable party "exercised due care with respect to the hazardous substances concerned" and "took precautions against foreseeable acts or omissions" by the third party.100 However, if the act or omission on the part of the third party was in relation to a contractual relationship regarding the hazardous substance of which the owner was a party, the defense will not work.101 A release caused by an act of war or God will also remove liability from any owner.102

In addition, a claim by a previous owner that he or she sold the hazardous material, and its liability with it, will not succeed103 because CERCLA imposes strict liability on all previous owners.104 This is true regardless of the duration of the ownership of the facility.105 These defenses are the extent of affirmative defenses available to defeat CERCLA liability. The only other defense available is to disprove the liability on the merits and the elements.

The courts, in enforcing and interpreting CERCLA, have proven to be a powerful ally to the statute. The courts generally construe CERCLA broadly, paying particular attention to its remedial purpose, and make rulings that flow from policy considerations rather than abstract legal principles.106 Courts recognize that Congress gave the statute wide latitude to shift the costs of cleanup actions under the CERCLA from public entities to private responsible parties.107 Therefore, the courts usually follow the route to a cleaner environment proscribed in CERCLA and defer to its remedial purpose.108

The nation's courts have prescribed rights that defendants have under the statute. It is well settled that private responsible parties may make binding and enforceable agreements to apportion the cleanup costs under CERCLA between joint defendants.109 Parties held liable, or parties that settle the case with the EPA, may seek contribution from any and all other

100. Id. § 9607(b)(3).
101. Id.
102. Id. § 9607(b)(1)-(2).
104. Id. at 841.
105. See id. at 844.
107. Aronovsky, supra note 6, at 426.
108. Id. at 429.
responsible parties under the act.\textsuperscript{110} Being accused of a CERCLA violation does not crush an entity’s options; it simply forces someone involved, and possibly everybody involved, to cleanup his or her own mess.

CERCLA, in one overly complex statement, provides that the United States can no longer tolerate short-term economic gain at the expense of long-term environmental health.\textsuperscript{111} The true costs of producing environmentally harmful chemicals must fall upon those who profit from their production. The preceding discussion of the CERCLA statute will assist in a proper understanding of the information in the proceeding sections. An entire body of law has arisen out of the complexities contained in CERCLA. This body of law incorporates everything from simple civil procedure issues to complex issues of state versus federal law.

IV. THE LIABILITY THEORIES PRECEDING BESTFOODS

Because CERCLA does not speak directly to the issue of parent corporation liability for the acts of subsidiaries, the courts were left to struggle with the concept in order to find a resolution that preserved the corporate form but allowed liability where it was deserved. The courts always start with the language included in the statute when interpreting a legislative enactment.\textsuperscript{112} Then, the courts must determine the meaning of a term or section in the statute by considering first its bare definition, and then its placement and purpose in the overall statutory scheme.\textsuperscript{113} CERCLA’s overall statutory scheme is to take decisive action to clean up or otherwise make benign the nation’s leaking waste sites.\textsuperscript{114} Therefore, the meaning of “persons”\textsuperscript{115} in CERCLA must have been meant to include parent corporations if they had something to do with the waste produced. “The meaning of statutory language, plain or not, [always] depends on context.”\textsuperscript{116} The silence of Congress on this parent corporation liability issue has sparked widespread and nonuniform interpretation of CERCLA in the nation’s courts.\textsuperscript{117}


\textsuperscript{111} See Gore, supra note 8, at xxi.


\textsuperscript{113} Id. at 145.

\textsuperscript{114} Aronovsky, supra note 6, at 422.


\textsuperscript{116} Bailey, 516 U.S. at 145.

\textsuperscript{117} See supra note 33.
CERCLA provides no direct means of attaching a parent corporation for its subsidiary’s acts in violation of the Act’s provisions. However, it is well known that CERCLA’s general thrust is to extend liability to all parties involved in bringing about dangerous environmental conditions. This thrust is in direct conflict with the tenet that a corporation and its stockholders must be treated as separate entities in the eyes of the law. It is entirely acceptable that a corporation is used specifically as an insulator from liability on statutory assessments. Limited liability is a hallmark of corporation law. However, the desirable and socially beneficial protection of limited liability must be surrendered “when the sacrifice is essential to the end that some accepted public policy may be defended or upheld.”

Although never directly stated, the courts of the United States must consider the cleanliness of the environment to be an accepted public policy because they have found several ways to limit limited liability in the CERCLA context. The nation’s courts have for the most part applied two different standards in determining whether a parent corporation can be held liable for illegal discharges made by its subsidiary. The first standard involves looking to the amount of control that the parent corporation exercises over the subsidiary; if the requisite amount of control exists, then the parent may be held liable. The second standard involves looking closely at the relationship between the parent and the subsidiary to see if piercing the corporate veil is warranted. There are two main theories behind piercing the corporate veil: alter ego theory and mere instrumentality theory. However, the two theories are identical in substance and only differ in form.

It is essential to remember that the theory of direct liability through control and the theory of derivative liability through piercing the corporate veil are separate, unique, and noninterchangeable, but they are equally as

118. Aronovsky, supra note 6, at 422.
123. See supra note 33.
125. See, e.g., United States v. Jon-T Chem., Inc., 768 F.2d 686, 691 (5th Cir. 1985); Aronovsky, supra note 6, at 423.
126. See Aronovsky, supra note 6, at 432.
127. See id. at 430–31.
effective in finding liability over parent corporations.\textsuperscript{128} A conflict arose over veil-piercing regarding whether to apply state corporate veil-piercing laws or to use federal standards in the context of CERCLA. "Ultimately, the question facing the courts is whether to adhere to the traditional common law rule strictly limiting [parent] liability, or instead to look beyond the formalities of separate corporate existence and impose direct CERCLA liability on parent corporations and individual shareholders."\textsuperscript{129}

Up until \textit{Bestfoods}, the lower courts around the United States differed on whether to apply state or federal veil-piercing standards. The general consensus was that federal law governs the question of CERCLA liability, but state law is not irrelevant because "corporations are creatures of state law."\textsuperscript{130} Some statutes allow courts to fashion a new body of federal law to usurp state law, but corporate law is not such a body of law.\textsuperscript{131} Nevertheless, if the state law allows an action that is prohibited by the federal law or the application of state law is inconsistent with federal policy, then federal law must displace the state law.\textsuperscript{132} In addition, the Fifth Circuit has ruled that federal law governs whenever a case involves the rights of the United States under a nationwide federal program.\textsuperscript{133} Under these rules, it would seem that environmental protection is consistent with national policy and that a clean environment is a right of the United States as defined by CERCLA.

Notwithstanding the previous discussion, many courts hold that federal law may never intrude into veil-piercing under CERCLA. In order to abrogate state law, a federal statute must directly apply to the question addressed by the state common law.\textsuperscript{134} Nothing in the legislative history of CERCLA indicates that Congress intended to alter the basic tenets of state corporation common law,\textsuperscript{135} nor does the text of the statute itself indicate that federal corporate law should be presumed.\textsuperscript{136} It is agreed, however, that no state may empower its corporations to disregard federal laws or policies.\textsuperscript{137} Regardless of whether state or federal law is used to determine whether piercing the corporate veil is warranted, piercing the veil is the only

\footnotesize{\textsuperscript{128} See Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994).}
\footnotesize{\textsuperscript{129} Aronovsky, supra note 6, at 435–36.}
\footnotesize{\textsuperscript{131} Id.}
\footnotesize{\textsuperscript{132} See, e.g., id. at 479.}
\footnotesize{\textsuperscript{133} United States v. Jon-T Chem., Inc., 768 F.2d 686, 690 n.6 (5th Cir. 1985).}
\footnotesize{\textsuperscript{134} E.g., United States v. Texas, 507 U.S. 529, 534 (1993).}
\footnotesize{\textsuperscript{135} Joslyn Mfg. Co. v. T.L. James Co., 893 F.2d 80, 82 (5th Cir. 1990).}
\footnotesize{\textsuperscript{137} E.g., Anderson v. Abbott, 321 U.S. 349, 365 (1944).}
indirect way in which a parent corporation can be held liable for illegal toxic releases made by its subsidiary under CERCLA.

"Piercing the corporate veil is the most litigated issue in corporate law, yet it remains among the least understood."138 Veil-piercing derives from the abuse of the corporate form's single most valuable asset of limited liability.139 "It is legitimate for [people] to stake only a part of their fortune on an enterprise."140 When a corporation abuses the protection provided by the corporate form as a vehicle to achieve an unjust result, courts would remove limited liability. This removal is known as piercing the corporate veil.141 All that veil-piercing consists of is enforcing a judgement against a shareholder of a corporation for the acts of that corporation.142 The two types of veil-piercing used are alter ego and mere instrumentality theories.143 Both theories involve proving that the two entities were so intermingled that they ceased to exist as separate entities.144 However, some jurisdictions require fraud in order to pierce the corporate veil.145

When a parent company completely dominates and controls the subsidiary or operates the subsidiary as a business conduit of the parent company, the subsidiary is considered an alter ego of the parent. If the subsidiary is an alter ego, then a court may pierce the corporate veil and hold the parent liable for the acts of the subsidiary.146 If the corporation is established to perpetrate a fraud or to commit an illegal act, or if the parent drains the subsidiary's assets, limited liability will not apply, and the veil will be pierced.147 The existence of interlocking directorates is not enough to pierce a corporate veil where there is no evidence of fraud or wrongdoing on the part of the parent.148 Neither one hundred percent ownership of the subsidiary by the parent nor the parent having the same officers as the


139. Id. Liability after a corporate investment usually will not exceed the amount invested.

140. Id. (internal quotes omitted) (quoting Douglas and Shanks, Insulation from Liability Through Subsidiary Corporations, 39 YALE L.J. 193, 193–94 (1929)).

141. Id.

142. See id. at 666.

143. Cane, supra note 138, at 667.

144. Id.

145. Id.


147. Id.

148. American Protein Corp. v. AB Volvo, 844 F.2d 56, 60 (2d Cir. 1988).
subsidiary is, by itself, sufficient to pierce the veil under the alter ego theory.\textsuperscript{149}

In alter ego, the parent actually controls the subsidiary without regard to its being a distinct entity, so the two are but one entity. The acts of one are therefore the acts of all, and the veil may be pierced.\textsuperscript{150} The following factors indicate that a subsidiary is the alter ego of a parent: 1) commonality of stock ownership; 2) commonality of directors and owners; 3) commonality of business departments; 4) consolidated financial statements and tax returns; 5) the parent finances the subsidiary; 6) the parent created or caused the incorporation of the subsidiary; 7) the subsidiary operates on an extremely inadequate amount of capital; 8) the parent pays the salaries and expenses of the subsidiary; 9) the subsidiary receives business based solely upon grant of the parent; 10) the parent uses the subsidiary's property as if it were its own; 11) the daily operations of the two entities are not kept separate; and 12) the subsidiary does not practice the usual corporate formalities.\textsuperscript{151}

The mere instrumentality theory requires control just like the alter ego theory. However, the exact wording of the theory deviates from the alter ego theory. The control must be present to such an extent that the subservient company has no distinct corporate interests of its own and operates only to achieve the purposes of the parent corporation.\textsuperscript{152} A domination of finances, policies, and practices that control the corporation must occur so that the subsidiary has "no separate mind, will [,] or existence."\textsuperscript{153} The difference between alter ego and mere instrumentality is that with mere instrumentality, there are no factors; there are simply three concrete elements: 1) control by the parent company; 2) the control exercised by the parent was used to perpetrate a fraud or worse; and 3) the control caused the specific injury complained of in that case.\textsuperscript{154} The courts acknowledge that although a parent is an entity unique from its subsidiary, sometimes the corporate fiction must be overlooked to inhibit fraud. In such a case, the subsidiary must be treated as an instrumentality of the parent.\textsuperscript{155}

The Fifth Circuit believes no direct liability for parent corporations exists under CERCLA unless the corporate veil can be pierced.\textsuperscript{156} This circuit also limits veil-piercing to situations where the corporate form is used

\begin{itemize}
\item \textsuperscript{149} Jon-T Chem., 768 F.2d at 691.
\item \textsuperscript{150} Fisser v. International Bank, 282 F.2d 231, 234 (2d Cir. 1960).
\item \textsuperscript{151} Jon-T Chem., 768 F.2d at 691–92.
\item \textsuperscript{152} Id. at 691.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Fisser, 282 F.2d at 238.
\item \textsuperscript{155} Buechner v. Farbenfabriken Bayer Aktiengesellschaft, 154 A.2d 684, 687 (Del. 1959).
\item \textsuperscript{156} Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990).
\end{itemize}
as a sham, to perpetrate fraud, or solely to avoid personal liability. The Eastern District of Louisiana agrees that a parent may be held liable under CERCLA only if the veil can be pierced. The only problem with this theory is that the conditions under which the veil may be pierced are different in each state. In California, for example, one may pierce the veil when the unity between the parent and the subsidiary causes their separate personalities to no longer exist and adherence to the corporate form would promote injustice. California's reasoning differs from many states' veil-piercing laws and illustrates the need for uniformity in federal CERCLA actions.

To complicate the matter even further, some courts apply the federal veil-piercing standard when deciding parent corporation liability under CERCLA. A district court in Massachusetts applied federal veil-piercing standards in reviewing CERCLA claims against parent companies. The court's reasoning was that policies underlying CERCLA directed a federal veil-piercing review. The Third Circuit also felt it was necessary to use federal veil-piercing standards in order to achieve uniformity in the application of CERCLA. Remember, piercing the corporate veil is not the only way in which a parent can be held liable for the acts of its subsidiaries; there is also a control test by which a parent could be held liable as an operator under CERCLA.

Many courts allow for both the actual control standard to be used in finding direct CERCLA liability, and veil-piercing to be used to find indirect liability for parent companies. The test under the actual control standard is whether or not the parent substantially and actively participates in the day-to-day activities of the subsidiary company. The type of control necessary can also be expressed as control which evinces the parent's "exclusive domination...to the point that the subsidiary no longer has legal or

157. Id.
159. Aronovsky, supra note 6, at 431.
161. Id. at 31.
162. Id. at 32.
independent significance of its own.”\textsuperscript{166} Direct liability under operator status is conferred when the parent has such extreme control over the subsidiary’s activity that it becomes an operator subject to direct liability.\textsuperscript{167}

There must be more than mere ownership and the control that is incidental to ownership to find parent liability under CERCLA.\textsuperscript{168} Owning stock is not enough;\textsuperscript{169} there must be actual participation in the conduct that led to the release causing CERCLA liability.\textsuperscript{170} The normal amount of oversight that any prudent investor would give to an investment is not construed as worthy of direct liability, although it does represent a certain degree of control.\textsuperscript{171} Some courts narrow the control test to require that the parent be actively involved in the day-to-day operations of the actual facility that is the subject of the CERCLA action.\textsuperscript{172} The actual control test does not appear to differ wholeheartedly from veil-piercing standards, but the distinction will become important in the context of the \textit{Bestfoods} case.

One last important issue that often presented itself in the cases before \textit{Bestfoods} was corporate officer liability. An officer of a corporation charged with CERCLA violations is not liable unless that officer spent a lot of time at the actual facility where the release was made, had the opportunity to participate in the illegal release, and directed such release.\textsuperscript{173}

It is important to understand that this was the mindset of the courts as the \textit{Bestfoods} case came to the docket. There were two forms of liability for parent corporations under CERCLA: a parent could be directly liable as an operator of the polluting subsidiary, or a parent could be indirectly liable as an owner of the polluting subsidiary through veil-piercing.

\begin{footnotes}
\textsuperscript{167} See United States v. Kayser-Roth Corp., 910 F.2d 24, 28 (1st Cir. 1990).
\textsuperscript{168} Id. at 27; See generally Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265, 267 (2d Cir. 1929).
\textsuperscript{170} E.g., Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993).
\textsuperscript{171} E.g., Aluminum Co. of Am. v. Beazer E., Inc., 124 F.3d 551, 563 (3d Cir. 1997).
\textsuperscript{172} E.g., Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1220 (3d Cir. 1993).
\end{footnotes}
V. HISTORY OF UNITED STATES V. BESTFOODS

A. Facts of the Case

The contaminated site ("The Site") which is the subject of the Bestfoods case is located near Muskegon, Michigan. It is a rural setting in western Michigan. There is a southeasterly flow of groundwater beneath The Site toward and The Unnamed Tributary and Little Bear Creek. From 1959 until 1986, the Site was used by many chemical companies to produce pharmaceutical, veterinary, and agricultural synthetic, organic, and intermediate chemicals.\(^{174}\)

Ott Chemical Company ("Ott I") owned and operated The Site from 1957 until 1965. Then, in 1965, a different Ott Chemical Company ("Ott II") bought The Site. Ott II was a wholly-owned subsidiary of CPC International ("CPC").\(^{175}\) CPC placed some of its own employees on the board of Ott II.\(^{176}\) Ott II tendered The Site to Story Chemical Company ("STCC") in 1972. STCC was then declared bankrupt in 1977.\(^{177}\)

Shortly thereafter, the Michigan Department of Natural Resources ("DNR") attempted to find new buyers for The Site to assist in its cleanup. They simultaneously investigated the extent of the environmental degradation and remedies available at The Site. DNR entered into negotiations with Aerojet-General Corporation ("Aerojet") and its subsidiary, Cordova Chemical Company ("Cordova"), which resulted in Cordova Chemical Company of California ("Cordova Cal."), Aerojet's wholly-owned subsidiary, purchased The Site from the STCC bankruptcy trustee. In 1978, Cordova Chemical Company of Michigan ("Cordova Mich.") bought the site from Cordova Cal. and owns it to this day. Operations, however, ceased at The Site in 1986.\(^{178}\)

When tested in 1957, the groundwater beneath The Site was in a pure and potable condition. After the groundwater was again tested in 1964, seven years since chemical production had started, the groundwater showed contamination. This contamination was a result of pumping water into The Site for use in production and then pumping the water out of The Site.\(^{179}\)

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\(^{175}\) CPC changed its name to Bestfoods shortly after litigation began.

\(^{176}\) Respondent's Brief at 5, Bestfoods (No. 97-454).

\(^{177}\) CPC Int'l, 777 F. Supp. at 555.

\(^{178}\) Id.

\(^{179}\) Id.
Because of waste disposal at The Site, surface water, groundwater, and soil were contaminated with a large volume of toxic substances.\footnote{\textit{Id.} at 555-56.}

During the periods when Ott I and Ott II owned The Site, chemical wastewater was dumped into unlined, engineered lagoons on the northwestern edge of The Site. Many contaminants then seeped into the ground and local waters from the lagoons. No waste, however, was dumped into the lagoons when STCC or Cordova owned The Site.\footnote{\textit{Id.} at 556.}

Ott I and II also buried hundreds of chemical-filled drums in a sandy pit on The Site. These drums eventually ruptured causing further soil contamination and water contamination through leachate. In addition, all of the owners through the present allowed major chemical overflows and spills, which they failed to clean up; instead, the materials were buried. In one such case, a train car full of hazardous chemicals spilled onto The Site's railroad tracks.\footnote{\textit{CPC Int'l}, 777 F. Supp. at 556.}

The contamination eventually reached the water supply of the surrounding community. By 1981, the groundwater that was extracted looked like brown root beer and contained foam. The air had a foul stench from chemicals that permeated everything. The soil and grounds of The Site were purple from the toxins released. In addition, there were many containers randomly thrown about that were exploding, leaking, corroding, and crushed. Free roaming traces of phenol, methylene, benzene, methyl isocyanate, and chloride were on The Site.\footnote{Kass, \textit{supra} note 2, at 3.}

Regardless of how the contaminants entered the ground, they eventually reached, through soil movement and leaching, The Unnamed Tributary and Little Bear Creek. Ott I and Ott II attempted to use purge wells\footnote{\textit{CPC Int'l}, 777 F. Supp. at 556. Purge wells are deep and wide wells that penetrate the earth far below the water table. When in operation, they pump water from the groundwater beneath a contaminated site and create a cone of depression whereby water will not flow past the site, but up into the well. Therefore, any contaminants will not pass beyond the site in question.} to slow down the proliferation of hazardous materials. STCC and Cordova, however, did not make use of these purge wells, thus allowing an unchecked spread of contamination from the Site.\footnote{\textit{Id.}}

Cordova Mich. and Cordova Cal. did not dump or bury waste. The two companies repaired the sewage system and equalization tanks, which were required for the sewage system to function properly, and all chemical waste was pumped offsite to a county treatment facility. Nevertheless, benzene
and one half dichloroethane, used exclusively on this site by the Cordova companies, was found in large quantities in the soil and groundwater.186

In 1981, federal action began when the EPA investigated The Site. By 1982, the EPA placed The Site on the national priority list and ranked The Site the 137th most in need of federal remedial action. As of 1991, the EPA had a three-phased plan to repair the groundwater, surface water, and soil in and surrounding The Site. Implementation of the plan will cost many millions of dollars.187

B. Procedural Posture of the Case

This litigation included many consolidated claims regarding who should be held liable for cleanup costs under CERCLA.188 CPC, Aerojet, Cordova Mich., the Michigan DNR, and the United States were all parties to this action.189 In May and June of 1991, the United States District Court for the Western District of Michigan conducted a fifteen-day trial to determine who was responsible for cleanup costs at the site in question.190 There was a windstorm of cross-claims, counterclaims, and contribution claims.191 The district court then consolidated the case into three phases: remedy, insurance, and liability.192 The trial on the first phase of liability included twenty-nine live testimonial witnesses, 2300 exhibits, and dozens of transcribed depositions.193 The trial court found that CPC, Cordova, and Aerojet were liable as operators under CERCLA.194

The United States Court of Appeals for the Sixth Circuit, ruling with a divided panel,195 first reversed in part and remanded the case back to the district court.196 The court of appeals then granted a rehearing en banc and vacated its previous judgement.197 In the court of appeals' second swing at the plate, it again reversed in part and remanded by a seven-to-six majority.198 The United States Supreme Court granted certiorari199 to resolve

186. Id.
187. Id.
188. Id.; 42 U.S.C. §§ 9607, 9613 et seq.
189. CPC Int'l, 777 F. Supp. at 549.
190. Id. at 555–70.
192. Id.
194. Id. at 581.
the conflict between the circuits regarding parent corporation liability under CERCLA. The Court heard the case on March 24, 1998 and made its ruling on June 8, 1998.

C. The District Court Decision

CERCLA, according to the district court, imposes strict, joint and several liability whenever there is a release at a site, and the statute must be interpreted broadly to avoid frustrating its remedial purpose. The court held that liability under CERCLA could attach to a parent corporation in two ways: either directly, as operator of the subsidiary, or indirectly, when the corporate veil could be pierced.

Liability through operator status occurs only when the parent exerts influence or power over the subsidiary by forcefully participating in and exerting control over the subsidiary's business operations during the time of the waste disposal. Oversight of the subsidiary that is consistent with the investment relationship will not create such liability. To determine if the appropriate "nexus of control" was present, the court considered the following factors: 1) the parent's representation on the subsidiary's board of directors; 2) the parent's management of the subsidiary; 3) the parent's daily involvement with the subsidiary; 4) the overlapping policies between the parent and the subsidiary; and 5) management, waste disposal, finance, and personnel policies.

The district court also ruled that a parent could be held liable through indirect or vicarious liability via traditional state law governed methods of veil-piercing. In Michigan, a three-pronged veil-piercing test is used to "prevent fraud, illegality or injustice." The elements of the test require the following: 1) that the subsidiary is an instrumentality of the parent; 2) that the limited liability between the parent and the subsidiary was specifically used to perpetrate a fraud or evil; and 3) that the fraud or evil

200. Bestfoods, 118 S. Ct. at 1884.
201. Id. at 1876.
204. CPC Int'l, 777 F. Supp at 573.
205. Id.
206. Id. at 577.
207. Id. at 573.
208. Id. at 574.
209. CPC Int'l, 777 F. Supp. at 574.
caused the injury to the plaintiff. Michigan law allows for an exception in that veil-piercing may also be warranted when it is done to serve the interests of justice. The fiction of separate corporate entities is disregarded if the two companies have identical interests so as to suggest that the subsidiary was an alter ego of the parent.

The court reasoned that CPC was directly liable as an operator with regard to The Site because it significantly controlled its subsidiary’s decisionmaking and business, even though neither CPC nor its former subsidiary still owned The Site. Internally, CPC installed its officers on the board of Ott II, and externally, CPC imposed policies of development on Ott II. These actions established, for the trial court, that CPC reached the nexus of control such that they assumed responsibility for the release of hazardous waste. In addition, Cordova Cal. was subject to indirect CERCLA owner liability through veil-piercing because its subsidiary owned the site in question; Cordova Cal. was the sole shareholder of Cordova Mich. stock, and there was an identity of interest between the companies. The intermediate parent here exercised dominion and control over its subsidiary to the point where the corporate fiction ceased to exist, and the parent was therefore held liable.

This decision established that the United States District Court for the Western District of Michigan would no longer allow parent corporations to escape liability under CERCLA. It seemed like an important victory for the environmental movement in the United States. However, The Court of Appeals for the Sixth Circuit of the United States added its two cents to the issue.

D. The Court of Appeals Decision

The Court of Appeals for the Sixth Circuit reversed in part and remanded after rehearing the case. The court held, like in the district court decision, that it would not interpret CERCLA in such a way that frustrated

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210. Id.
211. Id.
212. Id.
213. Id. at 574–75.
215. Id. at 577.
216. Id. at 578–79.
217. Id.
CERCLA's underlying policy.\textsuperscript{220} However, it limited the deference it would give to the statute in that it would only assess liability on those parties that were culpable, or by some realistic measure contributed to the creation of the harmful conditions.\textsuperscript{221} The court refused to hold parent corporations liable for the acts of their subsidiaries unless the corporate veil could be pierced, thus rejecting the district court's view that actual control could bring about direct liability.\textsuperscript{222}

The focus of the opinion was whether the parent abused the corporate form in such a way that the separation between corporation and stockholder disappeared.\textsuperscript{223} The court then applied Michigan state law with regard to veil-piercing, just as the district court did.\textsuperscript{224} However, in applying the Michigan veil-piercing standard, the court ruled that the facts in this case did not warrant a piercing of the corporate veil.\textsuperscript{225} While CPC was found to have had an active role with Cordova, the court found that the degree of control it exercised did not force the separate personalities of parent and subsidiary to cease to exist. In addition, there was no showing that the corporate form was utilized to accomplish fraud or wrongdoing.\textsuperscript{226} The court also let Cordova Cal. off the hook by pronouncing that its brief period of ownership, before it transferred The Site to Cordova Mich., did not put it in a position to incur previous owner liability under CERCLA.\textsuperscript{227}

The Court of Appeals for the Sixth Circuit's ruling in this case accomplished three things.\textsuperscript{228} First, it allowed two potentially liable companies with deep pockets to escape liability for environmental crimes for which they clearly should have been responsible under CERCLA.\textsuperscript{229} Second, it set a precedent calling for the use of state law to determine parent corporation liability under CERCLA.\textsuperscript{230} Third, the court removed the possibility of direct operator-status liability for parent corporations under CERCLA.\textsuperscript{231} Contrary to its pontifications in the beginning of the opinion,\textsuperscript{232} it would seem that the court did indeed frustrate the remedial purpose of

\begin{footnotesize}
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\item \textsuperscript{220} Cordova Chem. Co. of Mich., 113 F.3d at 577.
\item \textsuperscript{221} Id. at 578.
\item \textsuperscript{222} Id. at 580.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Cordova Chem. Co. of Mich., 113 F.3d at 581.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. at 583.
\item \textsuperscript{228} Id. at 572.
\item \textsuperscript{229} 42 U.S.C. § 9607(a)(3) (1994).
\item \textsuperscript{230} Cordova Chem. Co. of Mich., 113 F.3d at 580.
\item \textsuperscript{231} Id. at 580.
\item \textsuperscript{232} Id. at 577.
\end{itemize}
\end{footnotesize}
CERCLA. In one ruling, the Sixth Circuit Court of Appeals managed to set the environmental cause back eighteen years.

VI. UNITED STATES V. BESTFOODS

A. Petitioner’s Argument

There were three briefs submitted in support of the United States, the petitioner, in United States v. Bestfoods. The United States submitted a brief and a reply brief and the respondent, Michigan Department of Environmental Quality, submitted a brief in support of the petitioner. According to the Solicitor General for the United States, The Sixth Circuit Court of Appeals misapplied CERCLA, the most important statute which allows the United States to remedy public dangers created by toxic materials. The Court of Appeals’ ruling absolved all parent corporations of liability under CERCLA even when they actively participate in the operations of the polluting site. By only allowing parent liability when the circumstances warrant a piercing of the corporate veil, the Sixth Circuit is alienating the broader view held by the First, Second, Third, and Eleventh Circuit Courts of Appeals, which all allow for some sort of control test to find direct liability for parents as operators under CERCLA.

In the petitioner’s opinion, this case’s main issue is one of simple statutory construction. State common law veil-piercing standards should not apply. The United States wants the Supreme Court to “apply the [CERCLA] statute as Congress wrote it.” The definition of “owner” in CERCLA specifically excludes stockholders who do not participate in

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233. Respondent Michigan Department of Environmental Quality’s Brief in Support of Petitioner (No. 97-454); Petitioner’s Brief (No. 97-454); Petitioner’s Reply Brief (No. 97-454).
234. Petitioner’s Brief at 1, Bestfoods (No. 97-454); Petitioner’s Reply Brief at 1, Bestfoods (No. 97-454).
235. Formerly known as Michigan Department of Natural Resources.
236. Respondent Michigan Department of Environmental Quality’s Brief in Support of Petitioner at 1, Bestfoods (No. 97-454).
237. Petitioner’s Brief at 16, Bestfoods (No. 97-454).
238. Id.
240. Id. at 6.
241. Id.
242. Petitioner’s Reply Brief at 15, Bestfoods (No. 97-454) (citing Dunn v. CFTC, 117 S. Ct. 913, 916 (1997)).
managing the facility where the release occurred.\textsuperscript{243} This suggests that a stockholder who does participate in the management of the site is susceptible to liability.\textsuperscript{244} The statutory term "operator" in CERCLA must be interpreted in terms of its plain and ordinary meaning as opposed to an unusual or technical meaning.\textsuperscript{245} The plain meaning of "to operate" is to "direct the workings of [or] to manage."\textsuperscript{246} Congress wanted to impose liability on any operator of the site in question, regardless of protection provided by the corporate form.\textsuperscript{247} CPC, the United States argues, was an operator as defined by CERCLA, because it actively controlled the operations of the facility where the illegal release was made.\textsuperscript{248} Understand, however, that the petitioner is no longer referring to active control of the subsidiary's business; instead, it is saying that CPC had extensive control over the decision-making at The Site, which therefore shows that CPC operated The Site.\textsuperscript{249} This is direct liability in its most forward form; there is nothing vicarious about it; CPC physically controlled operations at The Site.\textsuperscript{250} CPC's argument that operator status is only conferred when a corporation mechanically operates a polluting facility would produce an absurd result because parents could control decision-making at a facility but others would be subject to liability for the parents' decisions.\textsuperscript{251} Any sort of managerial control over the facility is enough to obtain CERCLA liability over a parent.\textsuperscript{252} The United States suggests that there could never be anything bad, even considering limited liability, about requiring a corporation to pay for the harm it causes.\textsuperscript{253} The petitioner also argued that a federal veil-piercing standard must be used instead of the various state standards when interpreting parent liability under CERCLA.\textsuperscript{254} CERCLA specifically precludes the use of all state

\begin{footnotes}
\footnote{245. Petitioner’s Brief at 20, Bestfoods (No. 97-454).}
\footnote{246. Id. (internal quotations omitted) (citing e.g., OXFORD ENGLISH DICTIONARY (2d ed. 1989)).}
\footnote{247. Id. at 25.}
\footnote{248. Petitioner’s Reply Brief at 1, Bestfoods (No. 97-454).}
\footnote{249. Id. at 3.}
\footnote{250. Id.}
\footnote{251. See id. at 5.}
\footnote{252. Id. at 6.}
\footnote{253. Petitioner’s Reply Brief at 17, Bestfoods (No. 97-454).}
\footnote{254. Petitioner’s Brief at 32, Bestfoods (No. 97-454).}
\end{footnotes}
common law defenses in attempting to escape owner or operator liability.\textsuperscript{255} Therefore, the use of the state veil-piercing doctrine is impossible under CERCLA. In addition, all fifty states have different veil-piercing standards. Resorting to all of those different standards would be inconsistent, unpredictable, \textit{ad hoc}, and inappropriate in terms of CERCLA.\textsuperscript{256} The statute must be interpreted uniformly across the United States, employing only federal veil-piercing standards.\textsuperscript{257}

As its final argument, Petitioner discusses the fact that CPC placed its own corporate officers on the boards of directors of Ott II.\textsuperscript{258} It is normal for a corporate parent to place its own officers on the board of a subsidiary, and that alone does not impute liability under CERCLA.\textsuperscript{259} However, CPC's officers on the board of Ott II performed their duties on behalf of CPC and not on behalf of Cordova; therefore, they represent an instrumentality of CPC, which directed the functioning of Ott II's facility.\textsuperscript{260}

The petitioner presented a lucid and coherent argument. Nothing presented in the argument was untrue or vague. However, it seems that because the United States was on the side of what is right and good in the world, it felt it did not have to present an aggressive argument that would induce an emotional reaction in the Supreme Court Justices. It was a good argument that made its point effectively, but it did not call for decisive action to cleanup a life-threatening source of pollution.

\textbf{B. Respondent's Argument}

There were four briefs submitted in support of Bestfoods, the Respondent.\textsuperscript{261} Bestfoods itself submitted a brief and a supplemental brief,\textsuperscript{262} and the other two briefs were amicus briefs submitted by The Washington Legal Foundation and The United States Business and Industrial Council.\textsuperscript{263} Respondent argued that Congress did not give the courts a license to develop

\begin{itemize}
\item \textsuperscript{255} 42 U.S.C. § 9607(a) (1994); Petitioner’s Reply Brief at 12, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{256} Petitioner’s Reply Brief at 16, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{257} See \textit{id.} at 16.
\item \textsuperscript{258} Petitioner’s Brief at 45, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{259} \textit{id.} at 44.
\item \textsuperscript{260} \textit{id.} at 45.
\item \textsuperscript{261} Formerly doing business as CPC International.
\item \textsuperscript{262} Respondent’s Brief, \textit{Bestfoods}, (No. 97-454); Respondent’s Supplemental Brief, \textit{Bestfoods}, (No. 97-454).
\item \textsuperscript{263} Amicus Brief of the Washington Legal Foundation in Support of Respondents, \textit{Bestfoods}, (No. 97-454); Amicus Brief of United States Business and Industrial Council in Support of Respondents, \textit{Bestfoods}, (No. 97-454).
\end{itemize}
ad hoc rules of corporate parent liability in terms of CERCLA. The courts are not permitted to legislate via CERCLA. Federal intervention into the basic premises of state corporation law will destroy the value of incorporation and will devastate commercial relationships.

It would not serve justice to “sweep aside longstanding principles” of limited liability. Nothing in CERCLA suggests that Congress wanted to override common law corporate principles. Congress must act against the backdrop of the complete corpus juris of the states. Therefore, a matter interpreted in a federal statute that is not addressed specifically must be left to disposition via state law. Because parent corporation liability is not discussed in CERCLA, it follows that state law should be used in deciding when and to what extent a parent can be held liable for the acts of its subsidiary.

The term “corporation” does not include its shareholders. Allowing the courts to create an entire body of federal law from “whole cloth” will necessarily destroy state sovereignty. Respondent believes that creating this federal standard would constitute declaring “open season” on all parent corporations for the illegal acts of their subsidiaries. There must be significant conflict between the federal goals and the state law in order to abrogate the state law. Moreover, in the arena of corporate law, there is a strong presumption that state law must be applied to resolve parent corporation liability.

The need for national uniformity is not a strong enough need to displace state corporation law. There is a heavy burden on courts to use state and

264. Respondent’s Brief at i, Bestfoods (No. 97-454).
265. See Amicus Brief of the Washington Legal Foundation in Support of Respondents at 2, Bestfoods (No. 97-454).
266. Id. at 19.
268. Respondent’s Brief at i, Bestfoods (No. 97-454).
269. Id. at 29.
270. Id. at 28.
271. Id.
272. See id.
273. Respondent’s Brief at 20, Bestfoods (No. 97-454).
274. Id. at 12.
275. Id. at 14.
276. Amicus Brief of the Washington Legal Foundation in Support of Respondents at 4-5, Bestfoods (No. 97-454).
277. Id. at 5.
278. Id. at 7.
not federal law when applying a federal statute. It must be shown that national uniformity is required, the state law would frustrate the federal policy, and commercial relationships would not suffer in order to supplant the state law.

State veil-piercing law does not undermine CERCLA's purpose of holding liable any potentially responsible parties. Using state law provides the proper balance between CERCLA's imposition of costs and protecting the corporate form. If the parent has a sham subsidiary, the courts may still attack the parent, but corporate limited liability is held inviolate. States are interested in protecting their citizens from environmental contamination and will adjust their veil-piercing standards accordingly in order to snare the widest net of potentially liable parent corporations.

In arguendo, the different states have somewhat uniform veil-piercing laws. Basic uniformity can be accomplished by allowing the states to maintain their sovereignty. Veil-piercing in most states requires, with some variation, two basic elements: 1) uniformity in interest so that the separate corporate personalities no longer exist; and 2) fraud or wrongdoing in use of the corporate form. In addition, the only reason that the petitioner wants to apply federal veil-piercing law is because fraud is not a necessary element under federal law. In Michigan, fraud is a necessary element to pierce the veil, and the respondent in this case is not guilty of any fraud.

When Congress intends that there be a control test designed to find liable parties included in a statute, they simply put it in the text of the statute. Congress put a control test in the Securities and Exchange Act because it intended to do so in that case. A parent can only be held liable as an operator if they mechanically operate the site where the pollution has

279. See Amicus Brief of United States Business and Industrial Council in Support of Respondents at 18, Bestfoods (No. 97-454).
280. Id. at 18–19.
282. Id. at 14.
283. See Amicus Brief of United States Business and Industrial Council in Support of Respondents at 4, Bestfoods (No. 97-454).
284. Id. at 22.
286. Id.
287. Id.
288. Respondent's Brief at 24, Bestfoods (No. 97-454).
taken place.\textsuperscript{290} It would be improper to lower the threshold of vicarious liability by suggesting that control over the subsidiary's business operations indicated liability for an entity separate from the subsidiary.\textsuperscript{291} Actual control over the subsidiary is irrelevant, only operation of the facility in question is relevant, and CPC did not mechanically operate the facility.\textsuperscript{292}

The Supreme Court must not review evidence for credibility or discuss specific facts.\textsuperscript{293} The factual findings of the lower courts must be honored, and the District Courts did not find that CPC was an operator of The Site.\textsuperscript{294} CPC did place some of its employees at the site, but that is indicative of normal stockholder oversight.\textsuperscript{295} Ott II made its own decisions, derived its own revenues, and there was no abnormal intervention from CPC.\textsuperscript{296}

This argument is a textbook corporate America argument. It essentially states that the courts must protect the profit-making enterprises of the nation at the expense of the environment. Unfortunately for the environment, the argument makes perfect legal sense. So, while one might want to disagree with the points contained therein from an environmental and emotional standpoint, he or she must submit that corporations and shareholders do have certain rights, as do states.

\textbf{C. The Supreme Court Opinion}

Justice Souter did not pull any punches when he wrote for an unanimous court in \textit{United States v. Bestfoods}. He boldly stated that a parent corporation would not be held liable for violations under CERCLA if it exercised control over its subsidiary's operations.\textsuperscript{297} However, the resolution of this case did establish two ways in which a parent corporation can be held liable for the acts of its subsidiary under CERCLA.\textsuperscript{298} A parent corporation will be attached under CERCLA only when the corporate veil can be pierced and when the parent actually participated in the operations of the facility where the release of hazardous substances was made.\textsuperscript{299}

The basic American tenet that a parent corporation will not be held liable for acts perpetrated by its subsidiaries guided the Court through its

\begin{itemize}
\item \textsuperscript{290} Respondent's Brief at 19, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{291} \textit{See id.} at 7.
\item \textsuperscript{292} \textit{Id.}
\item \textsuperscript{293} Respondent's Supplemental Brief at 1–2, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{294} \textit{Id.} at 2.
\item \textsuperscript{295} Respondent's Brief at 5, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{296} \textit{Id.}
\item \textsuperscript{297} \textit{United States v. Bestfoods}, 118 S. Ct. 1876, 1881 (1998).
\item \textsuperscript{298} \textit{Id.} at 1886 n.12.
\item \textsuperscript{299} \textit{Id.} at 1881.
\end{itemize}
reasoning. The control that is incidental to stock ownership cannot make a parent liable for a subsidiary’s acts beyond the assets of the subsidiary. The Court held that the control incidental to stock ownership includes the formation of corporate guidelines, the appointment of officers, and all other acts normal to the parent-subsidiary relationship. Even the subsidiary having the identical board of directors as the parent is normal to the shareholder relationship. “[T]he congressional silence is audible” in CERCLA. Nothing in the act rejects the long-standing principal that parent corporations are protected by limited liability.

However, the Court does note that it is equally fundamental to American law that when a shareholder misuses the corporate form, the corporate veil may be pierced, and the shareholder will therefore be subject to liability. CERCLA does not reject this principal of corporate law just as it does not reject the principal of limited liability. “[I]n order to abrogate a common law principle, the statute must speak directly to the question addressed by common law.” For a matter as fundamental as parent corporation liability to be omitted from a comprehensive statute like CERCLA means that it was left out for a reason. The Court, therefore, agreed with the Sixth Circuit Court of Appeals that a parent corporation may be held derivatively liable for the acts of its subsidiary under CERCLA when and only when the corporate veil may be pierced under state law.

The Court continued by stating that there is a significant difference between liability as an owner versus liability as an operator, since CERCLA provides for both. Piercing the corporate veil applies to liability for an owner, but there may be a case where the parent corporation is an operator as defined by the Act. A parent may be liable for its own acts as the operator of the facility which is owned by its subsidiary if the CERCLA violation can be traced to the parent and the parent directly participated in the violation.

300. See id. at 1884.
301. Id.
302. Bestfoods, 118 S. Ct. at 1884.
303. See id.
304. Id. at 1885.
305. Id.
306. Id.
308. Id. (internal quotations omitted) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)).
309. Id.
310. Id. at 1885–86.
311. Id. at 1889.
312. Bestfoods, 118 S. Ct. at 1886.
313. Id. at 1886.
Therefore, while indirect liability may be limited to cases where the corporate veil may be pierced, CERCLA's operator proviso deals with one's direct liability for his or her own actions.\textsuperscript{314} A direct owner of a facility, a subcontractor, a malicious saboteur, a business partner, and even a parent corporation can be held liable.\textsuperscript{315} In the case of operator status, state corporate law and the distinction between parent and subsidiary is irrelevant. The critical inquiry is whether the parent operated the facility in question.\textsuperscript{316} It follows that a parent whose veil cannot be pierced because it adhered to the traditional separation between parent and subsidiary may be held liable as operator if it intervenes on one occasion relating to the release of hazardous materials.\textsuperscript{317}

In defining what it means to operate a facility, the court employed dictionary definitions, plain meanings, and common sense.\textsuperscript{318} CERCLA meant something more than mere mechanical activation of pumps and valves when it used the word "operate" to describe those who are liable under the statute.\textsuperscript{319} The Court ruled that the meaning of "to operate" should be construed in the "organizational sense" that was intended by CERCLA.\textsuperscript{320} To operate means "to conduct the affairs of; to manage: operate a business."\textsuperscript{321} Justice Souter then extended the meaning of "to operate" under CERCLA to mean directing, managing, or performing tasks directly related to the disposal of hazardous materials. This sharpened definition as applied to CERCLA also included institutional decisionmaking regarding "compliance with environmental regulations."\textsuperscript{322} The Court of Appeals, therefore, correctly rejected the District Court's view of an actual control theory based direct liability.\textsuperscript{323}

The Court rejected the actual control test for two reasons. First, the test inappropriately combined indirect and direct liability; second, it did not look at the parent relationship with the facility in question, but only at the parent's relationship with its subsidiary.\textsuperscript{324} The District Court only considered CPC's one hundred percent ownership interest and the fact that it placed its own employees on Ott II's board of directors; thus, the court did

\begin{itemize}
\item 314. Id.
\item 315. Id.
\item 316. Id.
\item 317. \textit{Bestfoods}, 118 S. Ct at 1886–87 n.12.
\item 318. See id. at 1887.
\item 319. Id. at 1889.
\item 320. Id. at 1887.
\item 321. Id.
\item 322. \textit{Bestfoods}, 118 S. Ct. at 1887.
\item 323. Id.
\item 324. Id.
\end{itemize}
not adequately analyze CPC’s liability. The Court then directed the District Court to consider the relationship between The Site and CPC on remand.

Guidance was given as to what constitutes operation of the facility. Again, a sole stockholder in a corporation has the right to supervise the subsidiary’s finances, proscribe mandatory policies that the subsidiary must follow, and monitor the subsidiary’s performance without liability attaching because of such actions. The main question is: “in degree and detail, [are the] actions directed to the facility by... the parent... eccentric under accepted norms of parental oversight of a subsidiary’s facility?”

It is completely normal for a parent corporation to place its own officers on the board of directors of a subsidiary, and that fact alone may not establish parent corporation liability for the illegal acts of its subsidiary. Common or dual officers can and do “change hats” when representing either the parent or the subsidiary, and the courts presume that they put on their subsidiary hats when they work for the subsidiary. However, when it appears that an officer is acting in a manner that is congruent only with the interest of the parent while also deviating from well-established corporate norms, the presumption may be rebutted.

In conclusion, the Court stated that CERCLA does not fundamentally alter or displace common law rules of limited liability. If the actual control test were used as the standard, derivative liability through veil-piercing would be unnecessary. CERCLA-specific corporate law doctrines are impermissible because they cast aside all traditional expectations of liability under CERCLA.

The Court found adequate information contained in the record to support a belief that CPC did in fact operate The Site as defined by Bestfoods. It therefore vacated the judgement of the Court of Appeals and remanded the case to the District Court to reconsider the issue in light of Bestfoods.

325. See id. at 1887–88.
326. Id. at 1888.
327. Bestfoods, 118 S. Ct. at 1889.
328. Id.
329. Id.
330. Id. at 1888.
331. Id.
333. Id. at 1889.
334. Id.
335. Id.
336. Id. at 1890.
337. Bestfoods, 118 S. Ct. at 1890.
D. Brief Analysis of the Supreme Court Decision

The two forms of finding liability announced in Bestfoods allow the EPA and private CERCLA plaintiffs to know when they will be able to force a parent corporation to contribute to a cleanup effort. The Court pronounced bright line rules which, if violated, indicate corporate parent liability. The guessing of the past is now over. However, there probably are many corporate parent boards of directors that alter their policies with regard to their subsidiaries in order to escape liability under the Bestfoods ruling but continue managing their subsidiaries as they see fit. If making profits at the expense of the environment is their corporate goal, it is assured that they will find a way to do it without violating the lines drawn in Bestfoods.

CERCLA’s intent is clear: it is a comprehensive statute designed to attach liability onto every potentially responsible party. It is inconceivable that Congress intended that parent corporations could escape liability based on fictional protections provided by the corporate form. The Bestfoods ruling allows parent corporations, which may have been deeply involved in the polluting activities of their subsidiaries, to escape liability. The Court should have looked more deeply into the policy concerns that underlie CERCLA. If it had, it would have seen that the statute is specifically designed to prevent exactly what the Court allowed to happen. Common law defenses are precluded when assessing CERCLA liability; only the defenses set forth in the text of the statute are effective. By limiting parent liability to situations where the parent operated the facility in question, the Court effectively demonstrated to potential polluting parents how to indirectly require that their subsidiaries pollute but get away with it in the process. A parent, for example, could place profit requirements on a subsidiary attainable only if it illegally dumped hazardous waste.

The Court of Appeals noted that the courts should not interpret CERCLA in such a way that frustrates its purpose. However, the Supreme Court’s decision to allow state law to determine whether the corporate veil should be pierced does frustrate CERCLA’s purpose. Unlike federal law, most state veil-piercing laws include an element of fraud that must be proven.

338. Id. at 1886 n.12.
339. Id. at 1876.
341. See Bestfoods, 118 S. Ct. at 1889.
343. Id. § 9607(b)(3) (1994).
344. Bestfoods, 118 S. Ct. at 1887.
346. Bestfoods, 118 S. Ct. at 1885–86.
in order to pierce the veil. Under the Court’s reasoning, a parent that has interfered with a subsidiary to the point where the corporate veil should be pierced, and has indirectly forced the subsidiary to pollute, but has not engaged in any deception or fraud will nevertheless be protected by the corporate form. The use of state law to pierce the corporate veil under CERCLA frustrates the Act’s purpose because federal veil-piercing law would necessarily provide for more parents’ indirect liability under CERCLA. The purpose of CERCLA is to cleanup the environment by forcing responsible parties to pay for the cleanup.

A state legislature or court system is now in the position to tailor its veil-piercing law with the intent to attract corporations that are interested in producing goods and not cleaning up the environmental pollutants they release. States could easily make the test for piercing the corporate veil narrower than it currently is in order to attract the worst element of rich, polluting companies. In terms of whether state or federal law applies in veil-piercing cases, “the congressional silence is audible.” Some recent cases that struggled to interpret Bestfoods have held that state law governs in veil-piercing inquiries. Several courts have resolved the issue by relying on the Sixth Circuit’s decision in Donahey v. Bogle, which requires application of state law in veil-piercing cases. However, there is a strong possibility that federal law may be held applicable in other jurisdictions. This issue requires a legislative solution.

In Bestfoods, the Supreme Court promoted form over function. While there now exist strict, uniform bounds by which a parent corporation may be held liable for the acts of its subsidiary under CERCLA, if a parent corporation maintains a few formalities with regard to the corporate form, it is nevertheless immune from liability should the subsidiary be charged with a CERCLA violation. It is true that parent corporations now have more to fear than ever. Before Bestfoods, the law regarding parent corporation liability was confused and erratic at best. Nevertheless, the circumstances by which a parent corporation will be held liable for the CERCLA violations

347. Amicus Brief of the Washington Legal Foundation in Support of Respondents at 9, Bestfoods (No. 97-454).
348. See Bestfoods, 118 S. Ct. at 1889.
352. 129 F.3d 838 (6th Cir. 1997).
353. Id. at 843.
354. Bestfoods, 118 S. Ct. at 1886 n.12.
355. See supra note 33.
of its subsidiary under *Bestfoods* are narrow, including only when the corporate veil may be pierced under state law, and when the parent actively manages or operates the polluting facility.\(^{356}\) Shareholders and parent corporations know how to protect themselves because of the *Bestfoods* decision.\(^{357}\)

**VII. CONCLUSION**

The environmental problem, which the Supreme Court tried to resolve in *Bestfoods*, is not merely legal in nature. It permeates deeply rooted social policies underlying CERCLA and the principle of limited liability.\(^{358}\) From the first Superfund site, a coal tar sludge waste depository,\(^{359}\) to present-day environmental catastrophes, all modern levels of economic activity have some effect on the environment. People prefer to “struggle along on [the] asphalt and concrete, in imitation of the short-lived transportation machines for which those hard surfaces were designed.”\(^{360}\) The use of agricultural chemicals has increased to over one billion tons per year since 1962, up nearly four hundred percent.\(^{361}\) Humankind has developed a mind that separates it from the natural world.\(^{362}\) To complicate matters, CERCLA, a statute designed to save the environment, is so confusing that courts stumble over its language and struggle to interpret it correctly.\(^{363}\)

*Bestfoods* sheds light on the confusing area of CERCLA parent corporation liability.\(^{364}\) One open issue is that of the safe limits for a parent in its oversight, advisory, and standard-setting role with its subsidiary.\(^{365}\) Perhaps intentionally, *Bestfoods* did not draw a clear line on that issue. Already, a case has cited to *Bestfoods* questioning its ruling.\(^{366}\) In the future,

\(^{356}\) *Bestfoods*, 118 S. Ct. at 1881.


\(^{358}\) See Aronovsky, supra note 6, at 461.

\(^{359}\) Pennsylvania v. Union Gas Co., 491 U.S. 1, 6 (1989).

\(^{360}\) Hoff, supra note 9, at 93 (emphasis added).

\(^{361}\) Gore, supra note 8, at xix.

\(^{362}\) Hoff, supra note 9, at 77.


\(^{364}\) Kass, supra note 2, at 3.

\(^{365}\) Id.

new court decisions, corporate practices, and new CERCLA clarifications may resolve these still unresolved issues.\textsuperscript{367}

Proponents of limited liability would argue that the theory of limited liability through corporate ownership has proven to be beneficial to the United States because the corporate structure insulates.\textsuperscript{368} \textit{Bestfoods} demonstrates that the idea of limited liability is alive and well in terms of CERCLA.\textsuperscript{369} Direct parent corporation liability would discourage investment across the board.\textsuperscript{370} Limited liability encourages growth because it allows investors to minimize their risks.\textsuperscript{371} The purchaser of one share of a corporation is not forced to place her entire wealth at risk.\textsuperscript{372} Finally, supporters of limited liability argue that it allows capital to flow to socially desirable but risky ventures.\textsuperscript{373}

However, these arguments do not hold water in the environmental context. Limited liability has protected wealthy industrialists since the late 1830s.\textsuperscript{374} It allows a parent corporation to avoid bearing the full social and economic costs of its actions.\textsuperscript{375} The parent corporation is free to reap the full benefit of the subsidiary’s production at the expense of the community which supports it without bearing the true cost of its activities.\textsuperscript{376} Limited liability, therefore, merely provides an incentive to use a subsidiary as a shield. The parent can then shift the costs of environmental cleanup to involuntary contributors.\textsuperscript{377} Involuntary contributors are residents of the community, recreational users of natural resources, and the government.\textsuperscript{378} It is simply unconscionable to allow parent corporations to get rich while taxpayers and residents bear the environmental costs for the corporation’s activities:

\begin{quote}
Economic analysis favors holding parent corporations of responsible parties liable for the outstanding portion of any judgement for hazardous waste clean-up costs and natural resource
\end{quote}

\begin{itemize}
\item \textsuperscript{367} Kass, \textit{supra} note 2, at 3.
\item \textsuperscript{368} Amicus Brief of United States Business and Industrial Council in Support of Respondents at 23, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{369} United States v. Bestfoods, 118 S. Ct. 1876, 1885 (1998).
\item \textsuperscript{370} Amicus Brief of United States Business and Industrial Council in Support of Respondents at 14, \textit{Bestfoods} (No. 97-454).
\item \textsuperscript{371} \textit{Harvard Liability, supra} note 5, at 988.
\item \textsuperscript{372} \textit{Id.} at 989.
\item \textsuperscript{373} \textit{Id.}
\item \textsuperscript{374} Aronovsky, \textit{supra} note 6, at 429–30.
\item \textsuperscript{375} \textit{Harvard Liability, supra} note 5, at 990.
\item \textsuperscript{376} \textit{Id.}
\item \textsuperscript{377} \textit{Id.} at 991.
\item \textsuperscript{378} \textit{Id.} at 992.
\end{itemize}
damages. Application of this liability rule would internalize the risks of setting up subsidiary corporations to perform hazardous waste disposal activities. Therefore, corporations would have strong incentives to exercise care when delegating and overseeing hazardous waste disposal activities. In addition, application of the rule would reduce the exposure of involuntary creditors to the risk of releases of hazardous waste—a risk that they are ill-suited to avoid or bear. Finally, the rule would reduce the enforcement costs of cleaning up unsafe hazardous waste disposal facilities and restoring natural resources.\textsuperscript{379}

In the future, the courts should use the social, economic, democratic, and policy factors underlying CERCLA to decide when limited liability should not apply.\textsuperscript{380} Liability for environmental harms should be placed squarely on the shoulders of those who are in the best position to mitigate damages and bear the costs.\textsuperscript{381} Parent corporations are in this position because they already have the oversight hierarchy in place and they can exert strong influence over polluting subsidiaries.\textsuperscript{382} Parent corporations should not incur liability when they unwittingly play some part in the subsidiary's waste disposal activities,\textsuperscript{383} but in the interests of economic efficiency, they should bear the costs of environmentally dangerous activities about which they knew or should have known.

Mother Nature is the last constant in this ever shrinking world. If CERCLA is to be the instrument of her savior, it must flourish, punishing all those who would attempt to poison and destroy her bounty. Economics, democracy, and recreation—these beliefs and activities exist because life exists, and without a life-supporting ecosystem, free from chemical pollutants, they will cease to exist.

\textit{Christian A. Guzzano}

\textsuperscript{379} \textit{Id.} at 998 (internal citations omitted).
\textsuperscript{380} Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 777 (5th Cir. 1997).
\textsuperscript{381} \textit{Harvard Liability}, supra note 5, at 992–93.
\textsuperscript{382} \textit{Id.} at 992.
\textsuperscript{383} Aronovsky, supra note 6, at 462.