THE BEST IS YET TO BE: CONSIDERING SHAREHOLDER LIABILITY FOR CERCLA VIOLATIONS POST *U.S. v. BESTFOODS*[+]

by

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Concerns over environmental liability have taken their toll in the corporate world.[1] Costs for cleanup of hazardous waste at a single site can run into multiples of tens of millions of dollars.[2] Adding to the anxiety already present when environmental cleanup issues come to the fore is the uncertainty created by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[3] regarding whether the traditional rules of corporate limited liability are fully operative in this regime.[4] That is, it is feared that CERCLA may require shareholders to bear personal liability for unpaid costs of corporate environmental cleanup.

In 1998, the Supreme Court decided *United States v. Bestfoods*,[5] and attempted to clarify guidelines for attaching shareholder liability for corporate violations of CERCLA.[6] Addressing the question of whether a parent corporation is liable for the clean-up costs of its subsidiary, the Court stated that liability will attach only where corporate law doctrine permits, or where the parent acted as the operator of a CERCLA-offending facility.[7] The question regarding parent corporation liability for CERCLA violations of its subsidiary is one that had divided the Circuit Courts of Appeals.[8] *Bestfoods* settled the split in the appellate courts that was caused by some courts requiring facts sufficient to pierce the corporate veil before finding CERCLA liability[9] while others considered the parent corporation's capacity to control the subsidiary in determining CERCLA liability[10] while still others required control by the parent in the affairs of the subsidiary before attaching liability.[11] In the end, the U.S. Supreme Court ruled that veil-piercing analysis is an appropriate consideration but not the only consideration when determining whether to assess liability on the parent corporations.[12] In addition, according to the Supreme Court, the parent corporation's control over the operations of the offending facility owned by its subsidiary may also lead to parent corporation liability.[13] *Bestfoods* has been hailed as consistent with traditional notions of limited liability.[14]

In June of 1998, *Donahey v. Livingstone,*[15] a case also involving CERCLA liability, was remanded to the Court of Appeals by the Supreme Court to be reconsidered in light of *Bestfoods*.[16] Unlike the corporate parent defendant in *Bestfoods,* the defendant in *Donahey* was a 100% individual shareholder. Although the *Bestfoods* Court did not specifically assess the viability of its analysis as applied to individual owners of closely-held corporations, the Court did explicitly invite such application. *Bestfoods* stated that direct liability may be imposed on any *person* who operates a polluting facility "whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice."[17]

This Article, by analyzing *Bestfoods* and how it is consistent with traditional doctrine, illustrates that at first glance a cursory application of the liability guidelines in *Bestfoods* might fail to generate results that are consistent with traditional notions of liability in individually-owned close corporations. For example, a court considering *Bestfoods* in the context of a case of neglect of duty might simply read *Bestfoods* as imposing liability on shareholders only when they physically participate in the dumping, and as providing exoneration of liability in situations like *Donahey* where the harm comes from failure to act. In order to avoid this anomalous result it is necessary to consider the special circumstances of individual shareholders of closely-held corporations when applying the *Bestfoods* analysis to these cases. The collusion of management and ownership inherent in closely-held corporations must be considered to achieve the desired results apparent in *Bestfoods*.[18] Although there have been several cases since the *Bestfoods* decision that have applied the *Bestfoods* analysis in the context of individually-owned close corporations, none of these cases have fully addressed the issues presented in the context of individual shareholder liability for failure to act.[19]

This Article attempts to fill this void and is organized as follows. Part I provides a description of the facts in *Bestfoods* giving rise to the issues addressed in this Article. Part II presents general background information on the creation, purpose and scope of CERCLA while Part III considers the traditional concept of corporate limited liability at stake in *Bestfoods*. Part IV then returns to *Bestfoods*, providing an analysis of the decision. Part V proposes a consistent interpretation of *Bestfoods* in the case of the individually-owned, closely-held corporation, considering the facts of *Donahey v. Livingstone,*[20] as an example. Concluding remarks are made in Part VI.

I. *UNITED STATES v. BESTFOODS* – THE FACTS

The facts giving rise to the *Bestfoods* litigation are as follows. The offending facility was a plant manufacturing a variety of synthetic organic materials near Muskegon, Michigan, originally owned by Ott Chemical Company (Ott I). Hazardous waste was disposed of at the facility by dumping it into the soil, resulting in polluted soil and groundwater.[21]

After a corporate reorganization where the Corn Products Company (CPC)[22] incorporated a subsidiary to purchase the assets of Ott I, the new company (Ott II) continued to pollute the area as its chemical manufacturing proceeded.[23] Although CPC had retained Ott I's management as the board of directors of the new company, several of Ott II's directors held positions at CPC simultaneously. After being sold to a company that subsequently went bankrupt, the site was investigated by the Michigan Department of Natural Resources (MDNR), which discovered that numerous leaking and exploding drums had contaminated the soil and water with hazardous chemicals.[24]

MDNR then oversaw the transfer of the facility from the bankrupt company to Cardova Chemical Company (Cardova). In exchange for indemnity, Cardova agreed to clean up the site and help MDNR with funding the clean-up.[25] In 1989, after clean-up intervention by the Environmental Protection Agency (EPA), which was estimated to cost tens of millions of dollars, the federal government brought suit under Section 107(a)(2) of CERCLA to recover these amounts.[26]

After a flurry of cross and counter claims, the district court consolidated the cases for a three-phase trial. The trial never made it past the first phase—liability. Defendants stipulated that the Muskegon site was a facility for purposes of CERCLA and that the government had incurred reasonable costs. Thus the 15-day bench trial focused on whether defendants had owned or operated the facility within the meaning of CERCLA § 107(a)(2).[27] The Supreme Court granted certiorari as to CPC's (the parent corporation's) liability.[28]

II. CERCLA: CREATION, PURPOSE AND SCOPE

The statute at the heart of the controversy addressed in *Bestfoods* is the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[29] Congress enacted CERCLA "to address the increasing environmental and health problems associated with inactive hazardous waste sites"[30] and to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment."[31] The impetus for this legislation was the well-publicized disasters at Love Canal[32] and Valley of the Drums.[33] Three competing bills[34] were merged and finally passed by the House with little debate.[35] CERCLA was signed into law by President Jimmy Carter on December 11, 1980.[36]

Congress intended the statute to have a wide scope,[37] as evidenced by its two essential purposes.[38] First, Congress intended to give the federal government the tools necessary to respond swiftly and effectively to pollution caused by hazardous waste sites.[39] Second, Congress intended that the cost and responsibility for remedying hazardous sites fall on those creating the pollution.[40] The second purpose is evinced by the creation of a private right of action against responsible parties.[41]

This private right of action permits EPA-named defendants to enjoin other potentially responsible parties.[42] In enacting CERCLA, Congress set out four groups of potentially responsible parties, all of whom could be held liable regardless of intent.[43] Through this scheme of liability Congress envisioned a system that would permit the EPA to recoup its costs from a source of funds other than the taxpayers. It was Congress' intent that CERCLA be construed liberally to accomplish these goals.[44]

The four groups of potentially responsible parties as defined in CERCLA are: (1) the current owner and operator of 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; (3) any person who arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at any facility; and (4) any person who accepts or accepted any hazardous substances for transport.[45] The term "person" is defined in CERCLA to include corporations and other business organizations,[46] and the term "facility" enjoys a broad and detailed definition as well.[47]

The terms "owner and operator," however, are not defined in the statute[48] and the courts have been left to wrestle with their meaning.[49] The courts have decided that although the statute provides that a current owner *and* operator is a potentially responsible party, it is appropriate to hold owners *or* operators liable.[50] The more elusive question has concerned the ambiguity presented when the polluting entity is a corporation. The corporation, as the offending facility is liable, but are its shareholders also liable as owners and operators under the language of the statute? The next Part explores the corporate law concepts at stake in this controversy. Part III then follows with an analysis of how *Bestfoods* attempts to resolve this issue.

II. CORPORATE LAW

A. Entity Theory and Limited Liability

Implicit in the *Bestfoods* opinion is respect for the corporate law fiction that the corporation is a distinct entity in and of itself. Entity law, since the time of the American Revolution, was based on English corporation law, which in turn drew its origins from ecclesiastical and public corporations that reflected concepts derived from Roman law.[51] Entity law embodies the notion that the corporation is a legal entity, separate from those who own its shares, that has the capacity to sue and to be sued, as well as to hold and transfer property, and to have a term of existence.[52] "Although recognition of the separate legal personality of the corporation—separate from that of the shareholders—goes back centuries, there has been intensive controversy on the jurisprudential level as to the exact nature of the corporation as a legal institution."[53]

In the United States the status of corporation was granted initially by the state legislature in the form of a special charter.[54] All of the early business corporation charters were granted for activities of some community interest—supplying transport, water, insurance, or banking facilities.[55] The concept of the corporation as an entity granted certain powers by the sovereign is reflected in Chief Justice Marshall's comments on the corporation: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[56] The sovereign could grant limited liability through the corporate charter, but often no mention of liability was made.

Although the corporation was accepted as a legal entity separate from its shareholders, limited liability for the shareholders did not naturally and immediately follow.[57] It was not uncommon for state issued corporate charters to impose full direct liability on shareholders for corporate debts.[58] Some early statutes, such as those in Massachusetts, expressly imposed unlimited liability on shareholders.[59] Through the mid-nineteenth century, considerable liability to third party claimants was explicitly imposed on shareholders statutorily.[60] Additionally, some insurance and bank charters typically provided for double liability[61] and occasionally triple liability was assessed for payment of corporate obligations.[62] Outside of the specific language in charters and statutes assessing direct liability, judicial interpretation in the early nineteenth century "made clear that a corporation charter conferred limited liability by implication in the absence of clear provision to the contrary."[63] Corporate charters for companies with public functions, such as canal, bridge, water, and turnpike companies typically provided for limited liability.[64] Eventually a boom in the manufacturing industry spurred investors to seek manufacturing charters.[65] As the manufacturing industry continued to grow, so too did the political and economic power of the industrialists, who lobbied for the extension of limited liability to manufacturing companies.[66] From 1816-1830, New Hampshire, Connecticut, Maine, and Massachusetts adopted limited liability statutes for manufacturing corporations.[67] Thus, judges as early as 1816 held that "personal liability of a stockholder is inconsistent with the nature of a body corporate;"[68] an 1816 New Hampshire statute granted manufacturing corporations limited liability; and by 1832 scholars took the absence of direct shareholder liability for granted.[69] "[I]t became generally accepted that no assessment could be made on shareholders unless expressly authorized by charter, contract, or statute."[70]

Limited liability thus emerged in the first quarter of the nineteenth century and was largely accepted by 1840, "long after the acceptance of the entity concept, but not as a necessary consequence."[71] Many reasons for the change to limited liability have been advanced.[72] Limited liability offered the small-scale entrepreneur and the average person the opportunity to enter the business market or invest.[73] Some scholars have argued that the need for industrial growth fueled the state legislatures to change to limited liability.[74]

As limited liability became the norm, the corporate entity was still evolving. When limited liability was established, "corporations could not acquire and hold shares of other corporations, unless expressly authorized to do so by statute or charter."[75] As Justice Brandeis once noted: "The power to hold stock in other corporations was not conferred or implied. The holding company was impossible."[76] By the end of the nineteenth century, however, states began amending their corporate statutes to grant corporations the authority to purchase shares of other corporations.[77] However, the change in the structure of corporations was not met with a change in the doctrine of limited liability. Some scholars question the implications of this practice and the continued validity of limited liability.[78]

Today, it is a "bedrock principle"[79] of American corporate law that a shareholder's liability is limited to the amount of her investment in the enterprise.[80] This concept of limited liability follows from the general rule that a "corporation and its stockholders are generally to be treated as separate entities."[81] Thus, creditors are entitled to look to the corporation in order to satisfy their claims, but usually will not be allowed to recover from shareholders.[82] Limited liability, then, is a legal doctrine that is separate and distinct from entity law."[83]

B. Exception to Limited Liability: Veil Piercing

As the doctrine of limited liability emerged in corporate law, so did concerns about its abuse. In an effort to curb these abuses, the courts found it necessary to carve out exceptions to the doctrine and under special circumstances hold the shareholders liable for actions taken in the name of the corporations they owned. One such exception to this doctrine is commonly known as "piercing the corporate veil." Veil-piercing is, unfortunately, the most litigated issue in corporate law.[84] It still remains as Justice Cardozo described it nearly 75 years ago—"enveloped in the mists of metaphor."[85] More recently, it has been described as "irreconcilable and not entirely comprehensible,"[86] and "defy[ing] any attempt at rational explanation."[87] This Part attempts to summarize the law and its most salient ambiguity.

Piercing the veil is a suspension of the fundamental corporate law rule of limited liability.[88] That is, where ordinarily the shareholders are not liable for torts committed by the corporation, when courts find facts sufficient to "pierce the corporate veil," shareholders may be held liable. This doctrine only applies when specific, unusual circumstances require that the veil be pierced and that the corporate form be disregarded.[89] Facts traditionally considered in veil-piercing cases include: a defendant's failure to maintain adequate corporate records or comply with corporate formalities, commingling of funds, undercapitalization, and treating corporate assets as if they were the defendant's own.[90] These facts are said to describe either a unity of interest and ownership such that the separate personalities of corporation and individual no longer exist or a situation in which the adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.[91]

The boundaries of the veil-piercing exception to limited liability are narrow and the fundamental rule of limited liability receives a broad reading, but it is unclear how these boundaries are defined.[92] Courts inquire into such fuzzy realms as injustice, fraud, and public convenience that demand nothing more than equitable consideration.[93] Balancing the equities is by definition somewhat *ad hoc*. Despite the unrefined practice of piercing the veil, the theory behind limited liability is fairly clear and it appears that veil-piercing is no more than a method of excluding cases that do not qualify for the general justification proffered for unlimited liability.

The standard theory against limited liability is that it gives rise to serious inefficiencies because enterprises are not forced to internalize the costs of their operations. This regime provides an incentive to take risks that are economically undue, but it has been accepted that this is what it takes to spur capital financing.[94] Given this justification, a generous regime of limited liability is not appropriate for purposes such as fraud.

C. Other Sources of Liability – Direct Liability for Own Actions

1. Tort

Another source of liability, arising in the context of corporations as well as other contexts, concerns direct liability for one's own actions. In tort law, the concepts arise from negligence as well as intentional wrongdoings. Tort liability attaches liability directly to an actor.[95] In tort liability cases the existence of a corporation is ignored and courts inquire solely into the acts (or omissions) of a director or officer, or, generally, of any accused tortfeasor. As Judge Posner put it in a recent director/officer tort liability case:

> If an individual is hit by a negligently operated train, the railroad is liable…had the president been driving the train when it hit the plaintiff, or had [he] been sitting beside the driver and ordered him to…he would be jointly liable with the railroad.[96]

The distinction between suspending the corporate defense of limited liability in veil-piercing cases and merely looking to an individual's actions, regardless of her relationship with a corporate entity, is often muddled[97] despite the fact that it is critical to proper liability analysis. This is to say that limited liability cannot be raised as a proper defense to a direct tort liability suit.

In the corporate context, and under traditional notions of tort liability, officers and directors are held liable for their own torts.[98] The general rule is that corporate officers are personally liable for those torts which they personally commit, or which they inspire or participate in, even if performed in the name of a fictional entity. Tort laws include liability for nonfeasance in cases where there is a duty to act.[99] Acts of omission may be considered as wrongful as acts of commission.[100]

Furthermore, several state codes hold members of limited liability partnerships (LLPs) and limited liability companies (LLCs) liable for torts of which they had notice.[101] To attach liability to an officer of a corporation he must have engaged in such a breach of duty as contributed to, or helped to bring about, the injury. In a LLP, partners are not liable for debts or obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed by another partner unless they were supervising such partner.[102] The general rule in the case of LLCs and LLPs is that members or partners are not liable for the liabilities of the organization or its members unless they commit a tort or those over whom they had supervisory responsibility commit a tort. Thus, liability is not limited to tortious acts that he actually and physically commits. Instead it extends to tortious acts which he brings about.[103]

Moreover, agency rules applied to these traditional notions of tort liability attach liability to anyone who appoints, supervises or cooperates with a tortfeasor. Finally, the idea of corporate duties creates an expectation of supervision and involvement in corporate affairs, which if not met may result in liability.[104]

Close corporations are much like partnerships, LLCs and LLPs,[105] and similarly different from public corporations when it comes to limited liability defenses. With the investor privy to and part of the decision making, liability will be imposed for their tort irrespective of the investor status bearing a shield of limited liability. It is well established that even where these torts are committed for the benefit of the corporation, individual liability is not excused.[106]

2. Fiduciary Duties of Directors and Officers

Under traditional fiduciary analysis corporate managers owe two general duties to the corporation and its shareholders: a duty of loyalty and a duty of care.[107] The duty of care addresses the attentiveness and diligence with which managers, both officers and directors, are required to perform their jobs.[108] Moreover, this duty includes the affirmative duty to know the business of the corporation,[109] as well as the duty to gather all reasonably available information before making a corporate decision.[110] In general, a director or officer has the duty to discharge her duties in good faith, with the care an ordinarily prudent person in a like position would exercise, and in a manner she reasonably believes to be in the best interests of the corporation.[111] In a typical close corporation, all of the stockholders participate in the management, direction, and operation of the corporation.[112] Because of the intermingling of interests, a "close corporation is one in which management and ownership are substantially identical to the extent that it is unrealistic to believe that the judgment of the directors will be independent of that of the stockholders."[113] In a close corporation then it is reasonable to expect the owner and director to understand and supervise the operation of the corporation[114] and in fact operate the corporation. Additionally, a managing officer of a corporation with control over the operation of the business is personally responsible for the acts of subordinates done in the normal course of business.[115]

A breach of the duty of care can arise under two separate theories. First, liability may result from an actual decisions rendered by the board of directors or officers that led to a corporate loss "because that decision was ill advised or negligent."[116] This class of active decisions is generally protected by the business judgment rule[117] assuming that the decision process was not irrational or applied in bad-faith.[118] Second, liability for a corporate loss may be premised on an unconsidered failure of the directors or officers to act in a "circumstance in which due attention would arguably have prevented the loss."[119] This type of corporate omission is not generally protected by the business judgment rule.[120]

3. Direct Statutory Liability

Another source of liability that affects corporate actors concerns direct liability as stated under particular statutes. For example, as Justice Cardozo stated, a surrender of the principle of limited liability would be made "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld."[121] Where such a policy is expressed as federal law, it will not be defeated by state corporate law.[122]

Exceptions of this sort occur in such notable contexts as the Financial Institutions Reform Recovery and Enforcement Act (FIRREA),[123] the Employee Retirement Income and Security Act (ERISA),[124] the Communications Act of 1934,[125] the regulation of pipelines,[126] as well as CERCLA.[127] The next Part discusses direct statutory liability under CERCLA as interpreted by *Bestfoods*.

IV. *BESTFOODS:* OUTCOME AND AFTERMATH

A. The Decision

Bestfoods came before the United States Supreme Court because of a split in the Circuit Courts of Appeals regarding how to analyze a parent corporation's potential liability as an owner or operator under CERCLA for the violations of its subsidiary.[128] The confusion in the circuits was grounded in a failure of some courts to distinguish between a parent corporation's control of a subsidiary and control of a subsidiary's facility.[129] This failure to distinguish often manifested in the application of an "actual control" test,[130] which instead of asking whether the parent had operated the subsidiary's facility, focused on the general relationship between the affiliated corporations. As the court put it: "The well-taken objection to the actual control test, however, is its fusion of direct and indirect liability; the test is administered by asking a question about the relationship between the two corporations (an issue going to indirect liability) instead of a question about the parent's interaction with the subsidiary's facility (the source of any direct liability). If, however, direct liability for the parent's operation of the facility is to be kept distinct from derivative liability for the subsidiary's own operation, the focus of the enquiry must necessarily be different under the two tests."[131]

In *Bestfoods*, the Supreme Court addressed the question of when a parent may be held liable for the clean-up costs of its subsidiary's polluting facility. It held that liability may attach indirectly, pursuant to the principles of corporate law in circumstances where the corporate veil should be pierced, or it may attach directly under the statute.[132] In the case of CERCLA, direct liability attaches where an individual or corporation is deemed the owner or operator of an offending site.[133]

The lower court in *Bestfoods* had applied the actual control of the subsidiary test and found the defendant parent corporation liable because the parent corporation held 100% ownership of the subsidiary owning the offending facility; the parent actively participated in the subsidiary's board of directors; and the parent had majority control over the board.[134] To assess direct operator liability, the Supreme Court, however, directed the focus to the control exercised over the offending site rather than the subsidiary.[135] Therefore, in parent-subsidiary contexts, a mixing of officers between the subsidiary and the parent, for example, is not an automatic trigger of parent liability;[136] rather liability attaches to the parent when it actively participates in and exercises control over the offending site. Specifically, the Court said that "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. [Sharpening the] definition for purposes of CERCLA's concern with environmental contamination, on 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 organizations."[137] Thus, regardless of what corporate law may say about a parent's liability for the acts of its subsidiary, when the parent is itself involved in behavior that offends a federal statute, the parent will be liable for those acts.[138]

Conversely, the Court stated that "[n]othing in CERCLA purports to rewrite the[e] well-settled rule [of corporate veil piercing]…CERCLA is thus like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute."[139] Indirect, or derivative, liability attaches only by means of piercing the corporate veil in accordance with corporate law.[140] CERCLA does nothing to alter a veil-piercing analysis.

The ruling may thus be read even more simply: if a subsidiary offends CERCLA, its parent may be liable pursuant to veil-piercing doctrine, but if a parent corporation offends CERCLA, the fact that it did so at its subsidiary's facility will not shield it from the statutorily mandated liability.[141] It is this issue that is at risk of being most confused when applied in the context of a closely-held corporation. The next Part examines a few cases that have attempted to interpret the directives of *Bestfoods* in this context.

B. Liability of Parent Corporations Post-*Bestfoods*

The rules for imposing liability under *Bestfoods* dictate that the subsidiary alone will generally be held liable, unless: (1) the parent corporation operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of a joint venture; (2) dual officers or directors depart so far from the norms of parental influence exercised through dual office-holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility; and (3) an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility.[142]

Considering the three scenarios outlined by the Court in light of the scope it placed on the term *operate*,[143] it is clear that liability attaches to a parent corporation when it begins exercising discretion over the activities of the facility. Thus, the Court said "[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…[rather t]he critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility."[144] In the case of *Bestfoods* this reasoning led the Court to suggest an inquiry on remand into the behavior of a parent's agent who dealt with the facility's toxic risk emanation.[145] In short, any time a parent corporation engages in activities at a facility beyond those that are consistent with its status as a shareholder, there exist potential grounds for direct liability. A recent U.S. District Court case is illustrative.

In *Olin Corp. v. Fissons PLC*,[146] the district court denied the defendant's motion for summary judgment because the evidence was sufficient to show that: (1) the parent corporation intended to control the subsidiary facility's operation; and (2) the manager of the facility reported to the president of the subsidiary who was hired and directly paid by the parent. The court found it a reasonable inference that the president supervised and directed the facility's manager, a finding sufficient to subject the parent corporation to liability. Therefore, just as a parent corporation may be held liable when it engages in activities at a facility that are beyond those that are consistent with its status as a shareholder, a sole or controlling shareholder who is also an officer or director should be held directly liable as such for any statutory violations committed when activities she engaged in were beyond those consistent with her status as a shareholder.

V. *BESTFOODS* APPLIED TO INDIVIDUALLY-OWNED, CLOSELY-HELD CORPORATIONS

A. Actions Evidencing Control of the Facility

As stated above, it is apparent that by inquiring into the behavior of the parent corporation, not into the relationship between the parent and its subsidiary, the analysis endorsed by the *Bestfoods* opinion neither alters corporate veil-piercing doctrine, nor breaks from traditional notions of direct liability. Therefore a similar inquiry in the context of a closely-held corporation, where the defendant may be the sole shareholder and chief officer, ought to yield a result likewise consistent with corporate law doctrine notions of direct liability. It follows then that an individual who is a sole or controlling shareholder and chief officer and/or director of a closely-held corporation ought not escape liability for his actions that incurred CERCLA liability merely because she was acting pursuant to her relationship with the company.[147]

For example, in *Carter-Jones Lumber Co. v. Dixie Distributing Co.*,[148] a post-*Bestfoods* decision, the Sixth Circuit Court of Appeals found Harry Denune, president, chief executive officer, and the only shareholder of a company that owned a waste disposal operation, liable for CERCLA damages as an arranger of disposable waste.[149] The court found him "liable in his own right due to his intimate participation in the arrangement for disposal."[150] The court went on to say that "[h]e may not hide behind his officer or employee status in Dixie to claim that because he took all actions on behalf of the company he cannot be personally liable."[151] The court correctly applied the *Bestfoods* analysis in that it was not distracted by Denune's relationship to his company and kept its focus on his direct involvement in the offending activity.

Although this decision involves arranger, rather than operator liability, it illustrates the particular nature of liability analysis put forth by the *Bestfoods* Court. And just as the application of this analysis is consistent with notions of limited liability in the parent corporation context, it is consistent with these notions in the closely-held individually-owned corporation context as well.

B. Failure to Control the Facility

Although the statement of law in *Carter* was consistent with *Bestfoods,* its application may be trickier in circumstances, unlike those in *Carter,* where the controlling shareholder merely neglects environmental compliance, rather than actively violates compliance standards. The question is whether, in these circumstances, failure to control the pollution practices of a facility will be a valid defense to a CERCLA claim. *Bestfoods* states that operator liability attaches where "they themselves *actually* participate in the wrongful conduct prohibited by the Act…[that] an operator must *manage, direct, or conduct* operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[152] The question becomes whether failure to *actively* participate in the wrongful conduct (by merely ignoring it) or failure to *manage, direct, or conduct* operations related to pollution (nobody was) excuses a corporate official from CERCLA liability. Indeed, the *Carter* court that in all other aspects properly applied the *Bestfoods* analysis, went on to say that "[t]he evidence in this case supports the district court's findings of fact, and those findings satisfy the *Bestfoods* requirement that an officer by *actively* involved in the arrangements for disposal before individual liability may be imposed."[153]

Although CERCLA is not a model of legislative draftsmanship, and many of its terms are ambiguous,[154] the clear purpose behind the statute is to provide for the cleanup of hazardous waste and to hold parties responsible for the pollution responsible for the costs of cleanup. It is unlikely, therefore, that Congress intended to provide incentives for relevant corporate actors to turn a blind eye toward environmental matters. Beyond clinging to the fallacy of a distinction between malfeasance and nonfeasance in light of a duty to act, to hold that neglect of environmental affairs relieves a 100% individual shareholder -- who is actively involved in the corporation as an officer or director -- of CERCLA liability, undermines *Bestfoods,* frustrates federal law, is inconsistent with notions of director tort liability, and is thus inconsistent with traditional notions of limited liability. On the other hand, a reading of *Bestfoods* to hold defendants wholly owning corporations liable for corporate CERCLA violations in contexts where they are active in corporate affairs as well as in control of how the facility is managed, will yield equitable results consistent with traditional doctrine.

Indeed, recent cases hint to a judicial understanding that *operate* is not be read too literally. In *Unigard Ins. Co. v. Leven,*[155] for example, an insurance claim turned on whether the defendant, owner, president, and sole-shareholder, could qualify as an operator under CERCLA. Because the defendant had sworn in an earlier affidavit that he "had no 'operations or involvement' at the [site]" the court found against him despite his later claims that he did have *control* over all decision-making, which presumably would have qualified him for operator status and given him his desired insurance claim.[156] Although the court did not need to decide what level of involvement is necessary to be deemed an operator for CERCLA purposes, it insinuated that control over decision-making, a power inherent in chief officers who are also sole-shareholders, would be sufficient.[157]

Similarly, in *Browning-Ferris v. Ter Maat*,[158] the court stated that even if the defendant "supervised the day-to-day operations of the [site]…he would be deemed the operator, jointly with his companies, of the site itself."[159] Because the defendant had allegedly negotiated waste-dumping contracts, the court held that he could be found liable pending such a trial court finding, although he may have been held potentially liable had he not negotiated the contract but left that duty unattended.

In *Carter-Jones v. Dixie Distributing Co.*,[160] the defendant was found directly liable because he could not show that any other Dixie employee had responsibility for waste disposal practices. That is, he had left that job undesignated and was accordingly, as CEO, president, and sole-shareholder, deemed to have been responsible for the liability causing practices. However, the defendant had also represented his company in the purchase and sale of the offending materials, so it cannot be said with certainty that the court did not also rely on these acts as well as his general duty to effect proper waste disposal practices in assessing liability.

Again, in *Norfolk Southern Ry. Co. v. Gee*,[161] the court found the plaintiff's allegations of defendant exercising direction over the facility's activities was "sufficient to meet the lenient dismissal standard and specific guidelines set forth in *Bestfoods*."[162] The allegations specifically stated that the defendant "had knowledge of the disposal of hazardous substances at the site and *did nothing* about it, though he had the authority to prevent or abate damages…[and that] Defendant Gee personally inspected and participated in directing and supervising the labor force of the facility."[163] Because this case involved a motion to dismiss, it again remains uncertain as to what actual behavior or lack of behavior may induce the court to attach direct liability. However, if one were to follow traditional tort liability doctrine a showing of "personal knowledge, direct supervision, or active participation"[164] would satisfy the requirement.

Although many of the post-*Bestfoods* decisions seem to at least be on the right path, none have explicitly dealt with the problem of how to determine operator liability in omission cases, i.e., where the controlling shareholder acting as a director or officer neglects compliance with environmental standards. The problem is that *Bestfoods*' characterization of operator liability relies on active language that might seem inconsistent with liability based on an omission.[165] This language could, at first impression, be cursorily applied to prevent liability from ever attaching in omission cases. Thus regardless of how egregious the corporate nonfeasance, if this overly literal reading is used, the only way to attach liability to such a controlling shareholder is indirectly through piercing the corporate veil. This, however, is one of the notions that *Bestfoods* expressly overturned.[166] A proper application of *Bestfoods* should avoid this result.

On the other hand, shareholder liability should not be based on a mere capacity or authority to control the subsidiary.[167] The *Bestfoods* court was also careful to base liability on the defendant's own acts in relation to the polluting facility rather than on the relationship between the shareholder and the polluting corporation.[168]

C. A Proposal

The concern that has not yet been adequately addressed by the courts is the potential for *Bestfoods* to be misconstrued as encouraging corporate shareholders, who are active in corporate affairs at high levels within the corporation, to turn a blind eye toward environmental matters. The activities of the individual shareholder and her relationship to the management of the facility need to be closely examined.

In contrast to an "ability to control the subsidiary" test, this Article proposes that, in the context of individually-owned closely-held corporations, where the owner is active in corporate affairs, the courts consider both the activities of the owner with respect to environmental matters, as well as whether the individual failed to act in situations where he would have reasonably been expected to act. In determining whether an individual should have been reasonably expected to address environmental affairs, the courts should consider whether the individual: (1) either knew or should have known of pollution abatement practices or lack thereof; or (2) effectively controlled how the facility was managed. Thus, if the individual shareholder, due to his or her job responsibilities within the corporation either knew or should have known that pollution abatement was not being addressed, she could be held liable based on her knowledge and failure to act vis-à-vis the offending facility. In addition, if the shareholder, due to her roles within the corporation, was responsible for how the facility was managed, but did not address environmental concerns in that management structure, the individual could also then be held liable. It would be the shareholder's failure in her activities as a manager as related to the offending facility that would determine liability, not merely her status or relationship with the subsidiary. This test would avoid providing an incentive for individuals wishing to conduct businesses involved in hazardous waste production from neglecting to properly address the issue of cleanup when operating in the corporate form, yet respect the concerns articulated by *Bestfoods* in not holding shareholders automatically liable for corporate violations based merely on their status as such. Moreover, this test is nothing more than application of traditional corporate and tort law principles to the environmental context.[169] The next Part considers this test in the case of *Donahey v. Livingstone*.[170]

1. The Facts of *Donahey v. Livingstone*[171]

Donahey v. Livingstone[172] represents an opportunity to apply the *Bestfoods* holding to the owner and operator of an individually-owned, closely-held corporation, and consequently clarify the muddling of direct and indirect liability for operators of closely-held corporations. The case centers on a dispute concerning the division of clean-up costs for an industrial site in Marysville, Michigan.[173]

On October 31, 1962, Helen Bogle acquired title to the St. Clair site and on the same day entered into a ten-year lease with the St. Clair Rubber Company.[174] The lease was renewed for a second ten-year term upon its expiration in 1972.[175] The District Court found that St. Clair's manufacturing process produced a compound that was cleaned off of the machinery with a solvent, which in turn produced a "sludge" that was drained off into 55-gallon drums.[176] The St. Clair employees typically transported between 12 to 20 drums of the sludge from the plant to the property every six months for disposal.[177] After allowing the sludge to drain for approximately one week, the employees returned to burn the sludge.[178] The practice of dumping and burning stopped sometime in the 1970s at the urging of the city of Marysville.[179]

Throughout this time period, Bogle's brother, Seabourn S. Livingstone, was 100% owner of St. Clair, chairman of the board, and treasurer.[180] Livingstone did not actively, personally participate in the waste disposal practices of St. Clair.[181] "The testimony at trial clearly indicated that Livingstone personally participated in only the financial aspects of St. Clair's operations, and that the day to day affairs, including waste disposal practices, were handled by managers and supervisors who did not need approval from Livingstone to execute their duties."[182] The court acknowledged that Livingstone had the authority and ability to control St. Clair's waste disposal practices.[183] However, rather than exercise this authority he delegated it to others.[184]

In 1981, Richard Donahey agreed to purchase the property, only after negotiating an agreement with St. Clair, in which St. Clair agreed to restore the property to an environmentally satisfactory condition.[185] St. Clair also agreed to indemnify Donahey for costs resulting from any dumping on the part of the company. However, St. Clair subsequently dissolved and ceased to exist as a corporation.[186] In 1982, Donahey purchased the property and in 1986 Donahey was informed by the Michigan Department of Natural Resources to undertake an environmental evaluation of the property.[187] The investigation revealed an extensive amount of pollution that would cost in excess of one million dollars to clean up.[188] Donahey sought contribution for the clean-up costs from Bogle, who consequently filed a crossclaim against her brother Livingstone.[189]

The district court initially found that "Seabourn Livingstone was not a responsible party as defined by CERCLA because he took no active role in St. Clair's environmental activities."[190] On appeal in 1993 the Sixth Circuit reasoned that, as a matter of law, Livingstone was a responsible party because the "evidence clearly established that Livingstone had the authority to prevent the contamination of the property by his corporation."[191] After granting certiorari, the Supreme Court vacated the judgment, and on remand in 1997 the Sixth Circuit found that Livingstone would not be subject to operator liability for the environmental harm done by the corporation unless the elements necessary to pierce the corporate veil were present.[192] However, this is the same issue on which the *Bestfoods*' court overturned the lower court's decision in *Cordova*.[193] Thus the Sixth Circuit's 1997 decision in the *Donahey* case was likewise vacated and is currently on remand, to determine the operator liability issue regarding Seabourn Livingstone.[194]

2. The Standard for Individually-Owned Closely-Held Corporations

The majority opinion in the Sixth Circuit's 1997 decision held that Livingstone would not be liable for his actions unless the corporate veil could be pierced.[195] The court based this opinion on *Cordova*,[196] in which the court held that "where a parent corporation is sought to be held liable as an operator…based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met."[197] In *Donahey*, the court reasoned that the veil-piercing standard should apply because "stockholders, like parent corporations are shielded from the liability unless requirements to pierce the veil are satisfied."[198] The court further ventured that "[g]iven the similar treatment accorded to parent corporations and stockholders with respect to vicarious liability, it is clear to us that the standard articulated in *Cordova* before operator liability can attach should be extended to stockholders of a corporation. We therefore hold that a stockholder is not liable as an operator as defined by § 107(a)(2) of CERCLA unless circumstances justify piercing the corporate veil."[199]

The error of the majority opinion lies in its failure to consider the actions of Livingstone, not only as a shareholder, but as a director and officer of the closely-held corporation.[200] The holding of the Court of Appeals is a simple tautology: a stockholder is never liable unless the circumstances justify piercing the corporate veil, and when elements suggest piercing the corporate veil, the stockholder will be held liable.

This holding further frustrates the purpose and policy behind CERCLA of making the polluter pay and does not correctly analyze the liability of those involved in the operation of closely-held corporations. The author of the dissenting opinion in *Donahey*, Judge Martin, pointed out the majority's failure to follow congressional intent and understood the implications for future polluters.

> I write again to register my continuing unhappiness that the majority has turned a blind eye to congressional intent. The en banc majority merely compounds the error of *Cordova* and pushes responsibility for environmental liability onto the wrong parties. The majority opinion not only creates new law but also offers novel opportunities for the savvy polluter. Therefore I dissent on this issue.
>
> The majority opinion relieves defendant Seabourn Livingstone of CERCLA responsibility, but the larger problem is the blueprint it provides for future environmental malfeasors. Facility owners and operators are liable for pollution under 42 U.S.C. § 9607 (a)(1) and (2), but the ruling of the en banc majority provides the savvy polluter with a way to avoid that liability. The savvy polluter can form a closely held corporation of which he holds 100 percent of the shares. He can play an active role in the company but follow a "don't ask, don't tell" policy regarding the disposal of environmental toxins. This savvy polluter, although he manages the company and owns all the shares, nonetheless will not be considered an "owner" or "operator" under the majority's reading of CERCLA. The only way to reach the savvy polluter is to pierce the corporate veil and hold him derivatively liable. Of course, the hypothetical polluter posited herein is savvy enough to realize that in some states it is easier to pierce the veil than it is in others. He therefore will incorporate where he has the greatest protection. In Michigan, for instance, the savvy polluter will be protected from veil piercing unless it can be shown that he engaged in fraud—a difficult evidentiary standard to meet. In this way, the en banc majority opinion short-circuits CERCLA.[201]

The majority's opinion will likely fail to deter future polluters, and thus frustrate the purpose of CERCLA.

The dissent classifies Livingstone as an operator,[202] and then concludes that since "he had the ability to control waste disposal, it need not be shown that Livingstone actually was involved in the disposal."[203] The dissent argues that the inquiry should focus on whether the individual "could have prevented the hazardous waste discharge at issue."[204] Judge Martin concludes that Livingstone could have prevented the pollution, and should thus be held liable.[205] Although the dissent has the right intuition as to the result, this test, in and of itself, probably does not pass muster under *Bestfoods*. Almost any member of high-level management could in some sense have prevented the pollution, and *Bestfoods* was quite clear that operator liability is not to be based on status alone.[206] The dissent, however, limits liability "specifically to sole shareholders who are active in the corporation."[207] This caveat is helpful, yet *Bestfoods* likely still requires something more than considering whether an active, 100% shareholder could have prevented the pollution.

The important question in *Donahey*, is whether Livingstone was an operator in St. Clair's waste removal process for the purposes of CERCLA liability. The *Bestfoods* Court prescribed that "the verb 'to operate'…obviously mean[s] something more than the mere mechanical activation of the pumps and valves, and must be read to contemplate 'operation' as including the exercise of discretion over the facility's activities."[208] The imposition of operator liability was further elaborated on by a recent district court opinion: "*Bestfoods* also makes clear that the imposition of operator liability does not require a finding that the parent directly participated in the day-to-day activities of the hazardous waste facility. *Bestfoods* recognizes that operator liability may be imposed when the parent controls the manner in which a subsidiary manages the facility."[209]

Yet, applying the proposal outlined in Part V.C. above, Livingstone could still be held liable as an active director or officer who: (1) either knew or should have known of the failure of the facility to dispose of hazardous waste; or (2) effectively controlled the manner in which the facility was managed.[210] Here, Livingstone was under an obligation to know about the transactions of the corporation due to his dual roles as chairman of the board and treasurer. Livingstone, under the guise of St. Clair, leased the property from his sister for a twenty-year period. As treasurer, Livingstone was in control of the corporate books and records.[211] As treasurer, he would be on notice that corporate moneys were not being directed to cleanup activities. Additionally, as chairman of the board, Livingstone would have known of the production process employed by St. Clair and of the waste generated by such production methods. Livingstone, as both chairman of the board and treasure would be required to know the regulations regarding industrial waste. That Livingstone did not actively decide to pollute should not be a defense in this case, when as treasurer and chairman of the board, he is required to stay apprised of the activities of the corporation.

Livingstone should be held liable as an operator because he was the operator of the offending facility in the true sense of the word. Livingstone in his roles as chairman and treasurer either knew or should have known of the pollution causing processes and the failure of the company to spend funds on pollution abatement. Under these circumstances, Livingstone's failure to act on pollution control matters was in affect a decision regarding operation of the facility. Thus his act of omission is the act that is culpable. To exonerate Livingstone from CERCLA liability for failure to act when he either knew or was obligated under corporate law to know of the environmental harms of the facility, together with his ability to do something about it, would frustrate both the purpose of CERCLA as well as the intent of *Bestfoods*.

VI. CONCLUSION

The *Bestfoods* decision clarified liability with respect to parent corporations for the activities of their subsidiaries in a number of ways. First, it made clear that corporate law doctrine is to be left in tact, and CERCLA liability may attach under circumstances where it would be appropriate to pierce the corporate veil. Second, *Bestfoods* also provided that parent corporations could be held liable for their subsidiaries' CERCLA violations if they actively participate in and exercise control over the offending site. Mere status as parent of the subsidiary is not enough to impose CERCLA liability on the parent corporation. In an attempt to clarify this definition, the court stated that an "operator must manage, direct or conduct operations specifically related to the pollution."[212]

Unfortunately, there are still open questions left in the aftermath of the *Bestfoods* decision. One such question concerns its applicability to individually-owned closely-held corporations. The second concern involves the meaning of the Court's test in requiring that the operator be found to have managed, directed or conducted operations specifically related to the pollution. In the case of corporations which are 100% individually owned, with an owner serving multiple roles in the corporate hierarchy, it is important to keep in mind the underlying objectives of both CERCLA and *Bestfoods*, as well as the duties imposed upon corporate actors in both tort and corporation law when interpreting this language.

Considering the above examples of how courts deal with exceptions to limited liability in the context of closely-held corporations, it is clear that persons who exercise control over the operation of a facility that incurs CERCLA liability ought to be held personally liable for their contribution, irrespective of their relationship with the company that owns the facility. Their liability ought not be based on their status in the corporation, indeed the Supreme Court in *Bestfoods* has stated as much, but also should not be dismissed based on their failure to act. Instead, liability should be premised on activities giving rise to the environmental harm, which should include failure of a corporate official to act when that individual either knows or is otherwise under a corporate or tort law duty to know that the company is generating hazardous wastes. When that corporate shareholder is a 100% owner of an offending subsidiary, as well as a director or officer, as in the case of *Donahey v. Livingstone*, it defies imagination to suggest that a "hear no evil, see no evil" defense should be successful. Instead analogies should be drawn to either the corporate law duty of care where failure to act is not a defense in breach of care cases, or to tort law where failure to act, including failure to supervise may result in liability for the ensuing harm.

Thus, the resulting inquiry should be whether the corporate actor: (1) knew or should have known of failure of the facility to dispose of hazardous waste; or (2) effectively controlled the manner in which the facility was managed. This test fulfills the requirements of *Bestfoods* in requiring a nexus between the individual's responsibilities vis-à-vis the facility and prevents promotion of a policy that would reward active shareholders for turning a blind eye toward environmental harms.

FOOTNOTES

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[1] *See, e.g.*, Russ Banham, *Hazards of the Deal*, CFO: THE MAGAZINE FOR SENIOR FINANCIAL EXECUTIVES, May 2000, at 91-92, 95; Joanne Grossman & J.T. Smith, *Winning Strategies: Beating the Odds When You're Betting the Company*, CORPORATE LEGAL TIMES, Oct. 1997, at 42; Loralie S. Masters, *Back to the Future: Coverage for Environmental Losses in the New Millennium*, THE METROPOLITAN CORPORATE COUNSEL, Mid-Atlantic ed., Apr. 2000, at 10.

[2] *See e.g.*, Beth Daley, *Judge Oks Deal for Cleanup of PCBs*, BOSTON GLOBE, Oct. 28, 2000, at B8, available at 2000 WL 3348231 (cleanup of former industrial site estimated to take anywhere from $150 – 500 million); Dick Dawson, *Cleanup of Waste Site May Close Areo Drive*, BUFFALO NEWS, June 23, 2000, at C1, available at WL 5683216 (cleanup work at a landfill to cost $35-55 million). A 1989 study by the Environmental Protection Agency indicated that the average cost for remediation work done to date was in excess of $20 million per site. 54 Fed. Reg. 33,846 (1989).

[3] Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 990499, 100 Stat. 1613.

[4] *See generally* John M. Brown, *Parent Corporation's Liability Under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries*, 31 TULSA L.J. 819, 823 (1996); Richard S. Farmer, *Parent Corporation Liability for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 IOWA J. CORP. L. 769, 781 (1994); EPA Memorandum, *Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)* (June 13, 1984).

[5] 524 U.S. 51 (1998).

[6] Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 990499, 100 Stat. 1613.

[7] *Bestfoods*, 524 U.S. at 55.

[8] *Compare* Idaho v. Bunker Hill Corporation, 635 F. Supp. 665 (D. Idaho 1986) (holding parent company liable as operator although its subsidiary owned and operated the facility), Nurad Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992) (same), Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp. 976 F.2d 1338 (9th Cir. 1992) (same); *with* United States v. Kayser Roth Corp., 910 F.2d 24 (1st Cir. 1990) (holding parent company directly liable as operator based on active involvement in the activities of the subsidiary), Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996) (same), Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993) (same); *with* United States v. Cordova Chem. Co. of Michigan, 113 F.3d 572 (6th Cir. 1997) (holding parent company liable for the activities of subsidiary only if corporate veil

could be pierced), Joslyn Mfg Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990) (same).

[9] *See, e.g.*, *Cordova Chem.*, 113 F.3d 572; *Joslyn Mfg.*, 893 F.2d 80.

[10] *See, e.g.*, United States v. TIC Inv. Corp., 68 F.3d 1082, 1091 (8th Cir. 1995); Kaiser Alum. & Chem. Corp. v. Catellus Dir. Corp., 976 F.2d 1338 (9th Cir. 1992); Nurad Inc. v. William E. Hooper & Sons, 996 F.2d 837, 884 (4th Cir. 1992) (involving potential liability of a tenant rather than of a parent corporation); Kaiser Alum. & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992) (discusses operator test, but does not concern a parent corporation).

[11] *See, e.g.*, United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); United States v. USX Corp., 68 F.3d 811, 823 (3d Cir. 1995); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993); Jacksonville Elec. Auth. v. Eppinger & Russell Co., 996 F.2d 1107 (11th Cir. 1993); FMC Corp. v. Aero Indus. Inc., 998 F.2d 842, 846 (10th Cir. 1993).

[12] *Bestfoods*, 524 U.S. at 55.

[13] *Id.*

[14] *See* Amanda L. Prebble, *Note, Corporate Law Confines to Parent Liability under CERCLA:* United States v. Bestfoods, 118 S. Ct. 1876 (1998), 67 U. CIN. L. REV. 1357 (1999); Barbara K. Bucholtz, *Sticking to Business: A Review of Business-Related Cases in the 1997-98 Supreme Court Term*, 34 TULSA L.J. 207 (1999).

[15] 524 U.S. 924.

[16] Donahey v. Bogle, 2000 U.S. App. LEXIS 16192 (6th Cir., July 7, 2000). Both the Sixth Circuit Court of Appeals and the U.S. District Court for the Eastern District of Michigan refer to the case as Donahey v. Bogle, whereas the U.S. Supreme Court calls it Donahey v. Livingstone. In deference to the Supreme Court, the case will be referred to as Donahey v. Livingstone throughout the text.

[17] *Bestfoods*, 524 U.S. at 65.

[18] Namely, attaching liability based on the actual behavior of a defendant, similar to tort liability, irrespective of the tortfeasor's relationship with the corporation. *See Bestfoods*, 524 U.S. at 65.

[19] *See* Unigard Ins. Co. v. Leven, 97 Wash. App. 417, 983 P.2d 1155 (1999); Browning-Ferris v. Richard Ter Maat, 195 F.3d 953 (7th Cir. 1999); Carter-Jones Lumber Co. v. Dixie Distributing Co., 166 F.3d 840 (6th Cir. 1999); Norfolk Southern Ry. Co. v. Gee. Co., 1999 U.S. Dist LEXIS 6581. These cases are discussed *infra* notes 148–161 and accompanying text.

[20] 129 F.3d 838.

[21] *Bestfoods*, 524 U.S. at 56.

[22] CPC recently changed its name to Bestfoods. However, following the Supreme Court's lead, the company will be referred to as CPC in this restatement of facts.

[23] *Bestfoods*, 524 U.S. at 56.

[24] *Id*. at 57.

[25] *Id.*

[26] *Id.* at 58.

[27] *Id.* at 57-58.

[28] Ott I and II were defunct, Arnold Ott (founder and president of Ott I) settled out of court, and Aerojet (a division of Cordova) and Cordova had issues not relevant to the Court's grant of certiorari. *See id.* at 58, 60.

[29] Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)), amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 990499, 100 Stat. 1613.

[30] Nurad Inc. v. William E. Hooper & Sons. Co., 966 F.2d 837, 842 (4th Cir. 1992).

[31] Pub. L. No. 96-510, 94 Stat. 2767, 2767 (1980).

[32] S. REP. 96-848, at 96 (1980); 125 CONG. REC. S7695 (1980). The 1978 "Love Canal" tragedy in Niagara Falls, New York, "involved an estimated 80,000 tons of hazardous waste improperly buried beneath an elementary school and residential subdivision. The magnitude of the contamination ultimately necessitated evacuation and declaration that the site was a Federal Disaster Area." James R. Deason, *Clear as Mud: The Function of the National Contingency Plan Consistency Requirement in a CERCLA Private Cost-Recovery Action*, 28 GA. L. REV. 555, 556 (1994) (citing S. REP. No. 96-848, at 7-10 (1980); *see also* F. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 602-03 (2d ed. 1990) (describing the extent of the Love Canal disaster); John M. Brown, *Parent Corporation's Liability Under CERCLA Section 107 for the Environmental Violations of their Subsidiaries*, 31 TULSA L.J. 819, 819 (1996).

[33] The "Valley of the Drums" of Sheppardsville, Kentucky involved "over 17,000 drums of improperly contained hazardous waste, 6,000 of which oozed toxic chemicals into the ground." Deason, *supra*, note 32, at 551, n. 1 (citing S. REP.*supra* note 32, at 4).

[34] HOUSE OF REPRESENTATIVES BILL 85, HOUSE OF REPRESENTATIVES BILL 7020, and SENATE BILL 1480.

[35] *See* Frank P. Grad, *A Legislative History to the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENV. L. 1, 1 (1982).

[36] *See id.* at 35.

[37] "Since CERCLA is a remedial statute, its provisions should be construed broadly to avoid frustrating the legislative purpose." United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992) (citing Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991)).

[38] For example, the First and Second Circuits have refused to interpret 9607(a)(1) narrowly to require current site owners to have owned the site at the time of dumping before imposing liability. *See* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); State of New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).

[39] *See Dedham Water Co.*, 805 F.2d at 1081 (1st Cir. 1986) (quoting United States v. Reilly Tar and Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

[40] *See* H.R. No. 96-1016(II), 96th Cong., 2d Sess. 17 (1980), *reprinted in*, 1980 U.S. Code Cong. & Admin. News 6119, 6119-6120. *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1,7, 105 L. Ed. 2d 1, 108 S. Ct. 2273 (1989).

[41] *See* 42 U.S.C. § 9607(a)(4)(B).

[42] Moreover, this private right of action is not limited to potentially responsible parties. *See In re* Hemingway Transp., Inc., 993 F.2d 915, 931 (1st Cir. 1993).

[43] *See* 42 U.S.C. § 9607(a).

[44] *See* GE v. AAMCO Transmissions, Inc., 962 F.2d 281, 285 (2d Cir. 1992).

[45] *See* 42 U.S.C. §9607(a).

[46] 42 U.S.C. § 9601(21).

[47] 42 U.S.C. § 9601(9).

[48] *See Bestfoods*, 524 U.S. at 56.

[49] *Bestfoods*, 524 U.S. at 56.

[50] *See, e.g.*, Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. L. REV. 259 (1990.

[51] *See* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 578 (1986).

[52] *See* SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND OR A COMMENTARY ON LITTLETON 250a (1628); W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, § 476 (1st ed. 1765); S. KYD, A TREATISE ON THE LAW OF CORPORATIONS 69-70, 103 (1793); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 642-644 (1819) (Marshall, C.J.)

[53] Philip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 Del. J. Corp. L. 283, 292, 286 (1990) ("Entity law has been a fundamental part of the Anglo-American legal system for centuries.") *Id.* at 286. *See generally*, Cindy A. Schipani, *Infiltration of Enterprise Theory into Environmental Jurisprudence*, 22 J. CORP. L. 599, 601-611 (1997).

[54] *See* JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, 15 (1970); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188-201 (1985); Blumberg, *Limited Liability*, *supra* note 51, at 587-588.

[55] *See* HURST, *supra* note 54, at 15.

[56] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

[57] *See* SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT 236, 262 (1939); Blumberg, *Limited Liability, supra* note 51, at 587-591. "By the start of the nineteenth century, direct shareholder liability was still common." *Id.* at 588-89.

[58] Blumberg, *Limited Liability, supra* note 51, at 588-89. *See also* Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1395-96 (1992); Kathryn R. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)*, 52 OHIO ST. L.J. 133, 159 (1991).

[59] The 1809 and 1822 Massachusetts statutes imposed direct liability on shareholders of manufacturing companies. *See* Blumberg, *Limited Liability, supra* note 51, at 591 nn. 111-112 (citing March 3, 1809, ch. 65, § 6, 1806-1809 Mass. Laws 464, 466; Act of Jan. 28, 1822, ch. 38, 1818-1822 Mass. Laws 619).

[60] *See* HURST, *supra* note 54, at 27.

[61] Double liability for shareholders of banks was quite long-lived. Shareholders of national banks were subject to potential double liability until as recently as 1959. *See* National Bank Act, 12 U.S.C. § 63, 64 (1863), *repealed by* Pub. L. No. 86-230, § 7, 73 Stat. 457 (1959); PHILIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW 12 (1993).

[62] *See* Blumberg, *Limited Liability, supra* note 51, at 588-589; BLUMBERG, MULTINATIONAL CHALLENGE, *supra* note 61, at 10, 12.
[63] HURST, *supra* note 54, at 27.
[64] *See*, Blumberg, *Limited Liability,* supra note 51, at 589.
[65] *See id.* at 590.
[66] *See id.* at 592-593.
[67] *See id.* at 593.
[68] *See* BLUMBERG, MULTINATIONAL CHALLENGE, *supra* note 61, at 11.
[69] *See* Blumberg, *Limited Liability*, *supra* note 51, at 592.
[70] BLUMBERG, MULTINATIONAL CHALLENGE, *supra* note 61, at 11.
[71] Blumberg, *Limited Liability, supra* note 51, at 577.
[72] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation,* 52 U. CHI. L. REV. 89, 97 (1985); Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967); STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL 1-11 to 1-12 (1991); *see generally* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 42 U. CHI. L. REV. 499 (1976).
[73] *See* Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability Democracy, and Economics,* 87 NW. U. L. REV. 148, 155 (1992).
[74] *See* RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784-1855 70 (1992); BLUMBERG, THE MULTINATIONAL CHALLENGE, *supra* note 61, at 11-12.
[75] BLUMBERG, MULTINATIONAL CHALLENGE, *supra* note 61, at 7.
[76] Louis K. Ligget Co. v. Lee, 288 U.S. 517, 555 (1933) (Brandeis, J. dissenting).
[77] New Jersey was apparently one of the first states to grant this authority. 1893 N.J. Laws, Ch. 171; 1889 N.J. Laws, ch. 265, § 4; 1888 N.J. Laws, chs. 269, 295; *see* BLUMBERG, THE MULTINATIONAL CHALLENGE, *supra* note 61, at 56-57 (listing New Jersey as the first state to allow this authority); 6A WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2833 (perm. ed. rev. 1994); *see also* JAMES C. BONBRIGHT & GARDINER C. MEANS, THE HOLDING COMPANY—ITS PUBLIC SIGNIFICANCE AND ITS REGULATION 58-65 (1932); William R. Compton, *Early History of Stock Ownership by Corporations,* 9 GEO. WASH. L. REV. 125, 127-30 (1940); Note, *Power of a Corporation to Acquire Stock of Another Corporation,* 31 COLUM. L. REV. 281, 284-85 (1931). *But see* Fred Freedland, *History of Holding Company Legislation in New York State: Some Doubts as to the "New Jersey First" Tradition*, 24 FORDHAM L. REV. 369 (1955).
[78] *See, e.g.*, BLUMBERG, MULTINATIONAL CHALLENGE, *supra* note 61, at 20; Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1880 (1991); Mark R. Patterson, *Is Unlimited Liability Really Attainable?: Of Long Arms and Short Sales,* 56 OHIO STATE L.J. 815, 898 (1995); Joseph H. Sommer, *The Subsidiary: Doctrine Without a Cause?*, 59 FORDHAM L. REV. 227, 230-31 (1990); Lynn M. Lopucki, *The Death of Liability*, 100 YALE L.J. 1, 3 (1996).
[79] *Bestfoods*, 524 U.S. 51, 61 (1998). Some commentators have gone as far as to call limited liability "the corporation's most precious characteristic…by far the most effective legal invention …made in the nineteenth century." HURST, *supra* note 54, at 9. Columbia President Nicholas Murray Butler stated: "I weigh my words when I say that

in my judgment the limited liability corporation is the greatest single discovery of modern times…Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it." *Id.*

[80] *See* ROBERT CLARK, CORPORATE LAW § 1.2.1 (1986); 1 FLETCHER, *supra* note 77, § 33, at 522. *See also* Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974.).

[81] Burnet v. Clark, 287 U.S. 410, 415 (1932).

[82] *See, e.g.*, United States v. Jon-T Chems., Inc., 768 F.2d 686, 690 (5th Cir. 1985).

[83] It should be noted however, that "[a]lthough entity law does not inevitably involve limited liability, limited liability cannot exist without acceptance of entity law." Blumberg, *Corporate Entity*, *supra* note 53, at 286.

[84] *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

[85] Berkey v. Third Ave. Ry., 244 N.Y. 84, 95, 155 N.E. 58 (1926)(Cardozo, J.), *reh'g denied*, 244 N.Y. 602, 155 N.E. 914 (1927).

[86] PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 8 (1983).

[87] Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary & Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 620 (1975). *See generally* Dana M. Muir & Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is it Curtains for Veil Piercing*? 1996 ILL. L. REV. 1059, 1080-90 (1996).

[88] *See* Hansmann & Kraakman, *supra* note 78, at 1932.

[89] Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967), *cert. denied*, 390 U.S. 988 (1968); *see also* Krivo Indus. Supply, 483 F.2d at 1102; United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905).

[90] *See* Sea-Land Services, Inc. v. Pepper Source, 941 F.2d 519, 521 (7th Cir. 1991); Labadie Coal Co. v. Black, 672 F.2d 92, 97-98 (D.C. Cir. 1982); Dudley v. Smith, 504 F.2d 979, 982 (5th Cir. 1974).

[91] *See* Carter-Jones Lumber Co. v. LTV Steel Co., 2001 Fed. App. 0025p (6th Cir., Jan. 23, 2001) (electronic citation); Van Dorn Co. v. Future Chemical and Oil Corp., 753 F.2d 565, 570 (7th Cir. 1985); United States v. Jon-T Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985).

[92] *See* Hansmann & Kraakman, *supra* note 78, at 1931 (citing R. CLARK, CORPORATE LAW § 2.4 (1986), at 71-85; David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371 (1981); Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENVER L.J. 1 (1978)).

[93] *See* Jon-T Chems., Inc., 768 F.2d at 691; McKibben v. Mohawk Oil Co., 667 P.2d 1223, 1229 (Alaska 1983); Irwin & Leighton, Inc., 532 A.2d 983, 987.

[94] *See* Hansmann & Kraakman, *supra* note 78, at 1879.

[95] *See* Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3d Cir. 1978); Wicks v. Milzoco Builders, Inc. 503 Pa. 614 (1983); Crigler v. Salac, 438 So.2d 1375 (1983).

[96] Browning-Ferris Ind. of Ill., Inc. v. Ter Maat, 195 F.3d 953, 956 (7th Cir. 1999).

[97] Veil-piercing applies only to shareholder liability, not to liability of other corporate actors such as officers and directors in their roles as such. Unfortunately, this distinction

is often missed, even by the best of us. *See* 3A FLETCHER, *supra* note 77, § 1137, at 300-301 ("it is necessary to pierce the corporate veil in order to impose personal liability upon a non-participating corporate officer"). Veil-piercing has nothing to do with non-owner liability.

[98] A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Oswald & Schipani, *supra* note 50, at 271.

[99] *See* 3A W. FLETCHER, *supra* note 77, § 1135, at 50 (Supp. 1990).

[100] See 3A FLETCHER, *supra* note 77, at § 1135.

[101] *See* George M. Cohen, *Legal Malpractice and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 305 (1997/98), citing W.VA CODE § 47B-10-5(a) (1996); TEX. REV. CIV. STAT. ANN. Art. 6132b-45 (West Supp. 1997); DEL. CODE ANN. Tit. 6, § 1546(a) (1997); CAL. CORP. CODE § 15052(a)(2) (West Supp. 1997).

[102] *See* TEX. REV. CIV. STAT. ANN. art. 6132b § 15(2) (West Supp. 1997).

[103] *See* Tedrow v. Deskin, 265 Md. 546, 550-51, 290 A.2d 799, 802-03 (1972). *See also In re* Pontier, 165 B.R. 797 (Bankr. D. Md. 1994); Fletcher v. Western Nat. Life. Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Miller v. Simon, 100 Ill. App. 2d 6, 241 N.E.2d 697 (1968); Pacific & Atlantic Shippers, Inc. v. Schier, 258 A.2d 351 (N.H. 1969); McGlynn v. Schultz, 95 N.J. Super. 412, 231 A.2d 386 (1967); Faulk v. Milton, 25 App. Div. 2d 314, 268 N.Y.S.2d 844 (1966); 3 FLETCHER, *supra* note 77, at § 1135.

[104] Model Bus. Corp. Act § 8.30 (1984).

[105] The close corporation, functionally allied as it is to a partnership, has sought to restrict the traditionally untrammeled discretion of the directors in the management of the corporation by such devices as voting trusts and stockholders' agreements. Although the courts have not been consistent in their approach to the problem, the present tendency is to recognize the identity of owner and manager in the close corporation and to sustain owner-imposed restrictions on the directors' managerial discretion. JEREMIAH SPIRES & PETER ERIC ROSDEN, DOING BUSINESS IN THE UNITED STATES (1995).

[106] *See* FLETCHER, *supra* note 77, at § 1137. *See also* David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM L. REV. 1565 (1991). For recent cases on tort liability, *see* Moellers North America, Inc. v. MSK Covertech, Inc. 912 F. Supp. 269, 272 (W.D. Mich. 1995); Lifeline Ltd. No. II v. Connecticut Gen. Life Ins., 821 F. Supp. 1201, 1213 (E.D. Mich. 1993), *modified in part by*, 821 F. Supp. 1213 (E.D. Mich. 1993); General Builders Supply v. Issaquah Real Estate, 1999 Wash App. LEXIS 1947.

[107] *See* 18B AM. JUR. 2D CORPORATIONS § 1689 citing cases from over forty states that support the duty running to both the corporation and its shareholders. *See also* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1984); Loft, Inc. v. Guth, 23 Del. Ch. 138, 2 A.2d 225 (1938), *affd* 5 A.2d 503 (Del. 1939); s*ee generally* Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care in Corporate Governance*, 75 IOWA L. REV. 1 (1989); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 Duke L.J. 879 (1988).

[108] The Revised Model Business Corporation Act (RMBCA) under § 8.30 provides a fairly typical example of the standard of care required.

[109] *See, e.g., In re* Caremark Int'l Inc., 698 A.2d 959 (Del. Ch. 1996); Francis v. United Jersey Bank, 87 N.J. 15, 20 (1981).

[110] *See, e.g.,* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Bradley & Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance, supra* note 107, at 19.

[111] For example, *see* M.C.L.A. § 450.1541(a). The standard of care required under Michigan law is representative of the standard required in most states.

[112] *See* Donahue v. Todd Electrotype Co., 328 N.E.2d 505 (Mass. 1975).

[113] Thisted v. Tower Management Corp., 409 P.2d 813 (Mont. 1966).

[114] The owner and director has an affirmative duty to know the business of his corporation. *See* Francis v. United Jersey Bank, 87 N.J. 15, 20 (1981).

[115] *See* People v. Toomey, 157 Cal. App. 3d. 1.

[116] *See* In re Caremark Int'l Inc. 698 A.2d 959, 967 (1996); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1984).

[117] However, the business judgment rule is only available to a director or officer who has made a "reasonable investigation of the corporation's business and affairs." Robert Thompson, *Liability of Professionals*, 28 TORT & INS. L.J. 376, 386 (1993).

[118] *See Caremark*, 698 A.2d at 967 (noting that the business judgment rule is process oriented and does not ask the courts to inquire into the actual content of the decision reached).

[119] *Id.* The general rule is that corporate directors have an obligation to oversee how the corporation's business is being conducted and to remain reasonably informed of information funneled through the organization. Melvin Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 951-52 (1990). Thus it has been said that corporate directors have a duty to monitor that requires "installing or reviewing the adequacy of procedures or techniques by which salient information concerning the conduct of a corporation's business will flow to the board." *Id.* at 952.

In a 1981 New Jersey Supreme Court case, the court opined that "a director should acquire at least a rudimentary understanding of the business of the corporation." Francis v. United Jersey Bank, 87 N.J. 15, 20 (1981). The court went on to say "[b]ecause directors are bound to exercise ordinary care, they cannot set up as a defense lack of the knowledge needed to exercise the requisite degree of care." *Id.* at 21. The court cited other cases where liability had been imposed on directors despite their claim of ignorance or nonfeasance, and concluded that "[d]irectors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect." *Id.* at 31, citing Atherton v. Anderson, 99 F.2d 883, 889-90 (6th Cir. 1938) (ignorance no defense to director liability because of director's duty "to know the facts"); Williams v. McKay, 46 N.J. Eq. 25, 36 (Ch. 1889) (director under duty to supervise managers and practices to determine whether business methods were safe and proper). The *Jersey Bank* decision has been relied on in recent New Jersey cases, as well as in at least one other jurisdiction. *See* Brenner v. Berkowitz, 134 N.J. 488, 510 (1993) (*Jersey Bank* cited in support of estoppel to bar relief when a shareholder or director had or should have had knowledge of alleged misconduct but failed to act); Hake v. Manchester Twp., 98 N.J. 302, 311 (1985) (citing *Jersey Bank* in support of actionable causation of loss by failure to act); Resolution Trust Corp. v. Gregor, 872 F.

Supp. 1140, 1151 (E.D.N.Y. 1994) (*Jersey Bank* cited in support of higher standard of care (lower omission liability threshold) for directors of savings and loans). In addition, in an early patent case, the court explained that where an officer of a closely held corporation directs actions that infringe on a patent, he may be held directly liable for damages, irrespective of his knowledge of the patent. Dean Rubber Mfg. v. Killion, 106 F.2d 316, 320 (8th Cir. 1939). S*ee also* Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902 (1st Cir. 1980) (Specific direction of, sanction of, or active participation or cooperation in, a positively wrongful act of commission or *omission* which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation.).

[120] The business judgment rule cannot be relied on by directors that failed to inform themselves in any way before reaching a decision. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 108, at § 4.01 (c). The business judgment rule creates a presumption that the board's decision was informed, and can even be used to protect decisions that were clearly the wrong decision as long as the board went through the process of informing itself and deliberating with due care. "The business judgment rule does not shield unadvised judgments. This duty to become informed is, of course, an aspect of the duty of care." CLARK, *supra* note 80, at 129; *see also* CARY & EISENBERG *supra* note 108, at 375. The difficulty in establishing an omission type of breach of the duty of care on the part of a corporate director is that the board is only legally required to authorize significant corporate decisions such as mergers, changes in the capital structure, etc. *See Caremark*, 698 A.2d at 968. Furthermore, in Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963), the Delaware Supreme Court held that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists." In *Allis-Chalmers* there was no evidence that the directors knew of the behavior of subordinate employees that led to the anti-trust violations. Although the *Allis-Chalmers* decision may appear to encourage directors or officers to apply a 'don't ask don't tell' type of policy, the recent *Caremark* decision suggests that in today's corporate environment, the duties may be greater than as articulated by *Allis-Chalmers*. In 1996 Chancellor Allen held that:

> a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.

Caremark, 698 A.2d 959. Thus the duty of care often takes the form of installing corporate procedures or reporting policies to detect illegal activities. This is particularly the case in large corporations. Neither directors nor officers in a large corporation can be expected to have full knowledge of all the businesses operations. *See Allis-Chalmers,* 188 A.2d 125. However, the board can be expected to install a "system of watchfulness" that might bring many of these instances to their knowledge. *See id.*

[121] Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926); United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905).

[122] *See* Northern Securities Co. v. United States, 193 U.S. 197, 349 (1904); Seabury v. Green, 294 U.S. 165 (1935). *See also* First Nat'l City Bank v. Banco Para El Comercio, 462 U.S. 611, 630 (1983) ("[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies."); Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 713 (1974) ("Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy.").

[123] Seizure of a sister bank's assets was deemed to not be a taking where the assets were seized as compensation for losses sustained by another bank owned by the same bank holding company pursuant to the Financial Institutions Reform, Recovery and Enforcement Act's cross-guarantee provision. Branch v. United States, 69 F.3d 1571, 1573 (Federal Cir. Appeals Court, 1995).

[124] 29 U.S.C. §§ 1301-1461. In imposing liability on employers upon withdrawing from multi-employer pension plans or upon the termination of pension plans, Congress provided that liability would extend not only to the particular employer that belonged to the pension plan, but also to any related entities under "common control." *See* 29 U.S.C. §§ 1301(b), 1362, 1364, 1381 (1989); Pension Benefit Guar. Corp. v. Ouimet, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

[125] 47 U.S.C. § 307 (1994); Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974).

[126] KansOk Partnership, 73 FERC ¶ 61,160 (1995).

[127] 42 U.S.C. §§ 9601-9675 (1994).

[128] *Bestfoods*, 524 U.S. at, 54-55.

[129] This confusion is parallel to the muddling of direct tort and indirect veil piercing liability. A parent corporation's relationship with is subsidiary is the proper inquiry of veil-piercing analysis because the question is whether there are really two separate entities; while, a parent corporation's relationship with a CERCLA-offending facility is the proper inquiry of tort analysis, because the question is "who done it?".

[130] *See, e.g.,* United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993).

[131] *Bestfoods*, 524 U.S. at 67-68.

[132] *Id.* at 58.

[133] Liability also attaches to persons who arrange or accept hazardous materials for transport, treatment, disposal, or storage. *See* 42 U.S.C. § 9607(a)(1)-(4).

[134] CPC Int'l, Inc. v. Aerojet, 777 F. Supp. 549 (1991).

[135] *See Bestfoods*, 524 U.S. at 55.

[136] *See id. at 62.*

[137] *Id.* at 59 (emphasis added).

[138] "CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act." *Id.* at 65, citing Riverside Market Dev. Corp. v. International Bldg. Prods., Inc. 931 F.2d 237, 330 (5th Cir. 1991). *See also* Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA*, 72 WASH. U. L.Q. 223 (1994).

[139] *Bestfoods*, 524 U.S. at 57 (internal quotations omitted).

[140] The court did not address the issue of whether state or federal corporate law is controlling. *Bestfoods*, 524 U.S. at 64 n.9.

[141] This notion is what Judge Posner was illustrating with the train example: committing a tort while commanding the corporate train is no defense to direct liability. *See supra* note 96 and accompanying text.

[142] *Bestfoods*, 524 U.S. at 62.

[143] "In our enquiry into the meaning Congress presumably had in mind when it used the verb 'to operate,' we recognized that the statute obviously 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." *Id.*

[144] *Id.*

[145] *Id.*

[146] 1998 U.S. Dist. LEXIS 21967 (Mass. District Court). The case was ultimately dismissed on grounds of *forum non conveniens*.

[147] Several cases formulated different tests for the definition of "owner" and "operator" as presented in CERCLA. The courts have looked to analogous statutes in order to give substance to the CERCLA definition. *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986).

[148] 166 F.3d 840 (6th Cir. 1999).

[149] *Id*. at 843.

[150] *Id.* at 846.

[151] *Carter*, 166 F.3d at 846.

[152] *Bestfoods*, 524 U.S. at 59 (emphasis added).

[153] *Carter*, 166 F.3d at 846-47 (emphasis added).

[154] Courts have roundly criticized the statute as vague, contradictory, and lacking a useful legislative history. *See, e.g.*, HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 327 (D. Md. 1993); Rhodes v. County of Darlington, 833 F. Supp. 1163, 1172 (D.S.C. 1992); In re Acushnet River & New Bedford Harbor, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 677 (5th Cir. 1989).

[155] 97 Wash. App. 417 (1999).

[156] *Id.* at 430.

[157] *Id.* at 431.

[158] 195 F.3d 953 (7th Cir. 1999).

[159] *Id.* at 956.

[160] 166 F.3d 840 (6th Cir. 1999).

[161] 1999 U.S. Dist. LEXIS 6581 (N.D. Ill. 1999).

[162] *Id.* at 13.

[163] *Id.* at 12-13.

[164] Kelley *ex rel.* Michigan Natural Resources Comm'n. v. Arco Ind., 723 F. Supp. 1214, 1220 (W.D. Mich. 1989) (emphasis added). *See also* Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVT'L. AFF. L. REV. 579 (1993).

[165] *See Bestfoods*, 524 U.S. at 65-67.

[166] See United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 580 (6th Cir. 1997), vacated by *Bestfoods*, 118 S. Ct. 1876 (1998).

[167] For a description of the problems with the capacity to control test *see* Oswald, *supra* note 161, at 265.

[168] *Bestfoods*, 524 U.S. at 67-68.

[169] *See supra* notes 99-104 and 108-120 and accompanying text.

[170] 129 F.3d 838 (6th Cir. 1997), *vacated and remanded*, 524 U.S. 924 (1998); *vacated and remanded* 2000 U.S. App. LEXIS 16192 (6th Cir., July 7, 2000).

[171] *Id.*

[172] *Compare* Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993) (holding 100% owner a potentially responsible party as a matter of law because he had the authority to prevent the contamination of the property) *with* Donahey v. Bogle, 129 F.3d 838 (6th Cir. 1997) (holding 100% owner of a corporation liable only if the elements necessary to pierce the corporate veil are present).

[173] *Donahey*, 129 F.3d at 840.

[174] *Id.* at 840.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id*. at 841.

[186] *Id*. at 841 n.1.

[187] *Id*. at 841.

[188] *Id*. at 840 n.3.

[189] *Id*. at 841.

[190] *Id.* at 842. *See* Donahey v. Bogle, 1992 U.S. Dist. LEXIS 8106 (E.D. Mich. Apr. 6, 1992).

[191] *Donahey*, 129 F.3d at 842 (citing its 1993 decision in Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993)). The court admits that its 1993 decision, even though referring to Livingstone's liability as an owner, is actually premised on his status as an operator. *See Donahey,* 129 F.3d at 842 n.5. Further, the 1993 decision appears to be using a capacity or authority to control test rather than an actual control test.

[192] *Donahey*, 129 F.3d at 840.

[193] *See Bestfoods*, at 65.

[194] *See* Donahey v. Bogle, 2000 U.S. App. LEXIS 16192 (6th Cir. July 7, 2000) (remanding the case for further consideration of the issue of Livingstone's liability in light of the *Bestfoods* opinion).

[195] *Donahey*, 129 F.3d at 840.

[196] *Cordova*, 113 F.3d at 580.

[197] *Donahey*, 129 F.3d at 843.
[198] *Id*. at 843.
[199] *Id*.
[200] "Personal liability for the torts of officers does not depend on the same grounds as 'piercing the corporate veil'…Personal liability attaches, regardless of whether the breach was accomplished through malfeasance, misfeasance or nonfeasance." 3A FLETCHER, *supra* note 77, at § 1135.
[201] *Donahey*, 129 F.3d at 844–45.
[202] *Id.* at 845.
[203] *Id*.
[204] *Id*.
[205] *Id*. at 846.
[206] *Bestfoods*, 524 U.S. at 87.
[207] *Id*. at 845.
[208] *Bestfoods*, 524 U.S. at 71.
[209] United States v. Kayser-Roth Corp., 2000 WL 798085, *6* (D.R.I. 2000).
[210] *See* Levin Metal Corp. v. Parr-Richmond Terminal Co. 781 F. Supp. 1454, 1456-57 (N.D. Cal. 1991).
[211] *See* City of North Miami v. Berger, 828 F. Supp. 401 (E.D. Va. 1993).
[212] *Bestfoods*, 524 U.S. at 66.