Consistency in Judicial Interpretation? A Look at Cercla Parent Company and Shareholder Liability After United States v. Bestfoods

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CONSISTENCY IN JUDICIAL INTERPRETATION?
A LOOK AT CERCLA PARENT COMPANY AND
SHAREHOLDER LIABILITY AFTER
UNITED STATES V. BESTFOODS

Jennifer S. Martin†

TABLE OF CONTENTS

INTRODUCTION .................................................. 410

I. TRADITIONAL PIERCING DOCTRINE ......................... 417
   A. Established Theories .................................. 417
   B. Examples of Specific Piercing Tests ................. 422
      1. California Piercing Doctrine
      2. Delaware Piercing Doctrine
      3. Florida Piercing Doctrine
      4. New York Piercing Doctrine
      5. Federal Common Law
   C. Choice of Law Issues ................................. 429

II. CERCLA OWNER/OPERATOR LIABILITY ..................... 432

III. UNITED STATES V. BESTFOODS ........................... 437
    A. District Court Analysis ............................. 438
    B. Sixth Circuit Court of Appeals .................... 441
    C. United States Supreme Court ...................... 445

IV. INTERPRETATIONS BY FEDERAL COURTS .................... 449
    A. Federal or State Piercing Law? .................... 450
       1. Sixth Circuit and District Courts
       2. Seventh Circuit and District Courts

† Assistant Professor, Salmon P. Chase College of Law, Northern Kentucky University. J.D., Vanderbilt University School of Law. The author wishes to thank her research assistant, Ms. Sarah Netzger, for her valuable work on this project, Professors Edward Brewer, David Short, and Emily Ho, and Mr. Eugene Siler for their comments on an earlier draft of this Article. This research was presented at the Young Scholar’s Workshop at the annual SEAALS conference. The author also thanks the SEAALS participants and particularly Kent Syverud, Dean, Vanderbilt University School of Law, for their insightful comments on this work.
INTRODUCTION

Nearly one-third of all Americans live near abandoned hazardous waste sites, many of which are located near residential areas.\(^1\) Approximately eleven million Americans live near “Superfund” sites, which are the most highly contaminated locations.\(^2\) The U.S. Congress reacted to the severe problem posed by environmental damages\(^3\) by enacting the

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2. See id.
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)\(^4\) in 1980.\(^5\) CERCLA provides for the prevention of hazardous waste releases and the cleanup of contaminated sites and addresses liability issues related to hazardous waste sites.\(^6\)

CERCLA’s primary provisions are cleanup and liability.\(^7\) A lesser “removal” action under CERCLA costs as much as two million dollars, and remedial actions average over thirty million dollars per site.\(^8\) Because CERCLA adheres to the concept that the “polluter pays,” it allows the Environmental Protection Agency (EPA) to pursue potentially responsible parties (PRPs) for contribution related to the massive cleanup expense of the hazardous sites.\(^9\) Liability under CERCLA is strict, joint and several, so a PRP’s care in connection with the contaminating substances is irrelevant.\(^10\) A PRP may avoid liability for hazardous materials contamination if the contamination resulted from one of the following defenses: “(1) an act of God, (2) an act of war, (3) an act or omission of a third party, or (4) any combination of the foregoing . . . .”\(^11\)

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6. See Evans, supra note 3; McCrory, supra note 1, at 6.
8. See Evans, supra note 3. A removal action is a short term response to ameliorate an emergency environmental hazard in less than one year. See McCrory, supra note 1. Remedial actions are much more extensive and often take several years and millions of dollars per site. See id. Remedial actions also include an investigation and feasibility study associated with the contaminated site to properly assess the necessary steps. See id.
10. See McCrory, supra note 1, at 10-11; Taylor, supra note 3.
11. McCrory, supra note 1, at 15 (quoting 42 U.S.C. § 9607(b) (1994)).
Unfortunately, CERCLA’s statutory scheme has been difficult to interpret and enforce with respect to identifying PRPs related to the contamination. The statutory scheme allows the EPA and private parties that perform remedial cleanup actions to pursue “owners” or “operators” of hazardous waste sites for cost recovery and contribution associated with cleanup costs. Both the EPA and the PRPs, however, have had difficulty identifying who is liable, and litigation over liability has extended over a number of years.

Both identification and imposition of CERCLA liability on some PRPs have been contentious with respect to shareholders and parent corporations of known PRPs. The corporate law

12. See McCrory, supra note 1.
15. See Gary Allen, Refining the Scope of CERCLA’s Corporate Veil-Piercing Remedy, 8 STAN. ENVTL. L.J. 43, 44 (1989-90); Ronald G. Aronovsky & Lynn D. Fuller, Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA, 24 U.S.F. L. REV. 421, 423 (1990); Dean C. Miller & Nancy A. Mangone, Parent Corporation Liability Under CERCLA After United States v. Bestfoods, Colo. L. Rev., Mar. 28, 1990, at 85; Note, Liability of Parent Corporations for Hazardous Waste Cleanup and Damages, 99 Harv. L. Rev. 986, 987 (1986); Eric Yeo, Comment, United States v. Bestfoods: Narrowing Parent Corporation Liability Under CERCLA for the Twenty-First Century, 51 Admin. L. Rev. 1267, 1274 (1999). See generally United States v. Bestfoods, 524 U.S. 51 (1998); Browning-Ferris Indus. v. Trbovich, 101 F.3d 953 (7th Cir. 1999); United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 580 (6th Cir. 1997) (holding that a parent may be held liable for controlling affairs of a subsidiary only when the corporate veil can be pierced); Josslyn Mfg. Co. v. T.L. James & Co., 803 F.2d 80, 82-83 (5th Cir. 1986) (holding that a parent may be held liable for controlling the affairs of its subsidiary only when the corporate veil can be pierced). But cf. Schiavone v. Pearce, 70 F.3d 248, 253-255 (2d Cir. 1999) (holding that a parent that is actively involved in its subsidiary’s affairs may be held liable as an operator of the facility, even if the corporate veil cannot be pierced); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1220-25 (3d Cir. 1993) (holding that a parent that is actively involved in its subsidiary’s affairs may be held liable as an operator of the facility even if the corporate veil cannot be pierced); Jacksonville Elec. Auth. v. Bernuth Corp., 906 F.2d 1107, 1110 (11th Cir. 1990) (holding that a parent that is actively involved in its subsidiary’s affairs may be held liable as an operator even if the corporate veil cannot be pierced); Nurad, Inc. v. William E. Hooper & Sons Co., 968 F.2d 837, 841-42 (4th Cir. 1992) (holding that parent that has the authority to control its subsidiary is liable as an operator, even if it did not exercise that authority); Riverside Mkt. Dev. Corp. v. Int’l Bldg. Prods., Inc., 931 F.2d 327, 339 (9th Cir. 1991) (holding that a parent company that actually participates in the subsidiary’s wrongful conduct cannot hide behind the corporate veil and be held directly liable without veil-piercing); United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (holding that a parent actively involved in the affairs of its subsidiary may be held
principle of "limited liability" ordinarily shields shareholders, including corporate parents, from liability for the corporation's debts, including debts arising from tortious conduct.\(^\text{16}\) Certain situations, however, allow the corporate veil to be pierced and liability imposed on the individual shareholder or parent corporation.\(^\text{17}\) Courts have grappled continuously with the issue of whether the corporate veil should be pierced to impose CERCLA liability on a shareholder or parent corporation and whether

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\(^{17}\) See infra Part I; see, e.g., Anderson v. Abbott, 321 U.S. 349, 362 (1944) (finding that "there are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied"); Chicago, Milwaukee & St. Paul Ry. v. Minn. Civic and Commerce Ass'n, 247 U.S. 490, 501 (1918) (noting that principles of corporate separateness "have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose... of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company"); Papa v. Katy Indus., Inc., 166 F.3d 937 (7th Cir. 1999); Aioi Seiki, Inc. v. JIT Automation, Inc., 11 F. Supp. 2d 850 (E.D. Mich. 1998) (dismissing a complaint without prejudice and recognizing possibility of piercing the corporate veil); Phillip I. Blumberg, *The Law of Corporate Groups*, §§ 8.01-08 (1987 & Supp. 2000) (discussing the law of veil piercing in the parent/subsidiary context).
CERCLA provides other means by which to impose liability on the shareholder or corporate parent.\textsuperscript{18}

In \textit{United States v. Bestfoods},\textsuperscript{19} the U.S. Supreme Court examined the extent to which a parent corporation could be liable under CERCLA as an "owner" or "operator" for the environmental damage its subsidiary corporation had caused.\textsuperscript{20} The EPA brought an action under CERCLA against CPC International Inc., the parent corporation of a defunct chemical manufacturer subsidiary, Ott Chemical Co. (Ott), for the costs of cleaning up industrial waste generated by Ott's chemical plant.\textsuperscript{21} Justice Souter's majority opinion held that: (1) a corporate parent could be liable only as an "owner" for CERCLA purposes when the corporate veil may be pierced; and (2) a corporate parent would not be liable as an "operator" for CERCLA purposes under piercing doctrines; rather liability would attach only if the corporate parent actively participated in, and exercised control over, the operations of the facility itself.\textsuperscript{22} Further, if the corporate parent participates directly in the subsidiary's operation but not in the operation of the facility, no liability will attach.\textsuperscript{23} Although Souter's opinion is thorough and well reasoned, it left open whether state or federal law would apply to piercing the corporate veil under CERCLA and how to identify those shareholders and corporate parents that satisfy the general guidance given in the opinion with respect to establishing CERCLA liability for operators.\textsuperscript{24}

The Second, Sixth, and Seventh Circuits have applied \textit{Bestfoods} to the choice of law and piercing issues.\textsuperscript{25} Unfortunately, no uniform direction has emerged in the federal courts as to whether state or federal common law on piercing applies in CERCLA cases.\textsuperscript{26} Further, in most cases the judges

\begin{itemize}
  \item \textsuperscript{18} See sources cited supra note 15.
  \item \textsuperscript{19} 624 U.S. 51 (1998).
  \item \textsuperscript{20} See id.
  \item \textsuperscript{21} See id. at 51-61.
  \item \textsuperscript{22} See id. at 55.
  \item \textsuperscript{23} See id. at 65.
  \item \textsuperscript{24} See id. at 63 n.9; see also Lucia Ann Silecchia, \textit{Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform}, \textit{61} \textit{FORDHAM L. REV.} 115, 174 (1998).
  \item \textsuperscript{25} See, e.g., Browning-Ferris Indus. v. Ter Maat, 195 F.3d 953 (7th Cir. 1999).
  \item \textsuperscript{26} See id. at 959; see also North Shore Gas Co. v. Salomon, Inc., 182 F.3d 642, 651 (7th
usually defer the issue for resolution at a later date in the same manner that Justice Souter did in *Bestfoods*; 27 Although several courts indicate that federal common law on piercing is appropriate, 28 only those courts proceeding under state law provide a full analysis of the standard. 29 Among courts proceeding under state law, however, standards are varied because individual judges' attitudes about piercing are far from uniform. 30 Regarding imposition of operator liability for CERCLA cleanups on shareholders and parent corporations, appellate and district courts in the Second, Sixth, Seventh, and Eleventh Circuits have applied *Bestfoods.* 31 The judges used Souter's language in *Bestfoods* to guide them. In order for a shareholder or parent corporation to be considered an "operator" under CERCLA, the judges generally required that the defendant actually direct the workings and manage the affairs related to the hazardous materials at the contaminated facility, not merely activities of the corporation in general. 32 However, courts have not developed a clear standard to determine which activities constitute ordinary shareholder supervision of a subsidiary

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27. See e.g., *Browning-Ferris Indus.*, 195 F.3d at 959.
28. See Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1038 (7th Cir. 2000) (arising under ERISA but stating that federal common law would apply in CERCLA cases); *In re Nextwave Personal Comm., Inc.*, 200 F.3d 43, 57 n.14 (2d Cir. 1999) (indicating that some type of federal common law would apply in CERCLA cases); *North Shore Gas Co.*, 152 F.3d 642 (applying federal common law because the parties failed to raise the issue).
30. Compare, e.g., *Browning-Ferris Indus.*, 195 F.3d 953 (applying strict standards to piercing the corporate veil and favoring protection of shareholders from liability), with *AT&T Global Info. Solutions Co.*, 29 F. Supp. 2d 857 (going to great lengths to find piercing based upon "justice").
31. See infra Part IV.
consistent with investor status and which particular activities trigger CERCLA liability.\footnote{See cases cited supra note 29.}

This Article will explore recent case law redefining corporate liability for environmental damage under CERCLA based on the theory of piercing the corporate veil. It will also analyze whether courts are consistently applying the principles laid out by Justice Souter in \textit{Bestfoods}. Part I describes the development of the theory behind piercing the corporate veil, summarizes the various factors used to evaluate parent-subsidiary relationships, and addresses whether piercing is proper in an individual case to impose liability on the parent for the subsidiary's acts. Specifically, Part I establishes that there is clear and universal corporate precedent that generally bars liability for shareholders and corporate parents beyond their investment. Part II outlines the scope of "owner" and "operator" liability under CERCLA. Part III examines Justice Souter's opinion in \textit{Bestfoods}, describes the tests set forth in \textit{Bestfoods}, and addresses issues that were not decided by the Supreme Court. Part IV emphasizes the use of the piercing doctrine in CERCLA cases post-\textit{Bestfoods}.

Finally, Part V offers a critical evaluation of the courts' application of the piercing doctrines and imposition of operator liability. Most courts, with little comment or rationale, have applied state law on piercing doctrine, despite Justice Souter's clear statement that this is an undecided issue. Further, some courts appear to self-select certain factors of state piercing law instead of applying the principles in their entirety. This inconsistent approach suggests that a federal common law standard would be more appropriate to delineate a clear standard for imposing derivative liability on shareholders and parent corporations under CERCLA. Although the courts have not yet provided a clear standard with respect to shareholder activities that will trigger operator liability, they seem to be looking at similar facts, which hopefully will lead to a consistent application by future courts. If the courts do not establish clear guidelines and standards that encourage PRPs to accept liability at an earlier date, there will continue to be excessive litigation over CERCLA liability.
I. TRADITIONAL PIERCING DOCTRINE

A. Established Theories

Chief Justice Marshall observed that:

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. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand.34

It is a well-established premise of corporate law that the shareholders of a properly formed corporate entity enjoy limited liability.35 Shareholders are not liable to the corporation or its creditors beyond payment of consideration for the shares.36 A shareholder’s liability, and hence potential loss, is limited only to the investment in the corporation.37 The mere fact that a

37. See Easterbrook & Fischel, supra note 35, at 40; Henn & Alexander, supra note 35, § 202, at 547-48; see, e.g., Tri-State Steel Constr. Co. v. Herman, 164 F.3d 873, 879 (6th Cir. 1889) (stating that “exercise of control that results from a parent corporation’s ownership of stock in a subsidiary corporation does not create liability beyond the
corporation is organized to avoid personal liability does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form.38 This protection from liability is distinguishable from the situation of corporate officers, who have no protection under the corporate shield and are liable for the torts they actually commit in the course of their employment with the corporation, even though the corporation might also be liable under the doctrine of respondeat superior.39 Limited liability is justified from an economic, theoretical perspective as a means to: (1) allow corporations to operate their businesses efficiently without the continual micromanagement by each and every shareholder who would have to monitor the daily activities of a corporation to protect

subsidiary even where is duplication of some or all of the directors or executive officers”).


39. See RESTATEMENT (SECOND) OF AGENCY § 343 (1957) (“An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.”); A. CONRAD ET AL., ENTERPRISE ORGANIZATION § 145 (4th ed. 1987) (“The law of agency, which makes employers liable, does not repeal the law of torts, which makes negligent individuals liable.”); HENN & ALEXANDER, supra note 35, § 230, at 607-08; WILLIAM E. KNEPPER & DAN A. BAILEY, 1 LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 10-4 (6th ed. 1988 & Supp. 1990); see also Escude Cruz v. Ortho. Pharm. Corp., 619 F.2d 902, 907 (1st Cir. 1980) (“The general rule . . . is that an officer of a corporation ‘is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority.’” (quoting Lahr v. Adell Chem. Co., 300 F.2d 256, 280 (1st Cir. 1962))); Donoso, Inc. v. Casper Corp., 587 F.2d 602, 608 (3d Cir. 1978) (“The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility.”); Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1144 (4th Cir. 1975) (“If a director does not personally participate in the corporation's tort, general corporation law does not subject him to liability simply by virtue of his office.” (citing Fletcher v. Harre de Grace Fireworks Co., 177 A.2d 908 (Md. 1962))); Armour & Co. v. Celic, 294 F.2d 432, 439 (2d Cir. 1961) (“The ordinary doctrine is that a director, merely by reason of his office, is not personally liable for the torts of his corporation; he must be shown to have personally voted for or otherwise participated in them.”); Lobato v. Paxess Drug Stores, Inc., 261 F.2d 408, 409 (10th Cir. 1958) (“Merely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation.”). See generally Escude Cruz, 619 F.2d at 907 (“What is required is some showing of direct personal involvement by the corporate officer in some decision or action which is causally related to [the harm].”); Bryan Moore, Note, The Corporate Officer as CERCLA Operator: Applying the Holding in United States v. Bestfoods to the Determination of Officer Liability, 12 Tul. Envtl. L.J. 519 (1989) (providing a general analysis on holding corporate officers liable under CERCLA).
against risk of financial loss if limited liability were not the rule; 
(2) reduce costs of monitoring the wealth of other shareholders 
that would exist if an individual shareholder feared his wealth 
was exposed and wanted to ensure that others could share any 
potential loss; (3) provide incentives to management to operate 
the corporation efficiently or face the sale of shares to new 
shareholders who will install new management; (4) make shares 
easily marketable without the need to perform the same type of 
investigation that would be necessary if a shareholder's whole 
personal wealth would be at risk if shares are purchased; 
(5) allow investors to diversify holdings without increasing risk 
of liability; and (6) allow management to make optimal 
investment decisions in projects with high potential return, 
without exposing investors to the risk of financial ruin.40

It is equally well-established, however, that the corporate veil 
that protects the shareholder or parent corporation from 
extended liability may be pierced when the shareholder misuses 
the corporate form, as in the case of fraud on the shareholder's 
behalf, for instance.41 The general rule with respect to piercing 
is that if "corporate formalities are substantially observed, initial 
financing reasonably adequate, and the corporation not formed 
to evade an existing obligation or a statute or to cheat or to 
defraud, even a controlling shareholder enjoys limited 
liability."42 The test employed and factors considered in terms 
of piercing the corporate veil vary from state to state.43 The three 
overlapping general theories used to pierce the corporate veil 
are the "instrumentality" doctrine, the "alter ego" doctrine, and 
the "identity" doctrine.44 It is more likely, though, that the 
corporate veil will be pierced in a closely held corporation than 
in larger publicly held corporations.45

40. See Easterbrook & Fischel, supra note 35, at 41-44.
41. See, e.g., cases cited supra note 17; Blumberg, supra note 17, §§ 6.01-06 
(discussing the law of veil piercing in the parent-subsidiary context); James D. Cox et 
Al., Corporations §§ 111-12 (1997); Easterbrook & Fischel, supra note 35, at 54-55; 
42. Henn & Alexander, supra note 35, § 146, at 347.
43. See Fletcher et al., supra note 16, § 41.30.
44. See Cox et al., supra note 41, § 7.3, at 112.
45. See Easterbrook & Fischel, supra note 35, at 55-56. Easterbrook and Fischel 
argue that this result makes sense when one considers that the rationales supporting 
limited corporate liability are less compelling when the shareholder is also the manager 
involved in decision-making and that there generally is not an available market for the
The most common factors of the instrumentality doctrine include control by complete domination and "fraud, illegality, contravention of contract, public wrong, inequity, and whether the corporation was formed to defeat public convenience."^[46] Similarly, the "alter ego" doctrine disregards the corporate veil when the "corporation is the mere instrumentality or business conduit of another corporation or person . . . ."^[47] Essentially, those who act in the name of the corporation are liable when observing the corporate form would work an "injustice."^[48] This theory stems from the belief that shareholders who themselves do not respect the corporate form should not receive its protection.^[49] Again, the rules and standards the courts apply under the "alter ego" theory vary from state to state.^[50] Generally, though, courts will review the entire relationship with the corporation, considering whether: (1) "the shareholder owns all or most of the stock"; (2) there is inadequate capitalization; (3) the shareholder treats the corporation's assets as if they were his own; (4) the directors and officers act independently or at the behest of the shareholder; and (5) the corporation observes corporate formalities.^[51] Finally, the "identity" theory looks to a "unity of interest and ownership" to establish that the corporation never acted as an independent entity, and therefore, observing the corporate form would defeat justice by permitting corporate limited liability for an entity that used the corporation, not for its independent benefit, but rather for the benefit of the whole enterprise.^[52] In practice, these theories are somewhat indistinguishable from one another, resulting in the same outcomes under varying theories.^[53]

A second category of cases in which courts often pierce the corporate veil involves parent and subsidiary corporations.^[54]

shares. See id.

46. Fletcher et al., supra note 16, § 41.30 (citations omitted); see Cox et al., supra note 41, § 7.3, at 112.
47. Cox et al., supra note 41, § 7.3, at 112.
48. See Fletcher et al., supra note 16, § 41.10.
49. See id.
50. See id.
51. See id.
52. Cox et al., supra note 41, § 7.3, at 113.
53. See id.; see also Easterbrook & Fischel, supra note 35, at 55 (discussing that tests are "singularly unhelpful").
54. See Easterbrook & Fischel, supra note 35, at 56. This is arguably justifiable.
With respect to subsidiary and affiliate corporations, the same rules generally apply, and the courts will ordinarily treat them as separate entities, unless the corporations (1) intermingle operations, employees, banks, and accounts; (2) disregard formalities of corporate separateness; (3) supply inadequate capitalization for the subsidiary to meet its normal obligations; (4) are not held out as separate enterprises; or (5) direct corporate policies toward the parent's interests, not the subsidiary's interests. In terms of establishing grounds appropriate for piercing in a parent-subsidiary situation, it is not enough that the corporations have some, or even all, directors and officers in common. Essentially, if one corporation's acts dominate the other's, then courts will disregard the corporate form and treat the parent-subsidiary relationship as one of agency in which the principal may be liable for the acts of the agent.

Furthermore, derivative liability of a shareholder or corporate parent through piercing can be distinguished from other instances in which “the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management,” and “the parent is directly a participant in the wrong complained of.” For instance, the corporation may enter into a contract on behalf of a shareholder, or a shareholder may commit a tort for which the corporation is liable under respondeat superior. In essence, the shareholder or corporate parent is liable for its own actions.

because allowing creditors to reach the parent corporation does not entail unlimited personal liability of individual investors and because subsidiary corporations have less incentive to insure against risk when only the assets of the subsidiary are at risk, as opposed to all the assets of the parent corporation. See id. at 56-57.

55. See Cox et al., supra note 41, § 7.8, at 120; Easterbrook & Fischel, supra note 35, at 54-59; Fletcher et al., supra note 16, § 41; Henn & Alexander, supra note 35, § 148, at 355-56.

56. See, e.g., Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265, 267 (2d Cir. 1929) (noting that “control through the ownership of shares does not fuse the corporations, even when the directors are common to each”); West Va. Highlands Conservancy, Inc. v. Pub. Serv. Comm'n, 527 S.E.2d 495 (W. Va. 1998); Fletcher et al., supra note 16, § 41; Henn & Alexander, supra note 35, § 148, at 355 (noting that it is “normal” for a parent and subsidiary to “have identical directors and officers”).


60. See id. (stating that “[a]part from corporation law principles, a shareholder,
In *Papa v. Katy Industries, Inc.*, Judge Posner followed these long-standing general corporate law rules to limit a parent corporation’s liability for acts of the subsidiary. Although recognizing that the corporate veil is pierced in some instances, Posner noted there would be no parent corporation liability absent piercing. Posner concluded that the corporate veil will be pierced if the corporate form is used for wrongful purposes or to accomplish fraud. He also observed that corporate parents cannot hide behind the corporate shield if their management of the subsidiary amounts to direct action by the parent corporation that violates a federal statutory scheme. Thus, Posner applied traditional theories of piercing the corporate veil, as if the corporate entity engaged in wrongful conduct or fraud.

**B. Examples of Specific Piercing Tests**

Although the general, broad theories of piercing the corporate veil are readily described, each state employs its own particular test and set of factors to determine whether piercing is appropriate in a particular case. Justice Cardozo observed that the doctrines of piercing the corporate veil are “enveloped in the mists of metaphor.” Easterbrook and Fischel have commented that “[p]iercing’ seems to happen freakishly. Like lightning, it

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61. 168 F.3d 937 (7th Cir. 1999).
62. See id. This case involved two separate subsidiaries and parent corporations. See id. at 939. In both instances, an employee claimed that the subsidiaries violated anti-discrimination statutes. See id. The subsidiaries, however, were not subject to these statutes because they did not employ the required minimum number of workers to be bound by these statutes. See id. at 941. The employee then attempted to sue the parent corporations, which did meet the number requirement. See id.
63. See id. at 940-41.
64. See id. at 942-43.
65. See id. Posner would have found liability if Katy had “formulated or administered the specific personnel policies, or directed, commanded, or undertook the specific personnel actions,” which were at issue here. Id. at 942. This appears to somewhat parallel with *Bestfoods’* definition of an “operator” being someone who manages, directs, or conducts the operations related to the issue at hand (pollution in *Bestfoods*, discrimination here). See United States v. Bestfoods, 524 U.S. 51, 68-68 (1998).
66. See *Papa*, 168 F.3d at 942-43.
67. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (stating that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslave it”).
is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.\textsuperscript{63} However, when shareholders are in the planning process of forming a corporation, they can limit this uncertainty by selecting the jurisdiction in which incorporation will take place; this limits uncertainty because, pursuant to the "internal affairs" rule, courts generally apply the laws of the state of incorporation to determine whether piercing is appropriate.\textsuperscript{63} Because piercing is one of the most litigated areas of corporate law,\textsuperscript{70} the theories are divergent. The following examples are provided to illustrate the possible variations in piercing theories used in California, Delaware, Florida, New York, and federal common law.\textsuperscript{71}

1. California Piercing Doctrine

One study has shown a high percentage of piercing the corporate veil in California, apparently attributable to a historical "lateness in embracing the concepts of limited liability."\textsuperscript{72} As a result, a general perception exists that public policy in California favors piercing the corporate veil.\textsuperscript{73} California ascribes to the alter ego doctrine in making piercing decisions.\textsuperscript{74} In \textit{Webber v. Inland Empire Investments, Inc.},\textsuperscript{75} the

\begin{itemize}
    \item \textsuperscript{69} See MODEL BUSINESS CORP. ACT § 15.05(c) (1984); RESTATMENT (SECOND) OF CONFLICT OF LAWS § 309 (1989); Robert B. Thompson, \textit{Piercing the Corporate Veil: An Empirical Study}, 76 CORNELL L. REV. 1036, 1053 (1991). However, some states, including New York and California, have passed statutes that allow courts to apply their own laws to corporations formed in other states, although laws on piercing are not mentioned specifically. See, e.g., CAL. CORP. CODE § 2115 (West 1991); N.Y. BUS. CORP. LAW § 1317 (McKinney 1991).
    \item \textsuperscript{70} See Thompson, supra note 69, at 1036.
    \item \textsuperscript{72} Thompson, supra note 69, at 1051 (noting that in forty-five percent of California cases, courts pierced the corporate veil).
    \item \textsuperscript{73} See id. at 1052.
    \item \textsuperscript{74} See, e.g., Mesler v. Bragg Mgmt. Co., 702 P.2d 601 (Cal. 1985); H.A.S. Loan Serv.,
\end{itemize}
California Court of Appeals considered a claim by defendant Previti, the principal of Forecast Mortgage Corporation, that a claim of conspiracy to interfere with a contract could not be asserted against him based on the alter ego doctrine. 76 Although the court recognized the separateness of the corporate entity, it stated that the corporate form may be disregarded under the alter ego doctrine when (1) there is a unity of interest and ownership such that separate personalities cease to exist, and (2) failure to disregard would “sanction a fraud or promote injustice.” 77

The issue is not so much whether, for all purposes, the corporation is the ‘alter ego’ of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form. 78

The test essentially evaluates whether disregarding the corporate entity assists the court in accomplishing justice and equity. 79

2. Delaware Piercing Doctrine

Although Delaware is the most predominant state for the formation of corporations, it has few reported piercing cases. 80 In those cases, the courts have rarely chosen to pierce the corporate veil; this may indicate a policy of protecting corporations formed in Delaware. 81 Thus, “[p]ersuading a


75. 88 Cal. Rptr. 2d 594 (Cal. Ct. App. 1999).

76. See id. Using the alter ego theory, Previti argued that he could not have interfered with his “own” contract. See id. at 599.

77. Id. at 604 (quoting Communist Party, 41 Cal. Rptr. 2d 618).

78. Mester, 702 P.2d at 606-07.

79. See id. at 607; see also Communist Party, 41 Cal. Rptr. 2d at 625; Wenban Estate, 227 P. at 731.

80. See Thompson, supra note 69, at 1052-53.

81. See id.
Consistency in Judicial Interpretation?

Delaware court to disregard the corporate entity is a difficult task." Delaware courts have simply stated that the reasons supporting piercing are fraud, contravention of law, and public wrong. With respect to subsidiaries, Delaware courts have stated that "[a] court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner." Under the alter ego theory, courts have construed this statement to require facts demonstrating complete domination or control of the corporation such that it has no "legal or independent significance of [its] own."

3. Florida Piercing Doctrine

Florida courts have not examined piercing to the extent of some other jurisdictions. However, the incidence of piercing the corporate veil is higher in Florida than in many jurisdictions. The Supreme Court of Florida, in Dania Jai-Alai Palace, Inc. v. Sykes, held that the corporate veil should protect corporate limited liability and that no piercing occurs without a showing of "improper conduct." Although the court referred extensively to previous Florida cases on piercing, the court did not reduce the precedents into a workable set of factors to provide sufficient guidance on exactly what conduct is improper. Despite this lack of guidance, subsequent Florida

86. See Thompson, supra note 69, at 1052 (noting that Florida courts pierced the corporate veil in forty-one percent of the cases examined).
87. See id.
88. 450 So. 2d 1114 (Fla. 1984); see also Marilyn Blumberg Cane & Robert Burnett, Piercing the Corporate Veil in Florida: Defining Improper Conduct, 21 NOVAL. REV. 663 (1997).
89. See Dania Jai-Alai Palace, 450 So. 2d at 1121; Cane & Burnett, supra note 88, at 664.
90. See Cane & Burnett, supra note 88, at 664.
decisions pierced the corporate veil based on improper conduct when (1) a real estate company owner promised to pay a commission on a sale to an employee and then refused to pay the commission after the employee found a buyer and completed the sale; instead, the employer converted the interest received in the property to her own name, rather than the corporate name with the intent to deprive the employee of the commission; 91 (2) a subsidiary corporation defaulted on a lease agreement, and its parent corporation had the same officers, and the subsidiary had no bank account, did not file tax returns, and did not have a written sublease for the property; 92 (3) a subsidiary corporation entered into a contract for the benefit of the parent corporation, but it did not have sufficient resources to follow through on the contractual obligations; 93 (4) a parent company formed a subsidiary as a mere instrumentality for the specific purpose of executing a charter contract, and the newly formed subsidiary did not perform; 94 (5) the company was an alter ego of an individual who had a history of transferring property to the company to avoid creditors; 95 (6) individual shareholders caused the corporation to retain funds, which were given as a furniture deposit on a contract to design and furnish a condominium unit, after the contract was canceled and forged other invoices for construction work actually done but increased the cost by thirty percent; 96 and (7) the manager of a corporation whose wife was the sole shareholder received a deposit for the construction of a home on a lot that was not even owned by the corporation; she then refused to return the deposit. 97

4. New York Piercing Doctrine

Courts in New York have examined many piercing cases with more restrictive results than other courts.\textsuperscript{98} New York courts generally allow piercing in instances "to prevent fraud or to achieve equity."\textsuperscript{99} In New York, piercing generally requires (1) that shareholders exercised complete domination of the corporation in respect to a particular transaction attacked and (2) that the domination was used to commit a fraud or wrong against the plaintiff that resulted in the plaintiff's injury.\textsuperscript{100} Both factors must be met to support piercing.\textsuperscript{101} For instance, in \textit{Commercial Sites Co. v. Prestige Photo Studios, Inc.},\textsuperscript{102} the New York Supreme Court, Appellate Division, pierced the corporate veil in a case brought by a landlord against a corporate tenant and two shareholders for unpaid rent and related charges.\textsuperscript{103} The court found that the evidence was sufficient to support piercing after finding: domination of the corporation by the shareholders, resulting in unpaid rents; absence of corporate formalities; inadequate corporate capitalization; intermingling of personal and corporate funds; and use of corporate property for personal and other purposes.\textsuperscript{104}

5. Federal Common Law

Numerous federal courts have already established many specific, well-reasoned factors for piercing the corporate veil in

\textsuperscript{98} See Thompson, supra note 69, at 1051-52 (noting that New York courts pierced the corporate veil thirty-five percent of the time in piercing cases).


\textsuperscript{101} See Morris, 623 N.E.2d at 1161.


\textsuperscript{103} See id.

\textsuperscript{104} See id. at 491-92.
CERCLA cases.\textsuperscript{105} Some courts use a twelve-factor test, which looks to whether:

(1) the parent and the subsidiary have common stock ownership; (2) the parent and the subsidiary have common directors or officers; (3) the parent and the subsidiary have common business departments; (4) the parent and the subsidiary file consolidated financial statements and tax returns; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operates with grossly inadequate capital; (8) the parent pays the salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given to it by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; and (12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.\textsuperscript{106}

Other federal courts apply a seven-factor test, which evaluates:

(1) inadequate capitalization in light of the purposes for which the corporation was organized, (2) extensive or pervasive control by the shareholder or shareholders, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers or directors.\textsuperscript{107}


\textsuperscript{106} Jon-T Chems., Inc., 768 F.2d at 691-92; see also Jacksonville Elec. Auth., 776 F. Supp. at 1545; Joslyn Corp., 696 F. Supp. at 227.

\textsuperscript{107} In re Acushnet River, 675 F. Supp. at 33; see also Idylwoods Assocs., 915 F. Supp. at 1095; Exxon Corp., 112 B.R. at 553; Kayser-Roth Corp., 724 F. Supp. at 20.
C. Choice of Law Issues

In terms of progressing with the piercing issue in CERCLA cases, courts must first decide whether state common law or federal common law applies. On a number of occasions, the United States Supreme Court has visited the issues surrounding the application of state or federal common law in the context of other statutory regimes. In United States v. Kimbell Foods, arising in the context of Small Business Administration (SBA) loans, the Court stated that silence by Congress is not dispositive as to choice of law, and Congress' silence on whether state or federal common law applies does not weigh in favor of state law. In the face of such silence "in an area comprising issues substantially related to an established program of government operation," federal courts should resolve the gaps in federal legislation "according to their own standards." The Court concluded that federal common law should determine the priority of liens under SBA programs because the loan programs originated from acts of Congress, and thus, federal common law should determine the rights.

In forming the federal common law rule, the Court stated that the choice was whether to incorporate state rules or whether to establish a uniform, national rule. The Kimbell Foods Court set forth the following test for determining whether a national,

110. 440 U.S. 715. Kimbell Foods concerned whether contractual liens arising from Small Business Administration loan programs took priority over private liens, which required a determination of whether federal or state law would govern. See id. at 715.
111. See id. at 721.
112. Id. (citation omitted) (quoting, respectively, United States v. Little Lake Misere Land Co., 412 U.S. 590, 593 (1973), and Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)). But see Paul Lund, The Decline of Federal Common Law; 70 B.U. L. REV. 895, 897 (1986) (arguing that the current Court is less likely to apply federal law to areas of federal concern, whereas past decisions indicate federal law would be appropriate).
113. See Kimbell Foods, 440 U.S. at 728.
114. See id. at 727-28.
federal common law should be created: (1) whether the federal program is by its nature one that "must be uniform in character" throughout the United States; (2) "whether application of state law would frustrate specific objectives of the federal programs"; and (3) whether "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." Applying this test, the Court concluded that a uniform, national rule is unnecessary to protect federal interests under the SBA loan programs because even the SBA's own practices accounted for the determination of priorities of securities under state law, such that state law on priorities shall be adopted as the applicable federal common law. The Court observed that rejecting workable commercial law would undermine justified expectations of creditors under state law.

In *O'Melveney & Meyers v. FDIC*, the Federal Deposit Insurance Corporation (FDIC) sued an attorney for a failed savings and loan and alleged legal malpractice and breach of fiduciary duty regarding counsel's advice and services in connection with public offerings. Justice Scalia, writing for the majority, found that state law would apply to a tort related to imputation of the corporate officer's knowledge when the tort itself arises under state law. Furthermore, the argument for a federal common law standard was weaker where the FDIC was not acting as the United States but rather as receiver for the failed savings and loan institution. When the FDIC is standing in the shoes of the failed institution, creating federal common law results in altering the statute rather than supplementing it. It is appropriate to create federal common law in those limited cases in which there is a "significant conflict between some federal policy or interest and the use of state law." The FDIC proved no conflict, not even a conflict related to any

115. *Id.* at 728-29 (quoting United States v. Yazell, 382 U.S. 341, 354 (1966)).
116. See *id.* at 729-33.
117. See *id.* at 730-40.
119. See *id.* at 81-82.
120. See *id.* at 84-85.
121. See *id.* at 85.
122. See *id.* at 87.
123. *Id.* (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).
potential benefits to a federal interest resulting from uniformity.\footnote{124}{See id. at 88.}

Most recently, in Atherton v. FDIC,\footnote{125}{519 U.S. 213 (1997).} the Court considered an FDIC action for negligence, breach of fiduciary duty, and gross negligence against the former officers and directors of a failed federal savings association.\footnote{126}{See id. at 216.} In a decision written by Justice Breyer, the Court held that there is no rule of federal common law providing a standard for officers and directors of FDIC insured institutions.\footnote{127}{See id. at 226.} Federal courts should create rules of federal common law only upon “the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest.”\footnote{128}{See id. at 224 (citing O'Melveny & Myers, 512 U.S. at 87).} Again, the FDIC was acting simply as a receiver of a failed savings institution, rather than pursuing the interests of the United States as a bank insurer.\footnote{129}{See id. at 225.}

Finally, the Rules of Decision Act\footnote{130}{28 U.S.C. § 1652 (1994).} shows a preference in some situations for application of state law in that it provides, “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”\footnote{131}{Id.} However, the Act does not preclude the creation of
federal common law in appropriate cases as outlined in *Kimbell Foods, O'Melveney & Meyers*, and *Atherton*, discussed above.\(^\text{132}\)

**II. CERCLA OWNER/OPERATOR LIABILITY**

This backdrop of corporate liability must be reconciled with the following two primary goals of CERCLA: (1) cleaning of hazardous waste sites, regardless of whether the dumping that created the hazard was legal, and (2) imposing liability on PRPs under the theory that the “polluter must pay.”\(^\text{133}\) The EPA identifies hazardous waste sites and ranks them according to the degree of hazardous nature on the National Priorities List (NPL).\(^\text{134}\) Although eighty-five NPL sites have been cleaned each year since 1995, the EPA and the General Accounting Office (GAO) have added forty new sites to the NPL, leaving 700 unfinished sites identified and 1789 additional sites that the GAO should add to the NPL.\(^\text{135}\) The average site takes twelve years to complete, and some are expected to take up to thirty to forty years.\(^\text{136}\) Not surprisingly, environmental commentators have criticized CERCLA for being too slow to accomplish cleanups and too expensive with respect to CERCLA costs.\(^\text{137}\) The cleanup efforts under CERCLA related to hazardous waste releases in the United States exceed $40 billion; these efforts are funded by state, federal, and local governments, as well as private parties.\(^\text{138}\) The EPA estimates cleanup costs per site at $40 million, so PRPs emphasize avoiding the imposition of a disproportionate share of the cleanup costs.\(^\text{139}\)

Although the EPA, under CERCLA section 106, can file suit for injunctive relief or can issue an administrative order mandating PRPs to clean up a hazardous waste site, it

\(^{132}\) See *supra* discussion Part I.C.

\(^{133}\) See Evans, *supra* note 3.

\(^{134}\) See id.


\(^{136}\) See Taylor, *supra* note 3.

\(^{137}\) See Evans, *supra* note 3.


\(^{139}\) See Evans, *supra* note 3.
frequently uses “Superfund” monies to perform the cleanup and then seeks recovery of costs from PRPs, often in litigation.\(^{149}\) Additionally, third parties who perform cleanups can assert contribution claims in an EPA enforcement action or in a separate action for contribution.\(^{141}\) CERCLA liability is strict: PRPs are liable for all cleanup costs without regard to the amount of care used in handling the hazardous substances or even whether prior law allowed or required the particular type of hazardous materials handling by the person making the disposal.\(^{142}\) That is, CERCLA requires neither intent nor negligence to establish liability.\(^{143}\) Furthermore, the legislative history of CERCLA led courts to conclude that CERCLA liability was joint and several, such that each PRP is liable for the entire harm.\(^{144}\)

Section 107(a) of CERCLA provides that the following persons shall be liable for hazardous releases:

1. the owner and operator of a vessel or facility, 
2. any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, 
3. any person who . . . arranged for disposal or treatment . . . of hazardous substances . . ., and
4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities.\(^{145}\)

The liability for releases or threatened releases of hazardous substances includes: (1) all costs of a removal or remedial action by the United States or a state; (2) other necessary costs of response by other persons consistent with the national contingency plan; (3) damages for injury to, destruction of, or loss of natural resources; and (4) the costs of any health assessment or health effects studies.\(^{146}\) Thus, courts have generally held CERCLA liability attaches if a release or threat

\(^{140}\) See generally Evans, supra note 3. Approximately seventy percent of sites are cleaned up by companies. See Schwartz, supra note 135.

\(^{141}\) See 42 U.S.C. § 9613 (1994); see also Evans, supra note 3; McCrory, supra note 1, at 5.

\(^{142}\) See McCrory, supra note 1, at 10-11.

\(^{143}\) See id. at 11.

\(^{144}\) See id. at 11-12.


\(^{146}\) See id.
of release of hazardous substances has occurred at a facility, causing a plaintiff to incur response costs, and the defendant is a responsible party as defined under CERCLA section 107(a).\textsuperscript{147} The only defenses to established CERCLA liability are that the contamination by hazardous materials was caused by an act of God, an act of war, an act or omission of a third party, or any combination of the previous three defenses.\textsuperscript{148} CERCLA uniquely defines "owner or operator" as:

(ii) in the case of an onshore facility ... any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the ... facility.\textsuperscript{149}

This circularity has led to much litigation over CERCLA liability.\textsuperscript{150} In fact, a Rand Institute for Civil Justice study found that only twelve percent of the monies spent by insurance companies goes toward the cleanup of hazardous waste, while eighty-eight percent went toward litigating claims and administrative costs.\textsuperscript{151} The focus on litigation has detracted from the actual cleanup efforts, with only five percent of EPA's high priority sites cleaned up by 1990.\textsuperscript{152}


\textsuperscript{148} See 42 U.S.C. § 9607(b) (1994).

\textsuperscript{149} Id. § 9601(20)(A).

\textsuperscript{150} See generally Don J. DeBenedictis, How Superfund Money Is Spent: Study Shows Companies Pay for Cleanup While Insurers Pay for Litigation, 78 A.B.A. J. 30 (1992); Evans, supra note 3; Fasman, supra note 3; Schwartz, supra note 135; Taylor, supra note 3.

\textsuperscript{151} See DeBenedictis, supra note 150, at 30. "Based on the data from the four large insurers surveyed, the report estimates insurance companies spent about $410 million on Superfund transaction costs in 1989, the last year studied. That would have been enough to pay for cleaning up 13 to 16 waste sites, the report said." Id. However, large industrial companies only spent seventy-eight percent of their cleanup money on cleaning up. See id.

\textsuperscript{152} See id.
The lack of clarity in CERCLA's owner and operator language also led to a split in the circuits and the development of two different approaches. With respect to direct operator liability, the "capacity to control" test was developed in the 1986 case of *Idaho v. Bunker Hill Co.*, in which the court imposed CERCLA liability based on the parent corporation's capacity to control the hazardous waste practices of its subsidiary, without regard to the actual exercise of such control. The court, finding Gulf liable as an owner or operator under CERCLA, observed that Gulf:

was in a position to be, and was, intimately familiar with hazardous waste disposal and releases at the Bunker Hill facility; had the capacity to control such disposal and releases; and had the capacity, if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and releases of hazardous wastes at the facility. As noted previously in this opinion, approval from Gulf was necessary before more than Five Hundred Dollars ($500) could be spent on pollution matters and before capital expenditures could be made. Gulf at times controlled a majority of Bunker Hill's board of directors and Gulf obtained weekly reports of day-to-day aspects of Bunker Hill operations. With respect to Congress's intent that those who bore the fruits must also bear the burdens of hazardous waste disposal, it must be noted that Bunker Hill's authorized capital was a mere Eleven Hundred Dollars.

153. See generally Stephanie Irby, United States v. Bestfoods: CERCLA's Effect on Climbing the Corporate Ladder of Liability, 52 Ark. L. Rev. 613 (1999); Yeo, supra note 15, at 1270-71 (discussing the two approaches).
($1100) while Gulf received Twenty-seven Million Dollars
($27,000,000) in dividends from Bunker Hill.158

The “actual control” test, a narrower approach to defining
owners and operators, was developed in United States v. Kayser-
Roth Corp.,157 and this test “[a]t a minimum . . . require[d] active
involvement in the activities of the subsidiary.”158 In Kayser-
Roth Corp., the court found that Kayser-Roth was a CERCLA
operator because it exercised “pervasive control” over the
subsidiary, Stamina Mills, through its: financial and budgeting
controls, requirements that Stamina Mills contacts with
governmental representatives would be handled through
Kayser-Roth, requirements that certain major transactions of
Stamina Mills be approved by Kayser-Roth, and dual officers
and directors.159 The court also looked to Kayser-Roth’s
involvement in environmental issues because it had the power
to control releases and its involvement with directives and
notifications regarding environmental regulatory matters.160

Regarding indirect liability for “owners,” federal circuit and
district courts disagree over when piercing is appropriate and
whether state or federal common law applies in cases that argue
for piercing the corporate veil.161 This split in approaches, in

156. Bunker Hill Co., 635 F. Supp. at 672 (emphasis added). The court noted, though,
that the “normal” activities of parent corporations would not automatically result in
owner or operator liability under CERCLA. See id.
157. 910 F.2d 24 (1st Cir. 1990).
158. Id. at 27; see also Schiavone v. Pearce, 70 F.3d 248, 254 (2d Cir. 1996) (holding that
liability arises when independent actions of parent corporation exhibit control over
subsidiary’s polluting site); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d
1209, 1222 (3d Cir. 1993) (applying the “actual control” test); Jacksonville Elec. Auth. v.
Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) (looking to “actual and pervasive
participation in and control over a subsidiary’s functions and decision-making . . .
[because a] parent’s mere oversight of a subsidiary’s business in a manner appropriate
and consistent with the investment relationship between a parent and its wholly owned
subsidiary does not [create liability]”); City of New York v. Exxon Corp., 112 B.R. 540,
547-548 n.9 (Bankr. S.D.N.Y. 1990) (applying the “actual control” test); Rockwell Int’l
Corp. v. IU Int’l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) (holding that the parent
corporation “must actually exercise control” over subsidiary’s to be liable).
159. See Kayser-Roth Corp., 724 F. Supp. at 22.
160. See id. at 22-23.
disagreement among courts and commentators over whether courts should apply state
law or federal common law on piercing the corporate veil to impose indirect liability
turn, led the Supreme Court to examine the issues related to CERCLA owner and operator liability of parent corporations in *United States v. Bestfoods*.

III. *United States v. Bestfoods*¹⁶²

In *Bestfoods*, the United States brought suit under CERCLA against numerous entities, including CPC International, Inc., (CPC) for costs related to the cleanup of the industrial waste generated by its defunct subsidiary, Ott Chemical Co. (Ott).¹⁶³ Because neither the existence of hazardous chemicals nor the necessity of cleanup were at issue, the litigation focused on determining whether CPC had "owned or operated" Ott's chemical plant within the meaning of CERCLA Section 107(a)(2).¹⁶⁴ The testimony showed that CPC selected Ott's board of directors and executive officers, and that another CPC official, also not an employee of Ott, played a primary role in determining Ott's environmental compliance policies.¹⁶⁵

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¹⁶² See generally Seena Foster, *Supreme Court's Views as to Validity, Construction, and Application of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, 157 A.L.R. Fed. 291 (1999) (discussing other issues taken up by the United States Supreme Court with respect to CERCLA). The contamination at the site at issue resulted from the operations of chemical manufacturers from approximately 1959 to 1988. See CPC Int'l, Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549, 549-55. The practices employed at the facility resulted in the contamination of soil, surface water, and groundwater at the site, as well as two waterways near the site. See id. at 555-56. The Ott facility was sold by CPC and eventually went bankrupt. See id. at 562. The Michigan Department of Natural Resources (MDNR) agreed to sell the site to Aerojet-General Corporation (Aerojet), which purchased the facility through one of its wholly-owned subsidiaries. See id. at 564. The EPA began cleanup in 1981 and filed suit under CERCLA section 107, naming CPC, Aerojet, Cordova of California, Cordova of Michigan, and Arnold Ott as responsible parties. See id. at 554-56.

¹⁶³ See *Bestfoods*, 524 U.S. at 51; see also Irby, *supra note* 153, at 613; Yeo, *supra note* 15 (providing an overview of the *Bestfoods* litigation).

¹⁶⁴ See *Bestfoods*, 524 U.S. at 55; see also Irby, *supra note* 153, at 613; Yeo, *supra note* 15 (providing an overview of the *Bestfoods* litigation).

¹⁶⁵ See *Bestfoods*, 524 U.S. at 88, 72.
A. District Court Analysis

In a lengthy opinion, the United States District Court for the Western District of Michigan found CPC liable as an owner and operator under CERCLA for the environmental damage caused by Ott.\textsuperscript{166} The court also found another company, Aerojet, liable under CERCLA as an owner and operator related to the hazardous waste activities of its two wholly-owned subsidiaries and present owners of the facility, Cordova Chemical Company and Cordova Chemical Company of Michigan (collectively, “Cordova”).\textsuperscript{167}

The district court concluded that a parent corporation can be directly liable “under the ‘operator’ language of CERCLA’s [section] 107(a)(2).”\textsuperscript{168} As an initial basis for CERCLA liability, the district court specifically found that liability could attach to parent corporations that operated a facility, even if direct or indirect ownership was not established to support liability.\textsuperscript{169} A parent company could be liable when it exerted power or influence over its subsidiary, and when that power exceeded the mere oversight ordinarily inherent in a parent-subsidiary relationship by involving active participation in and exercise of control over the subsidiary’s business during a period of hazardous waste disposal.\textsuperscript{170} Applying these principles, the

\textsuperscript{166} See CPC Int'l, Inc., 777 F. Supp. at 581.
\textsuperscript{167} See id.
\textsuperscript{168} Id. at 572.
\textsuperscript{170} The court went on to state:

Factors to consider in assessing whether a parent corporation operated its subsidiary include the parent’s participation in the subsidiary’s board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel, and waste disposal. In addition, determining the origin and business function of the subsidiary in the context of the parent corporation’s business may be helpful in determining whether the parent has operated a wholly owned subsidiary. Other evidence may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary’s financial performance, consolidation of corporate business matters such as accounting and legal work, and
district court found CPC liable "as an operator because CPC actively participated in and exerted significant control over Ott[s] business and decision-making," including matters related to hazardous waste disposal at the facility.\textsuperscript{171} The district court found the following facts particularly compelling:

1) CPC's 100-percent ownership of Ott II; 2) CPC's active participation in, and at times majority control over, Ott II's board of directors, which was an active decision-making body chaired by a CPC official throughout the Ott II era; 3) CPC's involvement in major decision-making and day-to-day operations through CPC officials who served within Ott II management, including the positions of president and chief executive officer; 4) the conduct of CPC officials with respect to Ott II affairs, particularly Arnold Ott, James Eiszner and Beverly Warner; 5) the function of the CPC development company as another source of policy-making for Ott II; 6) the active participation of and control by CPC officials in Ott II environmental matters, particularly through CPC's environmental director G.R.D. Williams who helped formulate Ott II policies, participated in regulatory meetings and issued directives regarding Ott II's responses to regulatory inquiries; 7) the active participation of CPC officials in Ott II labor problems; and 8) the financial control exerted by CPC through its approval of Ott II's budgets and major capital expenditures.\textsuperscript{172}

The district court also concluded that Aerojet was liable as an operator under CERCLA section 107(a)(2).\textsuperscript{173}

The second basis for CERCLA liability identified by the district court was liability as an "owner" through state common law veil-piercing.\textsuperscript{174} Although the district court concluded that Michigan veil-piercing law would apply, the court declined to rule on this basis in light of its holding that CPC was liable directly as an operator.\textsuperscript{175} The court did, however, apply

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cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.
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\textsuperscript{171} \textit{Id.} at 574.

\textsuperscript{172} \textit{Id.} at 575.

\textsuperscript{173} \textit{See id.} at 580.

\textsuperscript{174} \textit{See id.} at 575.

\textsuperscript{175} \textit{See id.}
Michigan veil-piercing techniques to hold Aerojet liable under CERCLA as an owner of Cordova because it dominated the business of Cordova. With respect to this issue, the district court found the following facts compelling:

1) Aerojet was 100-percent shareholder of Cordova/California, which in turn wholly owned Cordova/Michigan; 2) Aerojet itself led the acquisition of the site, only incorporating its Cordova division after it became apparent that the site would be purchased, about 10 days before the signing of the stipulation and consent order; 3) the timing of the incorporation of Cordova subsidiaries reflected Aerojet's singular goal of insulating itself from liability; 4) the purpose of acquiring the site was to manufacture a product essential to Aerojet's Cordova division that would no longer be available from outside sources; 5) when manufacturing operations commenced at the site, Cordova/Michigan was part of an integrated business operation in which Cordova/Michigan supplied EI for use in manufacturing by Cordova/California; 6) the incorporation of Cordova/Michigan and Cordova/California were changes in form, not in substance, as former officers in Aerojet's Cordova division retained identical or similar jobs with the new subsidiaries; 7) Aerojet dominated the corporate hierarchy of both Cordova/Michigan and Cordova/California, where at least 20 Aerojet officials have held positions nearly identical to those they have held simultaneously with the parent company; 8) Cordova/Michigan and Cordova/California officials reported directly to Aerojet officials, who held authority to give directions on day-to-day operations and policy matters; 9) the board of directors of Cordova/California and Cordova/Michigan [sic] were non-functional and did not even convene in meetings; 10) Aerojet possessed total financial control over Cordova/Michigan and Cordova/California, which lacked authority to maintain separate bank accounts; and 11) Aerojet arranged the assignment to Cordova/California of $25 million in worthless debt owed to it by Cordova/Michigan, which

176. See id. at 578-79.
177. E.I. is an abbreviation for ethelenimine—a chemical used in manufacturing. See id. at 563.
effectively eliminated $13 million owed by Aerojet to Cordova/California.178

B. Sixth Circuit Court of Appeals

On appeal, a Sixth Circuit panel affirmed in part, reversed in part, and remanded, holding that CPC and Aerojet, as parent corporations, “could incur operator liability under CERCLA for conduct of subsidiary corporations, only if requirements necessary to pierce corporate veil were met” rather than if CPC and Aerojet exerted significant control over operations of subsidiaries.179 The court found that Aerojet “did not incur former owner liability under CERCLA for brief ownership of [the contaminated] site before transfer to [the] subsidiary, absent evidence that additional releases of hazardous substances occurred during” Aerojet’s brief ownership.180 The court, without further comment, directed that Michigan state law would apply to the determination of piercing, which requires (1) “such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist,” and (2) “the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.”181 The court noted that the district court’s decision with respect to CPC must be reversed because the facts on which the court relied demonstrated that CPC had an active interest in the subsidiary, but the parties did not establish that “CPC utilized the corporate form to perpetrate a ‘fraud or wrong’ as required before a court can pierce the veil.”182 Similarly, the court found that Aerojet took an appropriate active interest in its subsidiary and that Aerojet’s activities in negotiating liability limits for existing environmental problems

178. Id. at 579.
180. Id.
181. Id. at 591 (citing WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.30 (perm. ed. rev. vol. 1990)); STEPHEN H. SCHULMAN ET AL., MICHIGAN CORPORATION LAW & PRACTICE § 3.9(c) (Supp. 1991); see also Bodenhamer Bldg. Corp. v. Architectural Res. Corp., 873 F.2d 169, 111-12 (6th Cir. 1989) (surveying Michigan corporate veil-piercing cases); Seaword v. Hilti, Inc., 537 N.W.2d 221, 224 (Mich. 1995) (holding corporate veil may be pierced where the subsidiary is a “mere instrumentality” of the parent and the separate corporate existence is used to subvert justice or cause result contrary to clearly overriding public policy).
at the facility before the purchase were in good faith and a "prudent use of the corporate form." 183

Judge Ryan, in his dissenting opinion, agreed with the district court that a parent corporation could be liable as an operator if it had “actual participation in and control over a subsidiary’s functions and decision-making,” but that no liability would arise from “a parent’s mere oversight of a subsidiary’s business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary . . . .” 184 Applying an “actual control” test, Judge Ryan explained that liability would arise “if the facts of the case show that [the parent’s] domination and control of the subsidiary corporation ostensibly operating the facility [are] so pervasive that the parent is the operator in fact.” 185 Judge Ryan also agreed with the district court that the facts were sufficient to hold CPC and Aerojet liable as operators under CERCLA. 186

In a rehearing en banc, the Sixth Circuit affirmed in part and reversed in part the district court decision, holding that CPC and Aerojet, as parent corporations, could only incur “operator” liability under CERCLA related to the actions of the subsidiaries if the requirements necessary to pierce the corporate veil were satisfied. 187 The court also concluded that Aerojet “did not incur former owner liability under CERCLA for [a] brief period of ownership of the site absent evidence that additional releases of hazardous substances occurred during that time.” 188 The Sixth Circuit viewed the district court’s analysis as abdicating traditional principles of corporate limited liability. 189 Certainly, owner liability under CERCLA could reach a corporate parent by applying traditional methods of piercing the corporate veil. 189 However, as to operator liability, the court of appeals also found that there was no justification for piercing the corporate veil unless the parent corporation operated the facility alongside the

183. Id. at 592.
184. Id. at 594 (Ryan, J., dissenting).
185. Id. at 596.
186. See id. at 596-99.
188. Id. at 572.
189. See id. at 580.
189. See id. at 581.
subsidiary,191 exerted control over the subsidiary, or was involved with the facility such that it amounted to abuse of the corporate form.192

The court also concluded that Michigan state law on piercing the corporate veil would apply.193 Examining the facts noted by the district court,194 the court of appeals found that the actions of CPC only amounted to an active interest by CPC in the subsidiary and did not “indicate such a degree of control that the separate personalities of the two corporations ceased to exist and that CPC utilized the corporate form to perpetrate the kind of fraud or other culpable conduct” required for piercing of the corporate veil.195 Similarly, the facts related to Aerojet were insufficient to justify piercing the corporate veil under Michigan law because they primarily showed that Aerojet sought to limit its liability related to the site’s existing environmental problems, but did not “establish that Cordova/Michigan was a mere instrumentality of Aerojet in the sense that the separate corporate personalities of the parent and subsidiary ceased to exist.”196 Quite simply, the court of appeals concluded that CERCLA did not contemplate liability of parent corporations, such as CPC and Aerojet, that properly used the corporate form.197 As such, neither owner nor operator liability applied to the actions of the parent corporations.198

Judge Merritt, concurring in part and dissenting in part, wrote a separate opinion stating that federal common law should govern issues of piercing the corporate veil to establish CERCLA owner liability, rather than Michigan state law.199 Judge Merritt recognized that although federal programs can

191. See id. at 581. The court of appeals observed that facts supporting direct operation of the facility by CPC or Aerojet were not advanced at the trial. See id. Thus, operator liability would have to exist on some other theory, if at all. See id.
192. See id. at 580.
193. See id. at 580. But see id. at 584 (Merritt, J., concurring in part and dissenting in part) (arguing that federal common law principles on piercing the corporate veil should apply).
194. See FLETCHER ET AL., supra note 16.
196. Id. at 582. The court further stated “there is nothing to suggest that the company acted to subvert justice or with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate form.” Id.
197. See id.
198. See id.
199. See id. at 584 (Merritt, J., concurring in part and dissenting in part).
incorporate principles of state law, federal law governs nationwide federal programs.200 Quoting United States v. Kimbell Foods, Judge Merritt stated that federal law applied because “[f]ederal programs that ‘by their nature are and must be uniform in character throughout the Nation’ necessitate formulation of controlling federal rules.”201 However, it is also necessary to inquire whether the use of state law would frustrate objectives of the federal programs and whether the use of federal law would disrupt commercial relationships that state law established. Applying the Kimbell Foodstest, Judge Merritt concluded that federal common law applies to piercing issues under CERCLA because (1) CERCLA presents a nationwide remedy to a nationwide problem; (2) Congress did not intend for the effectiveness of CERCLA to depend on the attitudes of the states toward parent-subsidiary relationships and liability arising therein; and (3) liability under CERCLA should not depend on the particular state in which a shareholder or parent corporation happens to reside or do business.202 Thus, CERCLA’s far-reaching goal to impose liability on all PRPs would be frustrated if corporations could form subsidiaries in states with strict standards on piercing the corporate veil.203 Judge Merritt stated that the appropriate federal common law test should be “simply whether the parent corporation ‘controls or at the relevant time controlled the management and operations of the subsidiary.’”204

Judge Ryan, dissenting, again agreed with the district court and applied an “actual control” test, writing that a parent corporation may be liable as an operator under CERCLA “if the facts of the case show that its domination and control of the subsidiary corporation ostensibly operating the facility is so pervasive that the parent is the operator in fact.”205 Judge Ryan also would have affirmed the district court’s finding that CPC

200. See id.
201. Id. (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979)).
202. See id. at 584-86.
203. See id.
204. Id. at 586 (quoting United States v. Nicolet, Inc., 712 F. Supp. 1193, 1202 (E.D. Pa. 1989)). Judge Merritt believed this is a fact-specific inquiry for which the court could look at a number of factors. See id. (citing United States v. Jon-T Chems., Inc., 708 F.2d 688, 691-92 (6th Cir. 1983)); see also cases cited supra note 105.
was liable as an operator because it acted as an operator, rather than as an interested investor, and also that Aerojet was liable as an operator because it actively participated in the businesses and exercised pervasive control over the Cordova corporations, which resulted in the parent effectively operating the facility.

C. United States Supreme Court

The Supreme Court, in an opinion written by Justice Souter, held that (1) a parent corporation can be held liable as an "owner" under CERCLA for the acts of a subsidiary when the corporate veil is pierced; (2) the participation-and-control test used by the district court to evaluate the parent corporation's supervision over the subsidiary is not an appropriate test to impose liability under CERCLA; and (3) a parent corporation can be held liable as an operator under CERCLA in cases other than the corporate parent's sole or joint venture operation with the subsidiary.

In developing CERCLA, Congress did not even attempt to rewrite the well-settled rules regarding piercing the corporate veil. Therefore, with respect to the control test used by the district court, Justice Souter wrote that extensive amounts of control over a subsidiary result in a situation in which the corporate veil may be pierced. The Court declined to address, however, whether it would be appropriate to apply state law piercing doctrines or federal common law piercing doctrines because none of the parties had appealed the issues with respect to derivative liability by piercing. In such situations when

208. See id. at 591.
209. See id. at 593.
209. See id. at 70; cf. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979) (stating that "silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely").
210. See Bestfoods, 524 U.S. at 64.
211. See id. at 59 n.2. Justice Souter noted considerable disagreement among courts and commentators on the issue of the using state or federal common law principles on piercing with respect to CERCLA indirect liability. See id. Many courts hold that federal law should govern corporate veil piercing. See, e.g., Cordova Chem. Co., 113 F.3d at 584-85 (Merritt, J., concurring in part and dissenting in part) (arguing that federal common law should apply); Lansford-Coaldale Joint Water Auth. v. Tonoli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993) (stating that "given the federal interest in uniformity in CERCLA application, it is federal common law, and not state law, which governs when corporate
piercing is appropriate, indirect liability as an "owner" does exist to reach the corporate shareholder or parent under CERCLA.212

However, with respect to "operator" liability, the Supreme Court concluded that the control test used by the district court was not the correct approach.213 According to the Court, the district court's analysis would create a "relaxed, CERCLA-specific rule of derivative liability" that would vary from traditional expectations of corporate CERCLA law.214 If the acts of operating the polluting facility are done on behalf of the corporate parent itself, then reference to piercing the corporate veil is not necessary and the operation of the facility establishes direct CERCLA liability.215 The appropriate inquiry with respect to "operator" liability is whether the parent corporation or shareholder operates the polluting facility, not whether it operates the subsidiary.216 A reviewing court should look to the extent of participation in the activities of the polluting facility.217 That is, operation would entail the direction or management of the workings or conduct of the polluting facility.218 In particular,


212. See Bestfoods, 524 U.S. at 61-64.
213. Id. at 67-70.
214. Id. at 70.
215. See id. at 65 (citing Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc., 831 F.2d 327, 330 (5th Cir. 1987) (stating that "CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act"); United States v. Kayser-Roth Corp., 810 F.2d 24, 28 (1st Cir. 1987) (stating that "[a] person who is an operator of a facility is not protected from liability by the legal structure of ownership").
216. See Bestfoods, 524 U.S. at 64-65.
217. See id.
218. See id. at 52.
a corporate parent, in order to be liable as an operator, must “manage, direct, or conduct operations specifically related to . . . the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” The test articulated by the Sixth Circuit fell short of this definition because it only looked to situations in which the corporate parent operated the facility itself or alongside the subsidiary as a joint venturer.

The Court explained that there were some situations not expressly recognized by the circuit court in which the conduct of dual officers and directors in a parent-subsidiary relationship might amount to direct operation by the parent corporation under CERCLA. The Court cautioned, though, that “it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary’s acts.” In fact, the presumption exists that such dual directors and officers “change hats” as appropriate in terms of their actions taken on behalf of a subsidiary. With respect to CPC and Ott, the government would have to rebut this presumption by showing that CPC officers and directors were acting on behalf of CPC, rather than Ott, when making decisions concerning the polluting facility. For instance, the government might rebut the presumption if it could show that the dual officers’ and directors’ actions were contrary to the interests of Ott and simultaneously advantageous to CPC. If the presumption is rebutted, then the parent corporation might be held liable as an operator under CERCLA.

The Court recognized another possibility that might lead to the imposition of liability under CERCLA as an operator; a parent corporation may be liable if it manages or directs its

219. Id. at 66-67.
220. See id. at 67.
221. See id. at 71.
222. Id. at 69 (quoting Am. Protein Corp. v. AB Volvo, 844 F.2d 56, 57 (2d Cir. 1988).
223. See id. at 69-70; see also United States v. Jon-T Chem., Inc., 768 F.2d 686, 691 (5th Cir. 1985); Fissler v. Int’l Bank, 282 F.2d 231, 238 (2d Cir. 1960); BLUMBERG, supra note 17, § 1.02; 18A AM. JUR. 2D Corporations § 57 (1985). See generally Lusk v. Foxmeyer Health Corp., 129 F.3d 773 (5th Cir. 1997).
224. See Bestfoods, 524 U.S. at 69-70.
225. See id. at 69-70 n.13.
226. See id. at 69-70.
subsidiary facility’s polluting activities—even if an agent who is not associated with the subsidiary manages or directs the facility. 227 Again, the Court cautioned that certain activities of agents of the corporate parent are normal and incident to parent-subsidiary relationships and would not amount to an operation establishing CERCLA liability. 228 Some activities—particularly those related to subsidiary performance, general policy, and financial issues—are merely parent corporation oversight functions that are consistent with its investor status. 229 If a parent corporation’s oversight actions were to be considered “eccentric,” CERCLA liability as an operator may arise. 230 With respect to CPC, its agent, Williams, had worked only for CPC, yet he was heavily involved in the environmental and regulatory issues at the Ott facility, including direct participation in regulatory responses. 231 The Court found that Williams’ activities would not be sufficient to establish operator liability for CPC, but concluded that the facts in the record certainly raised an issue with respect to his activities on behalf of CPC such that the case should be remanded to the district court for further consideration as to his and any other CPC agent’s role in the operation of the facility. 232

227. See id. at 71-73.
228. See id.
229. See id. at 72.
230. See id.
231. See id. at 72-73.
232. See id. The Court noted that the evidence taken by the district court seemed to indicate that some of the actions taken in terms of the facility were actually dictated by CPC. See id. at 73 n.14. (citing CPC Intl Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549, 561 (W.D. Mich. 1991) (stating that “CPC officials engaged in . . . missions to Ott II in which Ott II officials received instructions on how to improve and change”). “CPC executives who were not Ott II board members also occasionally attended Ott II board meetings.” Id. The Court cautioned again that the evidence also suggested that the operations of the facility were decided on a daily basis without interference by or approval of CPC. See id.
IV. INTERPRETATIONS BY FEDERAL COURTS 233

Fifty-five cases have already cited Bestfoods, twenty-one of which relied on or discussed it. Justice Souter, however, left two issues unresolved in the opinion in Bestfoods. 234 First, the Court did not decide whether state or federal law should govern issues of piercing the corporate veil to impose liability on a shareholder or corporate parent under the “owner” provisions of CERCLA. 235 Second, the Court did not decide what it really means for a parent corporation to “operate” a subsidiary’s facility in order to hold the parent corporation liable as an

233. This Article focuses solely on the liability issues related to parent corporations and shareholders, particularly related to direct operation of facilities and piercing the corporate veil. This Article does not address CERCLA liability issues that arise out of an individual’s service as a corporate officer. See Moore, supra note 39 (providing a general analysis of corporate officer liability under CERCLA). Although an individual may be both a corporate shareholder and an officer, this Article focuses only on CERCLA liability issues arising out of corporate relationships. Numerous federal courts have also examined issues related to liability of corporate officers solely. See, e.g., Deby, Inc. v. Cooper Indus., No. 99-C2484, 2000 WL 263985 (N.D. Ill. Feb. 29, 2000) (finding that individual corporate officers are only liable as operators if they were personally involved in the polluting activities); Norfolk S. Ry. Co. v. Gee Co., No. 98-C1619, 1999 WL 286287 (N.D. Ill. Apr. 23, 1999) (holding that a shareholder or an officer could be liable as an “operator” of a subsidiary but not distinguishing between the roles of shareholder and officer). Similarly, this Article does not address Bestfoods principles as they apply to federal statutory schemes other than CERCLA. See, e.g., White v. Goodman, 200 F.3d 1016, 1019 (7th Cir. 2000) (discussing Bestfoods, Judge Posner found that the consumer protection statute could not be extended to the shareholders unless they show piercing of the corporate veil); Papa v. Katy Indus., Inc., 166 F.3d 937, 941 (7th Cir. 1999) (stating that the court could not “think of a good reason why the legal principles governing affiliate liability should vary from statute to statute, unless the statute, or the particular policy that animates the statute ordains a particular test”); United States v. Days Inns of Am., Inc., 151 F.3d 822, 828 (6th Cir. 1998) (following Bestfoods by applying it to the Americans with Disabilities Act such that a party is responsible for an inaccessible facility only if the party possesses a “significant degree of control over the final design and construction of the facility”); United States v. Anthony Dell’Aquila, Enters., 150 F.3d 329, 334 (3d Cir. 1998) (finding that Bestfoods applies to the Clean Air Act even though Bestfoods is concerned with the definition of “operator” in CERCLA); Harris v. Oil Reclaiming Co., 94 F. Supp. 2d 1210 (D. Kan. 2000) (applying the Bestfoods definition of “operator” to the oil pollution Act and Kansas law to determine whether the corporate veil had been pierced); Chavez v. Lawrence & Frederick, Inc., No. 97-C4536, 1999 WL 808374 (N.D. Ill. Oct. 6, 1999) (denying Chavez’s argument that Bestfoods principles for corporate parent liability should also apply to claims under the FMLA); Diangi v. Valez, Inc., 58 F. Supp. 2d 1023 (N.D. Ill. 1999) (stating that the legal principles governing affiliate liability under the FMLA, as set forth in Bestfoods, should not vary from statute to statute).

234. See Bestfoods, 524 U.S. at 51-53; see also Silecchia, supra note 24, at 174.

235. See Bestfoods, 524 U.S. at 63 n.8; Silecchia, supra note 24, at 122.
"operator" under CERCLA, and how courts should apply the guidance given in *Bestfoods* as to operator liability.\(^{238}\)

A. Federal or State Piercing Law?\(^{237}\)

1. Sixth Circuit and District Courts

The *Bestfoods* litigation originated in the Sixth Circuit, and as discussed above, Sixth Circuit judges gave the case considerable review.\(^{238}\) In *Carter-Jones Lumber Co. v. Dixie Distributing Co.*,\(^{239}\) the Sixth Circuit again addressed CERCLA issues.\(^{240}\) Carter-Jones brought an action under CERCLA for contribution from Dixie and its president and sole shareholder, Mr. Denune, with respect to costs Carter-Jones incurred in removing hazardous materials from a site in Ohio.\(^{241}\) In an opinion written by Judge Siler and joined by Judges Boggs and Suhrheinrich, the court applied *Bestfoods* to find that "Denune can be liable as an arranger for disposal due to his status as the

\(^{236}\) See Silecchia, supra note 24, at 122; see also United States v. Township of Brighton, 153 F.3d 307, 327 (6th Cir. 1998) (Moore, J., concurring) (stating that "[t]he Court thus left open the question of whether participation in a facility's pollution-related operations must involve substantial day-to-day control in order to hold a party liable as an operator for response costs").

\(^{237}\) Although courts in some circuits have had the opportunity to consider issues concerning the application of state or federal piercing doctrines resulting in CERCLA liability, courts in the First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have not yet done so. For a discussion on how some authors believe the Tenth Circuit will resolve this issue, see Miller & Mangone, supra note 15.

\(^{238}\) See supra Part III.B.

\(^{239}\) 168 F.3d 840 (6th Cir. 1999).

\(^{240}\) See id.

\(^{241}\) See id. "The district court found ... Dixie and Denune severally liable under ... CERCLA . . ., as arrangers for the disposal of hazardous waste [t]hat . . . had contaminated land owned by ... Carter-Jones, . . . which filed the CERCLA action against Dixie, Denune, and other defendants . . . to recover costs expended in cleanup of the site." Id. at 843. "Dixie and Denune appealed the judgment. Carter-Jones cross-appealed the decision of the court denying joint and several liability by Dixie and Denune." Id.
sole shareholder of Dixie if Ohio law would allow the piercing of the corporate veil . . . .\textsuperscript{242} Under Ohio law, piercing the corporate veil is appropriate to hold a shareholder liable when:

(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.\textsuperscript{243}

The court cited \textit{Bestfoods} for the proposition that Ohio law would be appropriate to resolve piercing the corporate veil in CERCLA cases.\textsuperscript{244} The court reasoned that CERCLA’s silence on the choice of law issue in piercing cases indicates that Congress did not intend to replace well-established state corporate law simply because CERCLA provides a remedy that arises under federal law.\textsuperscript{245} In such cases, the necessity of shareholders knowing the implications of corporate ownership demands that the statute speak directly to the issue before state law would be replaced.\textsuperscript{246} The court further stated:

CERCLA’s regulation of an environmental tort should not and does not relieve a corporation, its officers, or its owners of their bargained-for duties and liabilities as they do business in the corporate form. Section 113(f) of CERCLA, the section governing contribution actions, in no way addresses issues of corporate liability, and it should not therefore be presumed to alter state laws governing the liability of corporations vis \`a vis their officers and owners.\textsuperscript{247}

The court did not discuss the issue of joint and several liability under CERCLA any further because the district court

\textsuperscript{242} \textit{Id.} at 846. “Demure . . . can also be liable in his own right due to his intimate participation in the arrangement for disposal. He 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.” \textit{Id.}

\textsuperscript{243} \textit{Id.} at 847 (quoting Belvedere Condo. Unit Owner’s Ass’n v. R.E. Roark Cos., Inc., 617 N.E.2d 1075, 1085 (Ohio 1993)).

\textsuperscript{244} \textit{See Id.}

\textsuperscript{245} \textit{See Id.}

\textsuperscript{246} \textit{See Id.}

\textsuperscript{247} \textit{Id.}
had not addressed the issue; as such, the court did not have sufficient facts to make a determination.\textsuperscript{248}

In \textit{AT&T Global Information Solutions Co. v. Union Tank Car Co.},\textsuperscript{249} AT&T entered into a consent order regarding cleanup of chemical solvent waste on real property owned by Granville Solvents, Inc. (GSI).\textsuperscript{250} AT&T, along with the other PRPs that signed the consent order, brought an action under CERCLA for contribution against Vermont American and its subsidiary, Larsan Manufacturing Co. (Larsan).\textsuperscript{251} In the context of arranger liability, the District Court for the Southern District of Ohio applied the \textit{Bestfoods} rationale and concluded that in order to hold Vermont American liable for Larsan’s actions, under the CERCLA standard for arranger liability, AT&T would have to establish that piercing the corporate veil was appropriate.\textsuperscript{252} Derivative arranger liability, like derivative owner liability under CERCLA through piercing the corporate veil, would not require actual participation in the conduct that resulted in CERCLA liability.\textsuperscript{253} The district court recognized that \textit{Bestfoods} addressed, but did not decide, whether federal or state veil piercing laws were to be applied to pierce the corporate veil in order to establish CERCLA liability.\textsuperscript{254} Here, the court applied Ohio state law on piercing the corporate veil\textsuperscript{255} after concluding that the Sixth Circuit had already determined that state law applied to attempts to pierce the corporate veil in CERCLA cases.\textsuperscript{256} The court concluded that Larsan of Nevada was “merely

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\textsuperscript{248} See \textit{id.} at 848.
\textsuperscript{249} 29 F. Supp. 2d 857 (S.D. Ohio 1998).
\textsuperscript{250} See \textit{id.}
\textsuperscript{251} See \textit{id.} “Vermont American was the parent corporation of Larsan Manufacturing Company of Nevada (Larsan of Nevada). In turn, Larsan of Nevada was the parent corporation of Larsan. Both of these subsidiaries of Vermont American were dissolved in 1991.” \textit{Id.} at 880 n.3.
\textsuperscript{252} See \textit{id.} at 862-63 (stating that it is implicit, however, that a parent can be held derivatively liable as an arranger if the corporate veil can be pierced (citing \textit{Bestfoods} and U.S. v. Northeastern Pham. & Chem. Co., Inc., 810 F.2d 728, 744 (8th Cir. 1986))).
\textsuperscript{253} See \textit{id.} at 864.
\textsuperscript{254} See \textit{id.} at 865 n.9.
\textsuperscript{255} The district court applied the same test for piercing under Ohio state law as set forth above in \textit{Carter-Jones Lumber Co.}, 166 F.3d 840. See \textit{id.} at 865-66 (citing \textit{Belvedere Condo. Unit Owners’ Ass’n}, 617 N.E.2d 1075).
\end{flushleft}
a legal fiction" with "no more than a paper existence" so that
piercing through Lar San of Nevada was unnecessary, and the
court could consider whether Vermont American's veil should
be pierced.\textsuperscript{257}

Applying the Ohio piercing test, the court pierced the
corporate veil and found Vermont America liable for its share of
the cleanup for the following reasons. First, Vermont American
exercised control over Lar San when it purchased, sold, and
dissolved Lar San; owned (effectively) all of the capital stock in
its subsidiary Lar San; had overlapping employees, corporate
directors, and officers; and financed Lar San, which was
minimally capitalized.\textsuperscript{258} Second, it would be unfair and
inconsistent with CERCLA for Vermont American to escape
liability when it profited from improper waste disposal by
Larson even though there was no showing that control over
Larson in such a manner as to commit fraud or an illegal act.\textsuperscript{259}
Third, injury or unjust loss occurred because Vermont American
used its control to dissolve its patently liable subsidiary
corporation in the face of known potential environmental
liability.\textsuperscript{260} While the court stated that its decision was based on
the Ohio piercing law, the court relied on CERCLA's broad
policy to support its decision, stating:

Courts applying state veil piercing law in conjunction with
a CERCLA action must keep this statute's broad legislative
purpose in mind. It would be unfair and incongruous with

\textsuperscript{257} AT&T Global Info. Solutions Co., 29 F. Supp. 2d at 864 (citing State ex rel.
Johnson & Higgins Co. v. Safford, 159 N.E. 829 (Ohio 1927), followed in Independent Ins.
Agents of Ohio v. Febe, 587 N.E.2d 814, 819 (Ohio 1992)).

\textsuperscript{258} See id. at 866-87. Although the district court noted that "Ohio law permits one
corporation to own all of the stock of another corporation as well as to employ common
officers and directors, as well as other personnel, without risking veil piercing," id. at 867
(citations omitted), the court seemed to rely on the inadequate capitalization—well after
the corporation was formed rather than at the time of incorporation—as the sole factor
demonstrating control under this first prong of Ohio piercing doctrine. See id.

\textsuperscript{259} See id. at 868. That the parent corporation somehow "profited" from an
"improper" distribution of the assets of the subsidiary does not seem to be an
appropriate ground for piercing the corporate veil, as general principles of corporate law
already provide relief for creditors in the case of improper distributions to shareholders.
See HENN & ALEXANDER, supra note 35, § 323, at 901-02. Shareholders who receive
improper distributions of corporate assets are ordinarily liable up to the amount
received. See id. This is, however, a very different result than that of piercing the
corporate veil to expose a shareholder's entire wealth.

\textsuperscript{260} See AT&T Global Info. Solutions Co., 29 F. Supp. 2d at 869.
CERCLA to permit the entity which profited from improper waste disposal to escape all liability. Thus, with the intent behind CERCLA in mind and considering cases construing Belvedere, the record presents sufficient evidence to pass the second, or fairness, prong of the Belvedere test for piercing the corporate veil.  

2. Seventh Circuit and District Courts

Shortly after the Bestfoods decision was announced, the Seventh Circuit, in North Shore Gas Co. v. Salomon, Inc., considered CERCLA liability for North Shore Gas, as the successor corporation to North Shore Coke and Chemical Co. As in many CERCLA cases, the parties did not argue choice of law issues because both proceeded under federal common law. As such, the court reserved issues relating to choice of law until argued and did not comment further.

Similarly, in Browning-Ferris Industries v. Ter Maat, companies that were partially responsible for landfill-site pollution brought a CERCLA contribution action against M.I.G. Investments, Inc. (M.I.G.), AAA Disposal Systems, Inc. (AAA), and both corporations' principal shareholder, Richard Ter Maat. The District Court for the Northern District of Illinois relied heavily on Bestfoods in reaching its conclusion that Ter Maat, who was both a shareholder and officer of the polluting

261. Id. at 889-90. The court also stated: Given that the three Belvedere requirements are met, Vermont American’s corporate veil will be pierced to make certain that the entity who ultimately profited from arranging for the improper disposal of hazardous waste bears some of the burden for its cleanup. Any other decision would be circumventing the broad, expansive, and remedial purposes of CERCLA.

262. 152 F.3d 642 (7th Cir. 1998).

263. See id.

264. See id. at 650-51; see also United States v. Vitek Supply Corp., 151 F.3d 580, 585 (7th Cir. 1998) (deciding not to “discuss whether state or federal law controls the identification of alter egos or other exercises in corporate veil piercing” because the parties did not argue this issue).

265. See North Shore Gas Co., 152 F.3d at 651.

266. 195 F.3d 953 (7th Cir. 1999). The owners of a landfill leased it to a predecessor of Browning-Ferris in 1971, which operated it until the fall of 1975. See id. at 954. From that time until 1988, it was operated by two corporations—M.I.G. and AAA. See id. AAA was then sold, and the president and principal shareholder, Ter Maat, moved to Florida; M.I.G. abandoned the landfill without covering it properly. See id. at 954-55.

267. See id.
company, could only be liable "derivatively under state veil-piercing law."\textsuperscript{268} Although the district court found that Ter Maat was involved with decision making at the polluting facility, there were no grounds for piercing the corporate veil.\textsuperscript{269} The Seventh Circuit held that: (1) Ter Maat, as shareholder, could be individually liable as an operator under CERCLA if he personally operated the landfill, and (2) Ter Maat and an affiliate corporation would not be held derivatively liable for costs allocated to one defendant corporation under the theory of piercing the corporate veil.\textsuperscript{270}

With respect to piercing, Judge Posner noted that there was a split of authority as to whether state or federal laws on piercing the corporate veil apply to CERCLA cases.\textsuperscript{271} He also noted that "the Supreme Court expressly left the question open in [Bestfoods].\textsuperscript{272} The court did not take up the issue, though, because the parties proceeded as if Illinois state law applied; therefore, they waived any arguments for the application of federal common law.\textsuperscript{273}

After resolving other issues related to Ter Maat's status as an operator, discussed below, and those related to allocation of liability, the court observed that if Ter Maat were not deemed an operator, then it was important to determine whether he—as shareholder of M.I.G. and AAA and as an affiliate of M.I.G.—was derivatively liable under CERCLA for M.I.G.'s conduct.\textsuperscript{274} Judge Posner noted that the corporate veil may be pierced, but he emphasized that limited liability "serves the important social purpose of encouraging investment by individuals who are risk averse and therefore will not invest (or will insist on a much higher return) in an enterprise if by doing so they expose their entire wealth to the hazards of litigation."\textsuperscript{275} "[T]he strongest case[s] for piercing [are those in which the] corporation [leads]
potential creditors to believe that it [is] more solvent than” it is.  

Judge Posner wrote that Illinois law on piercing the corporate veil first looks to the traditional facets of “unity of interest and ownership,” ‘commingling of assets,’ disappearance of the separate ‘personalities’ of the corporation and [the shareholder, and] avoiding ‘injustice.” Without further citation to Illinois state piercing law, Posner observed that only two arguments support piercing the corporate veil when it comes to involuntary creditors, such as Browning-Ferris, because federal law mandated the cleanup, rather than M.I.G. inducing it by misrepresenting its solvency. The two supporting arguments were that (1) Ter Maat, as shareholder, so neglected the legal requirements for operating in the corporate form that he forfeited the protections of limited liability that the form provides, and (2) all entities engaging in “potentially hazardous activities” must maintain sufficient capitalization to answer in potential tort suits because if the corporation fails to do so, then the shareholders lose their limited liability protections. Noting that this second argument had not prevailed in any jurisdiction, Judge Posner observed that Illinois courts often use “undercapitalization” as a rationale for piercing.

The court observed that no evidence was present to show that M.I.G. or AAA failed to properly operate in the corporate form; thus, the evidence was insufficient to justify piercing the corporate veil. With respect to undercapitalization, the court concluded that although M.I.G. operated with low capitalization for tax reasons, this was not a sufficient ground for piercing.
because it was not wrongful for M.I.G. to take advantage of lawful means to reduce taxes. 282 Undercapitalization is only a proper ground for piercing when the corporation has so little money that it cannot actually operate the business on its own, and even then, undercapitalization is not ordinarily the sole factor to support piercing. 283 Without further comment as to the Illinois factors, perhaps because no evidence was presented, the court merely observed that M.I.G. was not a shell corporation, so piercing was not appropriate, and therefore, the district court had no piercing issues to consider on remand. 284

Recently however, in Board of Trustees, Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc., 285 a case arising under ERISA, the Seventh Circuit indicated that it believes that federal common law on piercing would apply with respect to CERCLA liability. 286 There, the plaintiffs sought to collect contributions that should have been made to the National Pension Fund and other trusts covered by ERISA. 287 In an attempt to protect the corporate officers from vicarious liability for their firm's pension debts, the defendants argued that such liability arises under state law, and any effort to show a piercing of the corporate veil in order to collect the debt belonged in state court. 288 Citing Bestfoods, the court observed that with respect to ERISA or CERCLA liability based on piercing the corporate veil, "everything depends on, and the claim arises under, federal law." 289

3. Second Circuit and District Courts

In In re Nextwave Personal Communications, Inc. 280 the Second Circuit Court of Appeals indicated, in dicta, that it believed some type of federal common law might apply to

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282. See id. at 961.
283. See id. (citing William P. Hackney & Tracey G. Benson, Shareholder Liability for Inadequate Capital, 43 U. Pitt. L. Rev. 837, 865-87 (1982)).
284. See id.
285. 212 F.3d 1031 (7th Cir. 2000).
286. See id. at 1038.
287. See id. at 1033.
288. See id. at 1037.
289. Id. at 1038.
290. 200 F.3d 43 (2d Cir. 1999).
CERCLA veil-piercing cases. The court, however, did not comment further because the issues concerning construction of FCC regulations were resolved on other grounds.

Considering a motion to strike corporate defendants in Accashian v. City of Danbury, the superior court granted the motion by simply stating that “[t]he plaintiffs have not alleged any facts of conduct that justifies piercing the corporate veil and failing to give effect to separate corporate status.” Because the plaintiffs had not alleged any facts supporting veil piercing, the court did not comment further on the application of federal or state piercing principles. Since the court did not pierce the corporate veil, it struck the claims against the parent corporations.

B. Defining and Applying Operator Liability

1. Sixth Circuit and District Courts

In Carter-Jones Lumber Co. v. Dixie Distributing Co., the Sixth Circuit also considered the application and extension of operator-type liability under CERCLA. The court applied Bestfoods in the operator context to arranger liability under

291. See id. at 57.
292. See id. at 57 n.14. The court commented that “[i]f we were to apply federal common law, it would not be federal common law in the strictest sense, i.e., a rule of decision that amounts, not simply to an interpretation of a federal statute, but, rather, to the judicial ‘creation’ of a special federal rule of decision.” Id. (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 755 (1998) (internal citations and ellipses omitted).
294. Id. at *5.
295. See id.
296. See id. at *6.
297. Although courts in some circuits have had the opportunity to consider issues concerning the definition and application of operator liability under CERCLA, courts in the First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits have not yet done so. Two state courts have considered the construction of “operator” as set forth in Bestfoods for purposes of application under state law environmental statutes. See Parks Hiway Enters. v. CEM Leasing, Inc., 995 P.2d 657, 663 (Alaska 2000) (rejecting the Bestfoods definition of operator and applying an “actual control” test, which is supportive of Alaska’s “common usage” approach to statutory construction); Uniguard Ins. Co. v. Leven, 983 P.2d 1155, 1162 (Wash. App. 1999) (using the Bestfoods definition of operator to impose liability on an individual shareholder under state law).
298. 166 F.3d 840 (6th Cir. 1999).
299. See id. at 846.
section 107(a)(3) of CERCLA since both involved PRPs. Mr. Denune, both the sole shareholder and president of Dixie, was to arrange for the disposal of the hazardous material contained within transformers that he had purchased. "[U]sing Bestfoods, [the court found that] Denune can be liable ... in his own right due to his intimate participation in the arrangement for disposal." Denune denied involvement in Dixie's illegal disposal practices but did not present any evidence to show that any of the other twenty-one Dixie employees were responsible for waste disposal practices. Further, Denune was the Dixie representative who purchased and sold the leaky transformers and who signed an affidavit on Dixie's behalf relating to PCB hazards at the time Dixie purchased the transformers. Denune was found to be individually liable due to his "intimate participation" in the waste disposal activities. The court's factual basis for holding Denune liable seemed to rely more on Denune's status as an officer of the corporation than on his actions as the sole shareholder of Dixie, similar to the case in Bestfoods.

In United States v. Township of Brighton, the Sixth Circuit examined operator liability in the context of a governmental entity. The United States brought suit under CERCLA against Brighton for costs it incurred when cleaning up a dump-site that Brighton and others used. Even though Brighton was a

300. See id.
301. See id. at 844-45.
302. Id. at 846.
303. See id. at 845.
304. See id. at 843.
305. See id. at 847.

Denune can be liable as an arranger for disposal due to his status as the sole shareholder of Dixie if Ohio law would allow the piercing of the corporate veil, and he can also be liable in his own right due to his intimate participation in the arrangement for disposal. He 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.

Id. at 846.
306. See id.
308. See id.
309. See id. at 310. The United States District Court for the Eastern District of Michigan found the defendants jointly and severally liable for the cleanup costs plus post-judgment interest, but not prejudgment interest. See id. at 312. Both Brighton and the United States appealed. See id.
governmental entity, not a parent corporation like the Bestfoods Court addressed, the court, in an opinion written by Judge Boggs, looked to Bestfoods to determine whether the Township was an operator.\textsuperscript{310} An operator is simply one who directs the workings, manages, and conducts the affairs related to the hazardous materials.\textsuperscript{311} The court interpreted Bestfoods to require an “actual control” test for CERCLA operator liability—before an entity can be considered an “operator” under CERCLA, it must perform affirmative acts.\textsuperscript{312} The court also stated that under Bestfoods, an “operator” would also include governmental entities that micro-managed polluting facilities through the enactment of environmental and other regulations.\textsuperscript{313}

However, “[t]he failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator.”\textsuperscript{314} Once a PRP acts, though, it cannot defend liability on the grounds that it was not responsible for the particular

\textsuperscript{310} See id. at 314.

\textsuperscript{311} See id.

\textsuperscript{312} See id. The court stated:

Nevertheless, these cases do highlight the importance of establishing some actual control by a putative operator. The plain meaning of the term ‘operator’ as expounded upon in Bestfoods does, after all, require that Brighton Township have performed some affirmative acts—that they ‘operated’ the site by ‘direct[ing] the workings,’ ‘manage[ing],’ or ‘conduct[ing] the affairs’—before they can be held responsible. We hold, therefore, that an ‘actual control’ test applies not just in the corporate context, but in the present one as well. Before one can be considered an ‘operator’ for CERCLA purposes, one must perform affirmative acts. The failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator.

\textit{Id.}

\textsuperscript{313} See id. at 316. Governmental entities can become operators under CERCLA if they regulate the operation of a polluting facility in an active and extensive manner. \textit{Id.} (citing United States v. Dart Indus., 847 F.2d 144, 146 (4th Cir. 1988) (declining to classify local government as operator merely for failing to regulate adequately)). Such liability may arise when the “‘regulations’ are just the government’s method of micromanaging the facility.” \textit{Id.} at 315. In Judge Moore’s concurring opinion, she stated that “the [federal] government . . . can be liable when it engages in regulatory activities extensive enough to make it an operator of a facility . . . even though no private party could engage in the regulatory activities at issue.” \textit{Id.} at 325. Judge Dowd, dissenting in part and concurring in part, stated that he believed that the court had altered the analysis set forth by Bestfoods to create a lower threshold for liability and that the Bestfoods standard of operator liability should apply to both corporations and governmental entities. \textit{Id.} at 333.

\textsuperscript{314} \textit{Id.} at 314.
contamination that entailed the costly cleanup. That is, once a party becomes an operator for purposes of CERCLA, it is bound to exercise care in the management of the facility in accordance with the strict liability scheme of CERCLA. Omissions cannot establish operator liability; however, after a defendant is established as an operator, it "is just as responsible for hazardous conditions caused by its neglect and omissions as it is for those caused by its affirmative acts." Ultimately, the court declined to resolve the issue of whether Brighton was an operator, remanding to the district court for further consideration of whether Brighton crossed the threshold of micro-managing the dump-site, which would trigger liability under CERCLA as a facility operator.

In Datron, Inc. v. CRA Holdings, Inc., the district court considered an action that Datron brought against CRA for contribution under CERCLA as a parent-corporation operator. The district court, quoting the Bestfoods opinion, stated that a CERCLA operator is someone who "directs the workings of, manages, or conducts the affairs of a facility" with respect to the hazardous waste and that normal oversight of a subsidiary corporation would not trigger liability. Datron submitted the following evidence regarding parent company operation of the subsidiaries: (1) "corporate policy referred to the subsidiaries as divisions"; (2) the parent company's "safety director conducted semiannual OSHA inspections of the properties"; (3) "corporate policy required all employees and divisions to comply with" federal environmental laws, and the parent company sought environmental liability coverage for one subsidiary; (4) the

315. See id.
316. See id.
317. Id. at 315.
318. See id. at 315-16. Although the court sympathized with Brighton, it indicated that it would have been more appropriate for the Township to enter into an arm's length disposal arrangement in the first place rather than to become overly involved in the dump-site's activities once the dump's management became too much for the landowner. See id. at 318.
320. See id. at 740. CRA was the corporate successor of International Controls Corporation (ICC), which owned a majority interest in two subsidiaries, All American Industries, Inc. and Datron Systems, Inc.; these subsidiaries owned the polluted properties at issue. See id. at 739. Datron also asserted claims under the sales agreement indemnification provisions. See id. at 742.
321. Id. at 748-47.
corporations had overlapping officers; (5) "the subsidiaries had to obtain [parent company] approval for any credit arrangements"; and (6) corporate legal counsel assisted in responses for the subsidiaries to the EPA and other matters.\textsuperscript{322}

The court agreed with CRA in that the corporate parent did not "manage, direct, or conduct operations ... having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."\textsuperscript{323} The court noted that the subsidiaries were operated as separate business entities, and personnel employed by the subsidiaries made daily environmental compliance and hazardous waste decisions.\textsuperscript{324} The court further noted that the parent company's legal counsel's involvement in some matters was only at the request of the subsidiary and was unrelated to the creation or disposal of hazardous waste.\textsuperscript{325} The parent company's involvement amounted plainly to "normal oversight by a parent corporation over its subsidiaries."\textsuperscript{326} That is, "[r]eferring to the subsidiaries as divisions, obtaining insurance, establishing corporate policies and conducting sporadic safety inspections are the kind of activities 'which are consistent with the parent's investor status.'"\textsuperscript{327} The court reiterated the statements from \textit{Bestfoods} that the existence of overlapping officers is singularly insufficient to establish CERCLA operator liability because it is presumed that corporate officers are wearing their subsidiary hats when performing such functions.\textsuperscript{328} To trigger CERCLA liability, the parent company must be shown to have operated the polluting facility at issue.\textsuperscript{329}

2. Seventh Circuit and District Courts

In \textit{North Shore Gas Co. v. Salomon, Inc.},\textsuperscript{330} discussed above, the Seventh Circuit also considered whether North Shore Gas, as the successor corporation to North Shore Coke and Chemical

\textsuperscript{322} \textit{Id.} at 747.
\textsuperscript{323} \textit{Id.} at 747-48.
\textsuperscript{324} \textit{See id.}
\textsuperscript{325} \textit{See id.}
\textsuperscript{326} \textit{Id. at} 748.
\textsuperscript{327} \textit{Id.}
\textsuperscript{328} \textit{See id.} (quoting United States v. \textit{Bestfoods}, 524 U.S. 51, 69-70 (1998)).
\textsuperscript{329} \textit{See id.}
\textsuperscript{330} 152 F.3d 642 (7th Cir. 1998).
Co., could be liable in a contribution action brought under CERCLA. The court concluded that North Shore Gas could only be liable if the predecessor company was an operator for purposes of CERCLA. However, because the court determined that North Shore Gas had succeeded to the liabilities of Coke Co., and would, therefore, be liable if Coke Co. were liable, the court declined to comment further with respect to issues raised by Bestfoods.

In *Browning-Ferris Industries v. Ter Maat*, the Seventh Circuit held that Ter Maat, as shareholder, could be individually and directly liable as an operator under CERCLA if he personally operated the landfill, rather than merely performing his duties as the president of the corporation. Thus, if Ter Maat:

supervised the day-to-day operations of the landfill—for example, negotiating waste-dumping contracts with the owners of the wastes or directing where the wastes were to be dumped or designing or directing measures for preventing toxic substances in the wastes from leeching into the ground and thence into the groundwater—then he would be deemed the operator, jointly with his companies, of the site itself.

331. *See id.*
332. *See id.* at 648-49.
333. *See id.*
334. 195 F.3d 953 (7th Cir. 1999).
335. *See id.* at 958 (citing *Bestfoods*, 524 U.S. at 55); *see also* Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 421-22 (7th Cir. 1994); Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prod., Inc., 931 F.2d 327, 330 (9th Cir. 1991) (per curiam). The Seventh Circuit court in *Browning-Ferris Indus.* explained:

[T]he line between a personal act and an act that is purely an act of the corporation (or of some other employee) and so not imputed to the president or to other corporate officers is sometimes a fine one, but often it is clear on which side of the line a particular act falls. If an Individual is hit by a negligently operated train, the railroad is liable in tort to him but the president of the railroad is not. Or rather, not usually; had the president been driving the train when it hit the plaintiff, or had been sitting beside the driver and ordered him to exceed the speed limit, he would be jointly liable with the railroad.

*Browning-Ferris Indus.*, 195 F.3d at 958.
336. *Browning-Ferris Indus.*, 195 F.3d at 956.
Since this particular scenario for liability had not been considered by the district court, the Seventh Circuit remanded for a determination of Ter Maat's status. 337

3. Second Circuit and District Courts

In Schiavone v. Pearce, 338 the plaintiff brought an action in an attempt to find a third-party defendant, Union Camp, liable for damages under CERCLA. 339 The district court originally ruled in favor of Union Camp because of an indemnification clause in the contract, but the court had not considered direct liability of Union Camp as an operator. 340 On remand after the Bestfoods decision was delivered, 341 the district court extensively quoted the language of Bestfoods describing the actual management beyond ordinary supervision of a subsidiary that is required to establish operator liability. 342 The court further commented on the three circumstances outlined in Bestfoods that would support operator liability under CERCLA: (1) "when the parent operates the facility in the stead of its subsidiary or alongside

337. See id.
339. See id. at 285.
340. See id. at 286.
341. See id. at 287. "After the... Bestfoods decision, Union Camp filed [a] motion for summary judgment, seeking review of its operator liability for pollution at the North Haven plant." Id.
342. See id. at 288-91. The district court stated:
    The Bestfoods Court stated that, [u]nder the plain language of the [CERCLA] statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. This is so regardless of 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."... The Court further held that "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. ... [A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."... When imposing direct liability on this ground, however, it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's act."... Nor can such liability be established on the ground "that dual officers and directors made policy decisions and supervised activities at the facility."
    Id. at 288 (quoting Bestfoods, 524 U.S. at 65-67, 69-70 (citations omitted)).
the subsidiary in some sort of a joint venture"; when a dual officer is acting beyond the norms of parental influence to serve the parent corporation's interest; and (3) when an agent of the parent corporation with no relationship to the subsidiary manages or directs the activities of the polluting facility.

Applying these principles, the district court noted that the facts revealed an overlapped and intertwined management structure but no sufficient evidence to show that Union Camp had managed, directed, or conducted operations related to the pollution in question or had influenced policy with respect to environmental decisions. The evidence did show the following: the parent and subsidiary had dual officers and directors; the subsidiary used the Union Camp legal department; the subsidiary ordinarily provided copies of contracts to Union Camp for review; a Union Camp employee solely guided the negotiations concerning contract renewals with the owner of the polluted site; the parent corporation kept the subsidiary operating during times of financial difficulties; and Union Camp officers were copied on correspondence related to the subsidiary, including environmental issues. The district court concluded that this evidence showed a proper parent-subsidiary relationship and was insufficient to rise to operator liability under Bestfoods. Further, the court concluded that no reasonable jury could find Union Camp liable as an operator.

Similarly, in United States v. Green, the District Court for the Western District of New York considered an action for recovery of costs brought by the United States against Polymer Applications, Inc. (Polymer) and its principal Kevan Green, the sole shareholder and president of Polymer. Green argued that he was not an operator under CERCLA. The district court observed that under Bestfoods, a shareholder can be liable if "such stockholder's management of a corporation requires

343. Id. (quoting Bestfoods, 524 U.S. at 71).
344. See id. (citing Bestfoods, 524 U.S. at 71).
345. See id. at 291-92.
346. See id.
347. See id. at 290.
348. See id. at 292.
350. See id. at 208.
351. See id. at 217.
actions beyond those which are incident to the legal status of stockholders, such as election of directors, and the establishment of by-laws.” Thus, the court would not hold Green liable under CERCLA as an operator “unless he directly participated in the management of the facility's pollution control operations including decisions pertaining to the disposal of hazardous substances and compliance with environmental regulations so as to expose himself to liability as an operator under section [sic] 107.”

Applying this reasoning to the facts, the district court concluded that Green did not manage, direct, or conduct the polluting operations for purposes of establishing liability as an operator under CERCLA. There was evidence that Green owned and exercised control over Polymer as president and treasurer, but there was no evidence that he was personally involved in the operations “specifically related to the pollution or the leakage . . . of hazardous wastes at [the Polymer facility].”

Finally, in Delaney v. Town of Carmel, a contribution action under CERCLA, the court considered claims that the Town of Carmel was liable as an operator of the polluted site. Although not arising in the shareholder or parental context, the court cited to the Bestfoods discussion to identify an operator. However, the court also cited to the Sixth Circuit decision in

352. Id. (citing Bestfoods, 524 U.S. at 61-62).
353. Id. (citing Bestfoods, 524 U.S. at 67).
354. See id. at 218.
355. Id. Although the court refers to this type of potential operator liability as piercing the corporate veil, it is discernable from the opinion that the court was not referring to derivative liability under CERCLA as an “owner”, which requires a traditional analysis of piercing the corporate veil under Bestfoods. See id. at 217.
357. See id. at 260.
358. See id. “The Supreme Court, in United States v. Bestfoods, recently provided some guidance to courts in applying CERCLA’s statutory definitions to determine ‘operator’ liability.” Id (citing Bestfoods, 524 U.S. at 51). The district court looked to the “ordinary meaning” language in Bestfoods:

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

Id. (quoting Bestfoods, 524 U.S. at 67).
United States v. Township of Brighton\footnote{359} to show that an “actual control” test also should be applied when the operator is a governmental entity.\footnote{360} Faced with a municipality that, like Carmel, had

(1) entered a waste disposal agreement for the benefit of township residents; (2) required the dump to meet certain specifications; and (3) paid rent and maintenance fees to the dump owner, the Brighton Court found these facts insufficient to impose CERCLA operator liability. Moreover, the Brighton [court did not impose CERCLA] “operator” liability in light of evidence that, unlike Carmel “[t]he township [of Brighton] was not operating at arm’s length with a contractor.”\footnote{361}

Combining the actual control and Bestfoods tests, the court concluded that the Town of Carmel was not an operator under CERCLA.\footnote{362}

4. Eleventh Circuit and District Courts

In Blasland, Bouck & Lee, Inc. v. City of North Miami,\footnote{363} the District Court for the Southern District of Florida considered an action brought by Blasland, Bouck, and Lee (BBL), an environmental engineering firm, against the City of North Miami for CERCLA contribution related to amounts owed on work performed during environmental cleanup of a former landfill site.\footnote{364} The city claimed that BBL was an operator under CERCLA.\footnote{365} The district court, applying Bestfoods, held that BBL did not become a CERCLA operator of landfill by serving as the city’s response action contractor engaging in cleanup activities at a facility. CERCLA contemplates an operator to be “someone who directs the workings of, manages, or conducts the affairs of a facility,” and the landfill at issue closed some twelve years before BBL was retained.\footnote{366} Although not arising

\footnotesize
\begin{itemize}
\item \footnotemark[359] 153 F.3d 307 (6th Cir. 1998).
\item \footnotemark[360] See Delaney, 55 F. Supp. 2d at 280.
\item \footnotemark[361] Id. (quoting Brighton, 153 F.3d at 315).
\item \footnotemark[362] See id. at 281-82.
\item \footnotemark[363] 96 F. Supp. 2d 1375 (S.D. Fla. 2000).
\item \footnotemark[364] See id. at 1377-78.
\item \footnotemark[365] See id. at 1378.
\item \footnotemark[366] Id. at 1389 (quoting Bestfoods, 524 U.S. at 66).
\end{itemize}
in the parent-subsidiary context, the court indicated that it will apply the general structure set forth by Justice Souter in *Bestfoods* for determining operator liability.367

V. CONSISTENCY AND CLEAR STANDARDS

A. State vs. Federal Common Law and Piercing the Corporate Veil

1. Emerging Inconsistent Judicial Approaches

The Second, Sixth, and Seventh Circuits have already applied *Bestfoods* with respect to the choice of law and piercing issues. However, no uniform direction has emerged in the federal courts as to whether state or federal common law on piercing applies in CERCLA cases; in most cases the judges defer the issue for resolution in the same manner that Justice Souter did in *Bestfoods*.368 Although several courts have indicated that federal common law on piercing is appropriate, only those courts proceeding under state law with respect to piercing369 have provided a full analysis of the standard applied.370

Of those courts, though, standards are as diverse as judges' attitudes about piercing generally.371 For instance, the District Court for the Southern District of Ohio in *AT&T Global Information Solutions Co. v. Union Tank Car Co.*,372 found that state piercing laws applied in the Sixth Circuit, despite Justice

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368. *See Browning-Ferris Indus. v. Ter Maat, 95 F.3d 953 (7th Cir. 1999) ; North Shore Gas Co. v. Salomon, Inc., 152 F.3d 642 (7th Cir. 1998); supra Part IV.A.


370. *See, e.g., Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031 (7th Cir. 2000) (arising under ERISA but stating that federal common law would apply in CERCLA cases); In re Nextwave Personal Comm., Inc., 200 F.3d 43 (2d Cir. 1998) (indicating that some type of federal common law would apply in CERCLA cases); North Shore Gas Co., 152 F.3d 642 (applying federal common law, under which the parties proceeded).*

371. *Compare, e.g., Browning-Ferris Indus., 195 F.3d 853 (applying strict standards to piercing the corporate veil and favoring shareholder protection from liability), with AT&T Global Info. Solutions Co., 29 F. Supp. 2d 857 (finding that piercing is based upon "justice").

Souter's clear statements in *Bestfoods* that the issue was unresolved. The court applied the Ohio piercing test, it nevertheless seemed to believe that CERCLA itself, rather than Ohio law, mandated holding Vermont American liable under the piercing doctrine. The court seemed determined to impose liability through piercing on Vermont American, even if it had to cite CERCLA's general policy as support for satisfaction of two of the three Ohio piercing prongs. Certainly, litigants before this court would expect a more lenient application of piercing standards in order to reach PRPs under all circumstances imaginable.

This approach can be contrasted with the one taken by Judge Posner in the Seventh Circuit case of *Browning-Ferris Industries v. Ter Maat*. Judge Posner's piercing decisions historically seem to support protection of the corporate form, and thus limited liability. Although Judge Posner first cited to Illinois state law, he primarily relies on general economic policies against piercing by emphasizing the importance of protecting limited liability to encourage investment by risk-averse individuals who would not want to expose all their assets to potential litigation. Minimizing the first-cited Illinois factors, Judge Posner again looks to general principles of corporate law with respect to piercing and the economic underpinnings thereof—such as neglecting the legal requirements for operating in the corporate form and

373. *See id.* The district court applied the same test for piercing under Ohio state law as set forth above in *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840 (6th Cir. 1999). *See id.* at 886 (citing Belvedere Condo. Unit Owners' Ass'n v. R.E. Reark Cos., 817 N.E.2d 1075 (Ohio 1993)).

374. *See id.* at 888.

375. *See id.*

376. 195 F.3d 953 (7th Cir. 1999).

377. *See id.; see also*, White v. Goodman, 200 F.3d 1016 (7th Cir. 2000). For example, in *Papa v. Katy Indus., Inc.*, Posner found that the corporate veil would have been pierced, as was found in *Bestfoods*, if the corporate form was used for wrongful purposes or to accomplish fraud. *See Papa*, 166 F.3d 937, 941-42 (7th Cir. 1999). Posner would have found liability if Katy had "formulated or administered the specific personnel policies, or directed, commanded, or undertook the specific personnel actions," at issue here, which seems to parallel Justice Souter's approach in *Bestfoods*. *Id.* at 942. However, it seems clear that Posner has a firm respect for the corporate form and does not want to liberally construe that decision to find liability absent wrongful purposes or fraud. *See id.* at 941-42.

378. *See Browning-Ferris Indus.*, 195 F.3d at 959.
undercapitalization. Judge Posner ultimately draws a very narrow ground for piercing, consistent with his general interpretations and beliefs regarding the importance of maintaining the limited liability that accompanies the corporate form.


Although one might be tempted to wait for Congress to resolve the issues regarding choice of law, courts seem to have no difficulty in resolving such issues generally without legislative intervention. Furthermore, in light of the controversy over other amendments to CERCLA that have been proposed, such legislative intervention seems unlikely. Therefore, the judiciary is left with the question of whether state or federal common law on piercing should be applied. Of course, it is always uncertain whether judges will devote sufficient analysis to resolution of the question as to whether state or federal common law on piercing should apply in CERCLA cases, in light of the more pressing issues that judges often face on substantive law.

The seemingly uncomplicated answer to the question of piercing might be to apply the various laws of the individual states on piercing issues because CERCLA is silent and state corporate law is developed. In *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, Judge Siler reasoned that the state law on

379. *See id.* at 980. "Moreover, if the formalities have been flouted, it becomes hard to see how the investors could reasonably have relied on the protections of limited liability; they would have known they were skating on thin ice. In such a case the investment-encouraging function of limited liability is attenuated." *Id.*

380. *See id.*

381. *See Silecchia, supra* note 24, at 174 (suggesting that Congress should resolve the issue).


383. *See generally Fasman, supra* note 3 (discussing controversies over several proposed CERCLA amendments); Schwartz, *supra* note 135 (discussing difficulty of refunding and making amendments to CERCLA to mitigate controversy); Taylor, *supra* note 3 (arguing CERCLA is so bad that it should be repealed and cleanup should be left to the states).


385. 168 F.3d 840 (6th Cir. 1999).
piercing the corporate veil should apply in light of CERCLA's silence on the issue, which indicates that Congress did not intend to replace well-established state corporate law.\footnote{360} Essentially, when a corporation is formed in a certain state, the shareholders bargain for certain duties and liabilities in exchange for the protection of the corporate form, and federal statutes should not easily put such principles aside.\footnote{357} That is, establishing new rules of corporate behavior might "disrupt existing commercial relationships" and be unfair to those who relied on state principles.\footnote{388}

One might reconsider, though, whether this approach advocated by Judge Siler and others will lead to consistent interpretations of the federal statute, CERCLA, which creates immense liability to those ultimately found liable.\footnote{353} Certainly, the Supreme Court in its decision in \textit{O'Melveny \& Meyers v. FDIC}, recognized that the need for uniformity is a proper federal interest.\footnote{393} The cases of \textit{AT\&T Global Information Solutions Co. v. Union Tank Car Co.}\footnote{391} and \textit{Browning-Ferris Industries v. Ter Maat}\footnote{392} suggest that the approach of applying state piercing doctrines will not lead to consistent interpretation of a federal statute with nationwide application.\footnote{393} For instance, one could easily envision a scenario regarding a single CERCLA facility in one state with multiple PRPs incorporated and doing business

\footnote{386. See id. at 847. Judge Siler, in his analysis of the choice of law issue, did not provide any discussion or evaluation under the prevailing Supreme Court precedents discussed in Part I.B.5, supra, on the creation of federal common law.}
\footnote{387. See id.; see also Sisk \& Anderson, supra note 108, at 507-08 (arguing that state common law will apply in CERCLA cases). Sisk and Anderson's argument appears to be framed along the lines of the "internal affairs" doctrine, which "is a conflict of laws principle that recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).}
\footnote{388. Sisk \& Anderson, supra note 108, at 508.}
\footnote{389. See generally Browning-Ferris Indus., 165 F.3d 653.}
\footnote{390. See O'Melveny \& Meyers v. FDIC, 512 U.S. 79, 88 (1994).}
\footnote{391. 29 F. Supp. 2d 857 (S.D. Ohio 1998).}
\footnote{392. 195 F.3d 653 (7th Cir. 1999).}
\footnote{393. See United States v. Kimbell Foods, 440 U.S. 715, 726 (1979); see also Sisk \& Anderson, supra note 108, at 507-08 (arguing that state common law should apply in CERCLA cases); Dopf, supra note 108 (discussing whether state or federal common law on corporate successor liability should apply in CERCLA cases and arguing state law should apply).}
in several states, whereby the judge might be forced to apply differing states' laws on piercing the corporate veil to determine liability. In light of the systematic differences illustrated above between states' laws, policies, attitudes, and history with respect to piercing the corporate veil, this could certainly lead to the imposition of liability on some PRPs and not on others, irrespective of true culpability, solely determined by the state of incorporation or perhaps the state of business operation. It could hardly be expected that Congress intended CERCLA to have such a result in light of the wide net cast to impose liability on as many PRPs as possible. 394

Although federal common law may be less familiar, it might provide a unified, clearer standard for CERCLA liability. 395 The courts taking up the issue of whether a federal common law standard should be applied have not provided an evaluation of Kimbell Foods and its progeny, one might again look closer at Judge Merritt's dissent in United States v. Cordova Chemical Co. of Michigan 398 where he argued that, in applying Kimbell Foods, 397 a federal standard was necessary to remedy a nationwide problem and eliminate the dependence of CERCLA on prevailing state law and judicial attitudes on piercing the corporate veil. 398 Judge Merritt observed that:

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396. 113 F.3d 572 (6th Cir. 1997).
397. 440 U.S. 715 (1979); see supra Part I.C.
398. See Cordova Chem. Co., 113 F.3d at 584 (Merritt, J., concurring in part and dissenting in part) (citing Kimbell Foods, 440 U.S. at 726); see also Lansford-Coaldale
CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection. Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.\footnote{Martin: Consistency in Judicial Interpretation? A Look at CERCLA Parent C}

Judge Merritt argued that corporate planners would, if given a state law alternative, frustrate the broad, remedial purposes of CERCLA by forming corporations and operating them in states with stricter piercing doctrines.\footnote{Martin: Consistency in Judicial Interpretation? A Look at CERCLA Parent C}

Merritt did not, however, directly address the additional issues raised by the cases of \textit{O'Melveny & Meyers v. FDIC} and \textit{Atherton v. FDIC}.\footnote{Martin: Consistency in Judicial Interpretation? A Look at CERCLA Parent C} These cases clearly reiterate the need to show a “significant conflict between some federal policy or interest and the use of state law” before it is appropriate to create a rule of federal common law.\footnote{Martin: Consistency in Judicial Interpretation? A Look at CERCLA Parent C} Merritt certainly argued that the need for uniformity is present in CERCLA’s policy to ensure that all polluters pay, uniformity being a proper inquiry under \textit{O'Melveny & Meyers}.\footnote{Martin: Consistency in Judicial Interpretation? A Look at CERCLA Parent C} In light of the substantial sums required to fund CERCLA cleanup activities and the need for the EPA to seek reimbursement from PRPs in order to perform

\begin{itemize}
\item \textit{Cordova Chem. Co.}, 113 F.3d at 584 (Merritt, J., concurring in part and dissenting in part).
\item \textit{See id.} (citing 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio, CERCLA House sponsor) (“[T]o insure the development of a uniform rule of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area.”)).
\item \textit{See supra} Part I.C.
\item \textit{See Cordova Chem. Co.}, 113 F.3d at 584 (Merritt, J., concurring in part and dissenting in part); \textit{see also O'Melveny & Meyers}, 512 U.S. at 88.
\end{itemize}
future cleanups, CERCLA’s policy would be compromised, and thus a federal policy and interest conflicted, if the EPA’s ability to administer CERCLA and perform remedial activities were hampered by the variance in state laws on piercing.\textsuperscript{404}

Furthermore, \textit{O’Melveny \& Meyers} can be distinguished because the FDIC, standing in the shoes of a failed banking institution, brought a tort suit where the cause of action arose under state law.\textsuperscript{405} In CERCLA cases, the United States brings its actions for reimbursement directly under CERCLA, a statute creating its own federal cause of action and standards for liability, rather than in an action originating under state law.\textsuperscript{406} The United States acts in its own interests, rather than on behalf of another entity, as was the case of the FDIC in \textit{O’Melveny \& Meyers} and \textit{Atherton}. In addition, future federal funds for hazardous waste cleanups will be depleted if PRPs are not held responsible.

The court in \textit{Carter-Jones Lumber Co. v. Dixie Distributing Co.} argued that CERCLA’s silence on the choice of law issue indicated that state law should apply.\textsuperscript{407} However, \textit{Kimbell Foods} clearly held that silence by Congress is not dispositive as to choice of law.\textsuperscript{408} The same state law principles on piercing the corporate veil utilized by Judge Siler, Judge Posner, and others will be relevant, though, in indicating that a presumption exists that the construction of federal common law principles incorporate state law, such that a federal common law rule of piercing in CERCLA cases very well might borrow heavily from state law on piercing the corporate veil.\textsuperscript{409} Those courts choosing to apply state common law on piercing have also not addressed the issue of whether, in the future, corporations that engage in hazardous waste activities will choose to incorporate and do

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    \item \textsuperscript{404} See generally Cordova Chem. Co., 113 F.3d 572.
    \item \textsuperscript{405} See \textit{O’Melveny \& Meyers}, 512 U.S. at 85.
    \item \textsuperscript{406} See 42 U.S.C. § 9607 (1994); supra Part II.
    \item \textsuperscript{407} 166 F.3d 840 (6th Cir. 1999).
    \item \textsuperscript{408} See United States v. Kimbell Foods, Inc., 440 U.S. 715, 738 (1979). But see Lund, supra note 112, at 857 (arguing that the current Court is less likely to apply federal law to areas of federal concern, whereas past decisions indicate federal law would be appropriate).
    \item \textsuperscript{409} See Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90, 98 (1991) (finding that a “presumption” exists that federal common law will incorporate the state law rules especially in areas such as corporate law); \textit{Kimbell Foods}, 440 U.S. at 727-28 (suggesting that an inquiry should be made into choice of law).
\end{itemize}
business only in those jurisdictions with stricter piercing law as a method of corporate planning. 410 This issue, of course, would mitigate in favor of a federal standard to further CERCLA's goal of identifying all PRPs and imposing liability for cleanups on those responsible.

In terms of the proper federal standard, Judge Merritt observed in Cordova Chemical Co. that "[t]he federal common law in this area emerges from the general principle that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity.'" 411 Thus, Judge Merritt stated the appropriate federal common law test would "be simply whether the parent corporation 'controls or at the relevant time controlled the management and operations of the subsidiary.'" 412 No showing of fraud would be necessary or appropriate. 413 As discussed above, numerous federal courts have already established a number of factors to make this determination in CERCLA cases. 414 Using one of two tests prevailing in the federal courts, or a similar test, combined with a factual consideration based on the "totality of the circumstances" of the case, 415 would likely lead to more uniform results, furthering the broad remedial goals of CERCLA to hold all proper parties accountable for contamination.

B. Courts Should Develop a Set of Factors for Use in Determining Which Corporate Acts Trigger Operator Liability

With respect to the imposition of operator liability for CERCLA cleanups on shareholders and parent corporations, courts have applied Bestfoods in the Second, Sixth, Seventh, and Eleventh Circuits. 416 The courts have followed Justice Souter's language in Bestfoods, generally requiring that in order

410. See generally Chapman, supra note 395.
411. 113 F.3d 572, 585 (6th Cir. 1997) (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981)).
413. See id.
414. See id.; see also cases cited supra note 105.
416. See supra Part IV.B.
for a shareholder or parent corporation to be considered an operator under CERCLA, the defendant must actually direct the workings, manage, and conduct the affairs related to the hazardous materials at the contaminated facility—not merely activities of the corporation in general.\textsuperscript{417} Unfortunately, courts have not yet developed a clear set of standards as to which particular activities conducted by shareholders and corporate parents in their "investor status" will be protected and those that will result in CERCLA liability.

Although \textit{Bestfoods} involved one parent company officer who had no subsidiary "hat" to wear, it also raised the situation in which corporate officers and others serve both entities.\textsuperscript{418} This will be the situation in many related cases. Judicial differences in theories of corporate liability will continue to determine whether a dual officer is wearing the subsidiary "hat" or the parent corporation "hat" when directing polluting activities.\textsuperscript{419} \textit{Bestfoods} requires operator participation in the subsidiary's hazardous waste activities specifically in order to find operator liability.\textsuperscript{420} The Sixth Circuit's return to an "actual control" test in \textit{United States v. Township of Brighton},\textsuperscript{421} with respect to governmental entities that might be CERCLA operators, is concerning because the court moved away from the \textit{Bestfoods} mandate of looking to whether the facility as a whole was directed, managed, and conducted by the alleged operator, instead concluding that even the performance of any affirmative acts of control would trigger CERCLA liability with respect to the entire facility and all associated hazardous waste disposal.\textsuperscript{422} This decision can be compared to the decision in \textit{Datron, Inc. v. CRA Holdings, Inc.},\textsuperscript{423} in which the court found no operator


\textsuperscript{420} See Bestfoods, 524 U.S. at 59.

\textsuperscript{421} 153 F.3d 307 (6th Cir. 1998).

\textsuperscript{422} See id.

liability even though there was some overlap with legal counsel on environmental regulatory matters. That is, although there were affirmative acts, the day-to-day operations regarding hazardous waste were completely separate.\textsuperscript{424} Similarly, Judge Posner, in \textit{Browning-Ferris Industries v. Ter Maat},\textsuperscript{425} directed the district court on remand to determine whether Ter Maat “supervised the day-to-day operations of the landfill . . . .”\textsuperscript{426}

Some judges demonstrate a great reluctance to ever hold the parent corporation liable in dual officer cases and will arguably give too much deference to the parent corporation. Still other judges will have no difficulty in holding a parent corporation liable in cases with dual officers, such that the “hat” wearing may only become a test of form.\textsuperscript{427} In other words, for those corporate officers who have acted for both the parent company and the subsidiary, it will be too late to recharacterize management behavior after it occurs.\textsuperscript{428} These dual officer cases will be evaluated differently depending on the local courts’ attitudes on corporate liability. However, with respect to future behaviors, parent corporations may choose to disassociate themselves from subsidiaries that pose a risk of potential liability, even if the ability to influence corporate direction of the subsidiary exists. Clearly, the result might be imposition of liability in some cases where it is unwarranted; avoidance of liability that might otherwise be imposed in some cases if the judge has firm beliefs of corporate limited liability; and ultimately, the creation of a corporate culture in which risk avoidance by parent corporations is the norm, as opposed to active, appropriate involvement in subsidiary operations.

This result clearly can be avoided if courts construct a well-reasoned list of factors to assist in the determination of which shareholder and parent corporations exceed normal oversight.\textsuperscript{429}

\textsuperscript{424} See id. at 747-48.
\textsuperscript{425} 185 F.3d 953 (7th Cir. 1999).
\textsuperscript{426} Id. at 956.
\textsuperscript{427} See Rands, supra note 419, at 451.
\textsuperscript{428} See id.
\textsuperscript{429} See Schiavone v. Pearce, 77 F. Supp. 2d 284 (D. Conn. 1999) (particularizing facts presented that did not amount to operator liability, but not indicating what facts would have been sufficient); United States v. Green, 33 F. Supp. 2d 203 (W.D.N.Y. 1998) (holding that Green was not liable as shareholder because no evidence was presented that he was involved in management of polluting activities, but not indicating how much participation might have triggered liability).
Those courts looking for a day-to-day involvement in the management, direction, and conduct of the affairs of the polluting facility seem to be more true to Justice Souter's analysis in *Bestfoods.* However, it is not difficult to speculate that the *Bestfoods* opinion provides insufficient direction to courts considering operator liability of shareholders and parent corporations, and that confusion and inconsistency will continue unless more direction is provided to the courts.

**CONCLUSION**

Justice Souter's opinion clearly leaves open this issue of whether state or federal common law will apply to piercing the corporate veil in CERCLA cases. This has resulted in the continuation of a split in the circuits, which will most likely require resolution in yet another Supreme Court decision. Most courts examining the issue have not given a reasoned analysis, but have applied state law on piercing doctrines. Those courts appear to be substantially influenced, however, by the particular state's and the individual judge's attitudes on CERCLA generally and the sanctity of the corporate form. This approach is already leading to inconsistent judicial interpretations that will decrease the certainty for corporations with subsidiaries engaging in ventures that entail CERCLA risk. In light of the difference in attitudes and the need to have nationwide, consistent liability under CERCLA, a federal common law standard would provide a more reasoned, fair approach. The alternative is a judiciary that will engage in a process of self-selecting which factors of state piercing law will be relevant, as opposed to applying the principles wholly, resulting in different standards state by state.

Furthermore, the courts have not yet provided a clear standard with respect to identifying which shareholder and parent corporation activities amount to operation sufficient to

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431. See 524 U.S. at 52.
432. See id. at 63 n.8.
433. See supra Part IV.A.
434. See cases cited supra note 29.
435. See supra discussion Part V.A.
trigger CERCLA's operator liability. Although the courts have generally taken guidance from the language of *Bestfoods*, a clear set of factors to guide corporate behavior has not yet emerged. The presence of a clear set of standards will hold those individuals and corporate parents liable under CERCLA, resulting in a more uniform application that will ensure that polluters pay, while protecting the interests of investors who rely on the limited liability aspects of the corporate form when structuring investments. Otherwise, not only will there be inconsistent judicial interpretations, but investment in risky industries will be affected if individuals fear that all of their assets will be exposed to loss, rather than simply risking the loss of their investment.

436. See generally cases cited supra note 417.