



TOXICS LAW REPORTER



Reproduced with permission from Toxics Law Reporter, Vol. 22, No. 47, 12/06/2007, pp. 1007-1021. Copyright © 2007 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

CORPORATE AFFILIATE LIABILITY AFTER U.S. v. BESTFOODS

By DAVID M. (MAX) WILLIAMSON AND
CHRISTOPHER J. MCKENZIE

In 1998, the United States Supreme Court sketched the outlines of corporate affiliate liability under the federal Superfund law¹ in its seminal decision *United States v. Bestfoods*, 524 U.S. 51 (1998). Although the Court reaffirmed that liability of owners or operators of contaminated industrial facilities should be governed by traditional principles of corporate separateness and shareholder limited liability, the Court declined to draw bright lines, but instead remanded to the trial court for resolution consistent with its general guidance.

This article examines lower court decisions in the 10 years since *Bestfoods* in an effort to identify where

¹ Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, commonly known as "Superfund."

Chris McKenzie is a shareholder in Beveridge & Diamond's New York, N.Y. office with a focus on environmental compliance counseling and corporate governance issues.

Max Williamson is a shareholder in Beveridge & Diamond's New York and Washington, D.C. offices with a focus on litigation and contaminated property transactions.

For more information, please contact Max Williamson at dwilliamson@bdlaw.com, (202) 789-6084 or Chris McKenzie at cmckenzie@bdlaw.com, (212) 702-5434.

courts are drawing the line between "normal investor oversight" and that overly intimate involvement with a corporate affiliate's activities sufficient to trigger liability under Superfund and other environmental statutes for pollution-related liabilities at a facility owned by the affiliate. This topic is of importance to corporate in-house counsel and others tasked with managing risk and liability within affiliated corporate groups.

This complex and controversial area of law is continuously evolving, and no definitive rules of conduct have been laid down by the courts. However, certain guideposts can be distilled from *Bestfoods* and subsequent decisional authority that can help companies manage environmental risks associated with interactions with affiliates. This article is intended to support the practical necessities of making risk management decisions in the corporate context by analyzing the concrete, fact-based holdings of *Bestfoods* case law, rather than policy or academic principles.

Although *Bestfoods* addressed the parent-subsidary relationship, the concepts have been held to be broadly applicable to interactions among all types of corporate affiliates (parents, subsidiaries, "grandparents," joint ventures, and special purpose entities) as well as to potential liability of officers, directors and shareholders. Moreover, as discussed below, the general principles articulated in *Bestfoods* have been extended to claims arising under other environmental statutes, such as the Clean Air Act and Clean Water Act, and even to non-

environmental claims such as employment discrimination.²

I. *United States v. Bestfoods*: Defining the Scope of Parent Corporation Liability

Following years of inconsistent judicial interpretation of parent liability under CERCLA, the United States Supreme Court in *United States v. Bestfoods*, 524 U.S. 51 (1998), clarified the standards for determining when a parent corporation may be held liable under CERCLA for the costs of responding to environmental contamination at a subsidiary's facility.³ The Court identified two independent legal theories under which a parent corporation might be held liable for environmental liabilities under CERCLA:

(1) *direct liability*, i.e., wherein the parent corporation's own actions or actions of its agents with respect to a facility would qualify it as an owner or operator of the facility under the statutory criteria provided in CERCLA, regardless of the parent-subsidiary relationship, or

(2) *derivative liability*, i.e., where the parent corporation can be held vicariously liable for the subsidiary's activities under principles of corporate veil piercing, such as when the parent dominates the subsidiary for improper or fraudulent purposes, so as to forfeit the traditional protections of corporate separateness.⁴

With regard to either form of liability, the Court affirmed that traditional and fundamental corporate law principles would continue to govern the assessment of any relationship between corporate affiliates. As the Court noted: "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is

² This article does not address liability that is imposed through contract (e.g., indemnification, assumption or breach of warranties), which is assessed under a different analytical construct, but which is an equally important consideration in corporate risk management.

³ Subject to certain statutory exceptions, CERCLA identifies four categories of potentially responsible parties (known as "PRPs" or "covered persons") for the costs of responding to a release or threatened release of hazardous substances from a facility: (1) current operators and owners of facilities; (2) past owners or operators of facilities at the time hazardous substances were disposed (known as "generators"); (3) persons who by contract or agreement arranged for the disposal, transport or treatment of hazardous substances ("arrangers"); and (4) persons who accept or accepted hazardous substances for transport to disposal or treatment facilities from which there was a release or threatened release ("transporters"). See 42 U.S.C. § 9607(a). CERCLA defines "operator" tautologically as "any person . . . operating" the facility. 42 U.S.C. § 9601(20)(A)(ii). The term "facility" means "(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601(9).

⁴ Prior to *Bestfoods*, many courts improperly fused direct and derivative liability; accordingly, pre-*Bestfoods* decisions are of limited utility owing to uncertainty whether those decisions would be construed as consistent with *Bestfoods*.

not liable for the acts of its subsidiaries . . . [N]othing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible." 524 U.S. at 61-62 (internal quotation and citation omitted).

Thus, the Supreme Court signaled strongly to lower courts that would hear such cases in the first instance that CERCLA liability should not be imposed on parent companies for cleanup costs at a subsidiary's facility except in unusual circumstances. Indeed, as discussed below, the Court remanded the *Bestfoods* case itself to the district court for further factual development and application of the principles announced in the opinion.⁵ The cases following *Bestfoods* have generally acknowledged the Supreme Court's general dictates, yet significant uncertainty remains with regard to which side of the CERCLA liability dividing line specific activities or interactions between corporate affiliates fall, particularly those involving environmental compliance, waste disposal and chemical use.

Both grounds of potential liability, direct and derivative, are discussed below in the context of the body of jurisprudence that has developed in the years since the *Bestfoods* decision and the particular facts that courts have considered when evaluating liability in the corporate affiliate context.

II. Direct Parent Liability

In *Bestfoods*, the Court noted that "nothing in [CERCLA's] terms bars a parent corporation from direct liability for its own actions in operating a facility owned by its subsidiary." *Bestfoods*, 524 U.S. at 65. The Court went on to explain that an operator under CERCLA is "simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Id.* at 66. As the Court put it:

Under the plain language of the 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. If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability.

Id. at 65.

Thus, under *Bestfoods*, when evaluating a corporate parent's potential direct liability as an operator, the critical question is "not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary." *Id.* at 68 (internal citation omitted, emphasis added). The Court further suggested that "participation" is confined to those activities that relate specifically to the environmental issues, waste practices or physical operations underlying the alleged liability at issue in a particular case, as opposed to general business activities:

To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an op-

⁵ The *Bestfoods* remand is discussed below as a case study at Part V.A.

erator 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. at 66-67 (emphasis added).

Prior to the *Bestfoods* decision, courts were split on the interpretation of “operator” liability with respect to corporate parents. Some courts employed an “actual control” test, which imposed “operator” liability on a parent corporation if there was “evidence of substantial control exercised” by the parent over the subsidiary’s general business affairs, even if there was no control by the parent over specific operations at a manufacturing plant. *See, e.g., Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993). Other courts applied an even more sweeping “authority-to-control” test, under which courts imposed operator liability “as long as one corporation had the capability to control, even if it was never utilized.” *Id.* The Supreme Court’s *Bestfoods* decision has been generally interpreted as rejecting the “authority-to-control” test in favor of a fortified version of the “actual control” test. *See, e.g., United States v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998); *City of Wichita v. Trs. of the APCO Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1055 (D. Kan. 2003) (an operator under CERCLA must make the relevant decisions on a frequent, typically day-to-day, basis).

Most lower courts also have interpreted *Bestfoods* as requiring a “nexus” between the corporate parent’s control over activities at a subsidiary’s facility and the particular environmental predicament triggering liability, as opposed to mere involvement in general business activities or even non-environmental operational activities. *See, e.g., Coeur D’Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1128 (D. Idaho 2003); *accord United States v. Friedland*, 173 F. Supp. 2d 1077, 1094-95 (D. Col. 2001) (“for one to be considered an operator, there must be some nexus between the person’s or entity’s control and the hazardous waste contained in the facility”); *BP Amoco Chem. Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 992 (D. Del. 2001) (“[*Bestfoods*] makes clear that, unless the corporate veil can be pierced, a parent corporation that actively participated in, and exercised control over, the general operations of a subsidiary, without more, cannot be held liable under CERCLA as an operator of a polluting facility owned or operated by the subsidiary”); *see also United States v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998) (“one must perform affirmative acts” in order to be considered an operator under CERCLA; the “failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator”); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003); *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff’d*, 153 Fed. Appx. 749 (2d Cir. 2005).

Thus, based on the prevailing interpretation of *Bestfoods*, a parent corporation can be held directly liable as an “operator” under CERCLA only if the corporate parent affirmatively engages in activities directly related to environmental issues at the subsidiary’s facility.⁶ As

⁶ This article does not cover the related, and equally nuanced, topic of successor liability or de facto merger, which

discussed below, such direct involvement will typically manifest in three ways, and the parent will be liable under *Bestfoods* only if that involvement exceeds “normal” parent involvement and oversight.

A. Three Direct Liability Scenarios

In *Bestfoods*, the Supreme Court recognized three general situations in which direct parent liability might arise: (1) action by the parent, whether unilateral or joint; (2) action by dual officers and directors, and (3) action by parental agents.

1. Parent Unilateral or Joint Action

First, liability might arise “when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of joint venture.” *Bestfoods*, 524 U.S. at 71. The Court made clear that the parent would be judged only by its own actions, and not those of its affiliate, but nonetheless could be liable under CERCLA if the parent itself undertook actions that constitute managing, directing, or conducting operations relating to leakage or disposal of hazardous substances, or if the parent made relevant decisions about compliance with environmental regulations.

As illustrated in the cases reviewed in Part II. C., *infra*, plaintiffs in many cases following *Bestfoods* have alleged that a parent corporation, rather than its subsidiary, actually operated a facility. Such arguments have been based, for example, on a parent company’s name or corporate logo appearing on the facility, statements by the parent in advertising literature to the effect that the facility is operated by the parent, or similar facts tending to show a direct connection between the parent and actual manufacturing activities. Not surprisingly, such cases typically arise when the subsidiary is defunct or insolvent and the plaintiff seeks compensation for cleanup costs from the current or former parent.

Drawing from the Supreme Court’s language, some plaintiffs have argued that parents and subsidiaries are de facto joint venture partners merely by virtue of the affiliate relationship and common interest, and therefore should always be jointly liable for CERCLA cleanup costs. However, this argument has generally been rejected by lower courts as disregarding the fact that the “*sine qua non* of a joint venture is a contract, express or implied; that is, an actual agreement between the parties.” *United States v. USX Corp.*, 68 F.3d 811, 826 (3d Cir. 1995) (emphasis in original) (citations omitted); *see also BP Amoco Chem. Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 994 (D. Del. 2001) (“Conclusory allegations of an undocumented joint venture or that stockholders in a corporation ‘operated as ‘partners at will’ are not sufficient to establish direct operator liability”).⁷ Although these “joint venture” theories have thus far not gained traction, companies should be aware of the argument, and should structure their ac-

has been subject to re-examination following *Bestfoods*. *See e.g., New York v. National Service Industries Inc.*, 460 F.3d 201 (2d Cir. 2006).

⁷ As noted in decisions following *Bestfoods*, the requisite elements of a joint venture are: (1) each party contributes money, property, effort, knowledge or some other asset to a common undertaking; (2) the existence of a joint property interest in the subject matter of the venture; (3) the right of mutual control or management of the venture; and (4) an agreement to share the profits or losses of the venture. *USX Corp.*, 68 F.3d at 826-827.

tivities where practicable to make clear that the parent-subsubsidiary relationship is not a joint venture.

2. Dual Agent: Departure From Corporate Norms (the “Hats Rule”)

The second way liability for a parent corporation may arise under *Bestfoods* is where an individual who serves as an officer or director of both the parent and subsidiary departs “so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility.” *Bestfoods*, 524 U.S. at 71. In *Bestfoods*, the Supreme Court reaffirmed the well-established principle of corporate law that there is a general presumption that officers or directors may legitimately hold positions with both the parent corporation and its subsidiary and, most importantly, “can and do ‘change hats’ to represent the two corporations separately.” *Id.* at 69 (noting further that “[i]t 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”).

Under the Supreme Court’s formulation, the presumption that a dual executive is wearing her “subsidiary hat” when working on matters relating to the subsidiary’s facility is overcome only when the dual officer acts in a manner that is inconsistent with “the norms of corporate behavior.” *Id.* at 70-71. While the Court offers little specific guidance, the Court suggests that a dual officer’s actions would be considered “eccentric” only when the subsidiary is disadvantaged or prejudiced by the employee’s actions to the benefit of the parent. *Id.* at 70 n.13 (“the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent”).

Importantly, the Supreme Court’s decision left unclear whether the dual officer presumption applies to an individual who is neither an officer nor director, but merely an employee of both the parent and subsidiary. Although the Court’s reasoning would seem to extend to all employees, such as loaned engineers or plant managers, it remains a debatable point, and the Justice Department has in at least one case argued that the “hats” rule does not apply to non-executive employees.⁸

In short, the lesson of *Bestfoods* is to keep the “hats” straight—and be able to prove which hat was being worn if challenged in court. The parent and subsidiary should both clearly define the role, scope of authority, duties, and source of compensation and benefits for each dual executive or employee, preferably in the form of an inter-company services agreement, book of account, or similar document. Because the sharing or loaning of employees is common in corporate America, a company that makes a clear record of the employee’s roles will have strong arguments that the arrangement

is consistent with corporate norms and does not implicate the parent as an operator of a subsidiary’s manufacturing facilities.

3. “Eccentric” Involvement of Parent’s Agent

The third situation that might trigger direct operator liability for a parent corporation is where an “agent of the parent with no hat to wear but the parent’s hat might manage or direct activities at the [subsidiary’s] facility.” *Bestfoods*, 524 U.S. at 71. The “dual officer” presumption does not exist in this situation because the agent of the parent is not an officer or director (or an employee) of the subsidiary. As with the “hats” rule, “norms of corporate behavior” serve as the benchmark for determining whether an agent wearing the parent’s hat is actually managing or directing environmental activities at the subsidiary’s facility, which could subject the parent to direct liability. As stated by the Supreme Court, “[t]he critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are *eccentric* under accepted norms of parental oversight of a subsidiary’s facility.” *Id.* at 72 (emphasis added). In other words, corporate norms will define whether the parent’s agent was merely facilitating parental oversight of, or normal interactions with, the subsidiary, which would insulate the parent from direct liability, or alternatively, whether the parent should be considered an operator of the facility itself. Again, the focus of this inquiry should be on activities related to pollution or the disputed liability, as oversight activities by the parent corporation that involve the subsidiary’s facility “but which are consistent with the parent’s investor status, such as monitoring of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability.” *Id.* (citation omitted).

B. “Corporate Norms” Are the Touchstone for Determining Direct Liability

Whichever category of parent-subsubsidiary interaction is at issue, it merits attention to the Court’s emphasis of “norms of corporate behavior” as the “crucial reference points” in drawing a line between acts of direct operation of a facility for CERCLA purposes, as opposed to the normal “interference” of investor oversight. In remanding the *Bestfoods* case for trial, the Supreme Court instructed lower courts considering whether a parent corporation’s involvement crossed the line into direct operation of the facility to ask “whether, in degree or detail, actions directed towards the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary’s facility.” *Bestfoods*, 524 U.S. at 71; *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) (determination of *Bestfoods* liability necessarily involves consideration of evidence of the corporate relationship and corporate norms); *BP Amoco Chem. Co. v. Sun Oil Co.*, 316 F. Supp. 2d 166 (D. Del. 2004) (granting summary judgment against party that failed to produce evidence to show that parent’s actions were unusual under the accepted norms of parental oversight of a subsidiary’s facility).

Where exactly the line is drawn is the key question, and one that is best answered by examining how actual fact patterns have been analyzed by lower courts through the lens of *Bestfoods*.

⁸ See *United States v. Montrose Chem. Corp.*, No. 90-cv-3122 (C.D. Cal. filed June. 18, 1990), Mem. in Support of Plf’s Mot. for Partial Summ. Judg. of Liability of Def. Chris-Craft Indus., Mar. 13, 2000 at 20.

C. Practical Examples of Acceptable Versus Questionable Interaction

The Court in *Bestfoods* did not define “norms of corporate behavior” or explain what constitutes “eccentric” behavior, and thus declined to provide a clear map of what activities will trigger direct operator liability. As Justice Souter acknowledged, it is easy to articulate general principles, but “the difficulty comes in defining actions” that trigger liability. Nevertheless, post-*Bestfoods* decisions do shed some light on the degree of interaction a parent corporation may have with its subsidiary without crossing the line into direct operator liability. Although the case law provides some guidance, this remains a fact-intensive inquiry that must be assessed on a case-by-case basis, and no single activity or factor is dispositive. Unfortunately, in cases where the parent corporation is found not liable as an operator, the courts typically do not discuss what facts would have constituted that “line in the sand” necessary to find liability, and some of the decisions have reached inconsistent results. With that caveat, general principles can be distilled from the principal cases.

Under *Bestfoods*, courts are directed to focus solely on actions relating to environmental issues at the facility in question and not to engage in an analysis of general corporate interactions or formalities that may be relevant to veil-piecing analysis (see Part III, *infra*), such as whether the subsidiary held regular board meetings, whether the parent and subsidiary had financial interactions, or whether the affiliates had interlocking directorates. Consistent with the Supreme Court’s direction, most cases after *Bestfoods* have required a “nexus” between the parent’s actions and the particular environmental liability at issue. Nonetheless, the practical reality is that the overall relationship between parent and subsidiary forms the context and backdrop against which environmental activities will be judged as “normal” or “eccentric.” When considering *Bestfoods* liability prospectively, an effective corporate risk management program will consider the factual context and align the parent-subsidiary relationship to *Bestfoods* considerations. As part of this process, companies should strive to clarify lines of command and duties and minimize potential misinterpretation of the corporate relationship by outside observers.⁹

The following is an illustrative outline of facts and actions distilled from the case law following *Bestfoods*, which is intended to provide guidance to companies assessing potential environmental liability under CERCLA. This is not intended as a comprehensive list. Relevant citations are noted throughout.

General Factors of Inquiry. Factors considered by courts in determining whether a parent company is di-

⁹ Of course, CERCLA litigation frequently implicates “legacy” properties, in which the events and corporate relationships were forged decades ago. In these cases, the investigation, proof, interpretation, and characterization of historical evidence will be central to defending against charges of *Bestfoods* liability. Often CERCLA litigation is a quasi-archeological effort, involving dredging through dusty file cabinets, piecing together ancient board minutes, memos or advertising materials, and interviewing former employees that may be quite elderly. Litigation counsel should conduct their investigation and discovery with an eye toward how similar evidence has played out in post-*Bestfoods* cases.

rectly liable as an operator under CERCLA have included:

- Degree of parent’s involvement in the use, management or disposal of the hazardous substances at issue;
- Degree of parent’s actual control over environmental management decisions at the facility (e.g., correspondence or negotiations with administrative agencies on behalf of subsidiary, hiring and management of environmental employees, hiring and management of contractors for subsidiary, facility design or operational decisions, environmental compliance decisions, monitoring or direction of waste disposal);
- Extent to which parent company employees, arguably acting in the interests of the parent, are involved in major decision making and day-to-day operations at the facility relating to environmental pollution (e.g., parent company environmental manager issuing directives or maintaining office at facility);
- Extent to which subsidiary is required to consult with or obtain approval from parent prior to making decisions regarding environmental matters;
- Parent company’s degree of knowledge, expertise and sophistication regarding the facility’s pollution issues, particularly the hazardous substances at issue;
- Whether “in degree and detail” the activities described above depart from norms of corporate behavior.

Permissible Activities. The following activities generally have been recognized as falling within the boundaries of normal oversight by a parent corporation, or perceived as neutral factors, depending on the specific facts and circumstances. Note that, in any particular case, a combination of otherwise permissible activities, viewed together, could be held to constitute an impermissible level of involvement.

- Parent involvement in the “general business” of the subsidiary not relating to environmental issues or waste disposal;¹⁰
- Election by parent of subsidiary’s directors;¹¹
- Overlapping officers or directors (interlocking directorates), unless there is evidence that the officer or director is acting in the interests of the parent, rather than the subsidiary;¹²

¹⁰ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001); *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999); *Consolidated Edison Co. of New York, Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff’d*, 153 Fed. Appx. 749 (2d Cir. 2005); *New York v. B.B. & S. Treated Lumber Corp.*, No. 02-cv-1358, 2007 U.S. Dist. LEXIS 74456 (E.D.N.Y. Sept. 30, 2007).

¹¹ *Bestfoods*, 524 U.S. at 61-62; *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff’d*, 153 Fed. Appx. 749 (2d Cir. 2005).

¹² *Datron Inc. v. CRA Holdings Inc.*, 42 F. Supp. 2d 736 (W.D. Mich. 1999); *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999); *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff’d*, 153 Fed. Appx. 749 (2d Cir. 2005).

- Attendance at subsidiary board meetings by parent executives who are not subsidiary officers or directors;¹³
- Making of bylaws for the subsidiary;¹⁴
- Supervision and monitoring of the subsidiary's finances, financial performance, and capital budget decisions;¹⁵
- Imposing financial controls (such as requiring parent approval of capital expenditures over a certain amount, approval of expenditures for pollution control equipment, review of subsidiary contracts);¹⁶
- Supplying capital, even if used for pollution related expenditures;¹⁷
- Guaranty of loans by parent;¹⁸
- Articulation or promulgation of uniform corporate policies and procedures regarding expectations for environmental compliance or minimum standards for management systems, particularly to enhance performance and profits or minimize risks and liabilities;¹⁹
- Periodic monitoring, review and inspection of facilities, with suggestions (in the form of advice, as distinguished from detailed mandates) for improvement;²⁰
- Requiring regular reports or information concerning environmental compliance or performance;²¹
- Provision or outsourcing of accounting functions to parent;²²
- Participation in parent or affiliated group welfare plan;²³
- Parent involvement in choosing product trade names;²⁴
- Sharing joint laboratory space (better if costs shared);²⁵
- Sharing or providing office space (better if costs are shared or formalized in sublease);²⁶
- Giving "instructions [to the subsidiary] on how to improve and change," so long as such instructions are consistent with the parent's role as an investor;²⁷
- Coordination of air and water compliance issues between parent and subsidiary;²⁸
- Use of parent employees as "consulting engineers";²⁹
- Imposing detailed specifications regarding products or manufacturing methods and related quality control, especially if in the context of an arms-length purchase or supply contract;³⁰ and
- Subsidiary's manufacturing of product developed by parent.³¹

Activities Warranting Caution. The following activities have received scrutiny in judicial decisions, sometimes with mixed, ambiguous or passing treatment. In a broad sense, these activities are viewed by courts as permissible, provided they are done in the context of sharing or cooperation among members of an affiliated group of companies and absent other indicia of abnormal or "eccentric" involvement. However, some judicial decisions have pointed to such activities (usually in conjunction with other "red flags") as suggestive of direct operator involvement or questionable affiliate interaction. Therefore, because the line between a close working relationship, on the one hand, and eccentric interference or parent involvement, on the other, is inherently fuzzy, these activities are best accompanied by arms-length arrangements between the companies, including consulting contracts and inter-company charges where appropriate. In other words, when engaging in the following activities, it is advisable to

¹³ *Bestfoods*, 524 U.S. at 63 n.14.

¹⁴ *Bestfoods*, 524 U.S. at 61-62.

¹⁵ *Bestfoods*, 524 U.S. at 72; *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff'd*, 153 Fed. Appx. 749 (2d Cir. 2005).

¹⁶ *Datron Inc. v. CRA Holdings Inc.*, 42 F. Supp. 2d 736 (W.D. Mich. 1999); *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999); *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001). *But see* *K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 472 F.3d 1009 (8th Cir. 2007) (holding shareholder personally liable for having authority to authorize expenditures).

¹⁷ *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999); *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001).

¹⁸ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001).

¹⁹ *Bestfoods*, 524 U.S. at 72; *Datron, Inc. v. CRA Holdings Inc.*, 42 F. Supp. 2d 736 (W.D. Mich. 1999); *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001); *Wyatt v. Ford Motor Co.*, 2006 U.S. Dist. Lexis 39464 (W.D. Wa. 2006); *City of Wichita v. Trustees of the APCO Oil Corp. Liq. Trust*, 306 F. Supp. 2d 1040 (D. Kan. 2003) (no liability based on promulgation of general chemical handling procedures and admonitions to local managers to handle chemicals safely); *but see Hoekstra v. Caribbean Cruises Ltd.*, 360 F. Supp. 2d 362 (D.P.R. 2005) (denying motion to dismiss where parent Royal Caribbean allegedly developed policies for the subsidiary).

²⁰ *Datron Inc. v. CRA Holdings Inc.*, 42 F. Supp. 2d 736 (W.D. Mich. 1999) (annual OSHA inspections); *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001); *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff'd*, 153 Fed. Appx. 749 (2d Cir. 2005).

²¹ *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff'd*, 153 Fed. Appx. 749 (2d Cir. 2005); *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001).

²² *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001); *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999).

²³ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001).

²⁴ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001).

²⁵ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001).

²⁶ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001).

²⁷ *Bestfoods*, 524 U.S. at 63 n.14.

²⁸ *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729, 749 (W.D. Mich. 2001).

²⁹ *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729, 741, 750 (W.D. Mich. 2001).

³⁰ *Miami-Dade County v. U.S.*, 345 F. Supp. 2d 1319 (S.D. Fl. 2004); *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001).

³¹ *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729, 744 (W.D. Mich. 2001).

clarify expectations and make a record of who is wearing what “hat” for *Bestfoods* purposes.

- Providing legal advice to subsidiary (but should be subject to accounting charge and required conflict-of-interest waivers);³²
- Providing advice or consulting to subsidiary on environmental matters including environmental compliance (should be accompanied by clear inter-company agreement as to duties of personnel, time commitments, accounting charges, and decision-making responsibilities; exercise special caution if advice shades into involvement or consulting on particular facility matters; better if parent employee has no authority to mandate actions);³³
- Participation in meetings at which environmental decisions are made;³⁴
- Parent employees, especially EHS personnel, working out of offices at subsidiary’s plant (especially in absence of inter-company memorandum or other agreement defining role, scope of authority and chain of command);³⁵
- Parent involvement in design of pollution control, waste water treatment, or remediation systems for affiliate;³⁶

³² *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999) (providing legal services, even on waste contracts, was permissible); *Bestfoods v. Aerojet*, 173 F. Supp. 2d 729, 751 (W.D. Mich. 2001) (the court “is aware of no case in which legal advice provided by a parent corporation’s attorney to a subsidiary represents control of the subsidiary”).

³³ Results in case law have been mixed or somewhat ambiguous regarding advice to subsidiaries on environmental matters, so particular caution is warranted. See, e.g., *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729, 744 (W.D. Mich. 2001) (advice is acceptable part of parent-subsidiary interaction); *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, 310 F. Supp. 2d 592 (S.D.N.Y. 2004), *aff’d*, 153 Fed. Appx. 749 (2d Cir. 2005) (“advice” to operating subsidiaries was acceptable, even to the extent of recommending parent’s equipment, construction and operation of plants, technical issues, and holding annual convention of facility managers); *Atlanta Gas Light Co. v. UGI Utilities Inc.*, 463 F.3d 1201 (11th Cir. 2006) (“management” arrangement that allowed subsidiary to generally tap into parent’s knowledge and expertise was not grounds for operator liability). Cf. *Carballo-Rodriguez v. Clark Equipment Co.*, 147 F. Supp. 2d 63 (D.P.R. 2001) (activity sufficient evidence to go to trial); *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001) (allegation that parent’s environmental manager actually made decisions relating to subsidiary’s manufacturing process was sufficient at Rule 12 stage).

³⁴ *City of New York v. New York Cross Harbor RR Terminal Corp.*, 2006 U.S. Dist. Lexis 4238 (E.D.N.Y. 2006) (sending case to trial based on evidence of decisionmaking by individual shareholder and executive).

³⁵ *Carballo-Rodriguez v. Clark Equipment Co.*, 147 F. Supp. 2d 63 (D.P.R. 2001) (activity sufficient evidence to go to trial); *New York v. B.B. & S. Treated Lumber Corp.*, No. 02-cv-1358, 2007 U.S. Dist. Lexis 74456 (E.D.N.Y. Sept. 30, 2007) (absence of such evidence was probative).

³⁶ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir.1999) (involvement in design was factor in liability); cf. *BP Amoco Chemical Co. v. Sun Oil Co.*, 316 F. Supp. 2d 166 (D. Del. 2004) (design work was not a basis for *Bestfoods* liability); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) (expert testimony on parent’s involvement in design was relevant to direct operator and arranger claims); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003).

- Involvement in installation of pollution-generating equipment, either by participating in decision making or actual construction;³⁷
- Supervision of labor force at operating facility relating to environmental pollution or waste;³⁸
- Assisting subsidiary in obtaining environmental permits;³⁹
- Signing environmental permit applications;⁴⁰
- Issuing “directives” regarding environmental matters or responses to regulatory inquiries;⁴¹
- Establishing parent or parent employee as point of contact for regulators or environmental consultants regarding issues at subsidiary’s facility,⁴² such as being named as “person in responsible charge” for environmental spill reporting;⁴³
- Involvement in negotiations with government agencies pertaining to subsidiary’s facility or enforcement actions⁴⁴ or directing the subsidiary’s response to regulatory inquires;⁴⁵
- Insisting that parent company be notified of all governmental communications (may trigger liability).

³⁷ *United States v. Kayser-Roth Corp.*, 272 F.3d 89 (1st Cir. 2001) (parent held liable based on mandate to use TCE dry cleaning rather than detergent-based equipment; decided under Rule 60); *United States v. Meyer*, 120 F. Supp. 2d 635 (W.D. Mich. 1999) (shareholder liable for participation in construction of sewer lines that leaked heavy metals).

³⁸ *Norfolk Southern Ry. Co. v. Gee Co.*, No. 98 C 1619, 1999 U.S. Dist. LEXIS 6581 (N.D. Ill. Apr. 21, 1999) (allegation sufficient to survive motion to dismiss).

³⁹ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001) (allegation that parent actually controlled this process was sufficient at Rule 12 stage); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003).

⁴⁰ *City of New York v. New York Cross Harbor RR Terminal Corp.*, 2006 U.S. Dist. Lexis 4238 (E.D.N.Y. 2006); *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998) (individual shareholder and executive held liable); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003) (individual shareholder and executive held liable).

⁴¹ *Bestfoods*, 524 U.S. at 62 (noting that such allegations warrant scrutiny and remanding for trial court consideration).

⁴² *Carballo-Rodriguez v. Clark Equipment Co.*, 147 F. Supp. 2d 63 (D.P.R. 2001) (activity sufficient evidence to go to trial); *City of New York v. New York Cross Harbor RR Terminal Corp.*, 2006 U.S. Dist. Lexis 4238 (E.D.N.Y. 2006) (company president potentially personally liable); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003) (individual shareholder and executive held liable).

⁴³ *City of New York v. New York Cross Harbor RR Terminal Corp.*, 2006 U.S. Dist. Lexis 4238 (E.D.N.Y. 2006) (company president potentially personally liable).

⁴⁴ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, No. 92-20259, 2000 U.S. Dist. Lexis 16805 (N.D. Ill. 2000) (found direct liability for individual shareholder and executive); *Datron Inc. v. CRA Holdings Inc.*, 42 F. Supp. 2d 736 (W.D. Mich. 1999) (found no liability); *United States v. Kayser-Roth Corp.*, 272 F.3d 89 (1st Cir. 2001); *City of New York v. New York Cross Harbor RR Terminal Corp.*, 2006 U.S. Dist. Lexis 4238 (E.D.N.Y. 2006) (sending case to trial based on evidence of decisionmaking); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003) (individual shareholder and executive held liable).

⁴⁵ *Bestfoods*, 524 U.S. at 62 (noting that such activity warranted examination and remanding to trial court).

ity if coupled with pervasive control and not properly caveated);⁴⁶

- Performing administrative functions for affiliate under management fee arrangement, especially if related to environmental matters, pollution or waste;⁴⁷
- Outsourcing purchasing functions, particularly if purchasing involves requisition of chemicals or waste hauling contracts (better to have protocols and clear lines of decision-making that gives subsidiary final authority on all purchase and specification decisions);⁴⁸
- Selecting chemicals to be used at subsidiary facility (if advice or purchasing assistance is rendered, better to clarify that subsidiary has final authority over chemical selection);⁴⁹
- Negotiating waste hauling contracts or transactions involving waste on behalf of affiliate;⁵⁰
- Hiring or supervision of consultants for subsidiary's environmental matters;⁵¹
- Receiving letters from environmental consultant addressed to both parent and subsidiary;⁵²
- Referring to subsidiaries as divisions;⁵³
- Obtaining insurance for subsidiary (better if premium is charged to subsidiary account);⁵⁴

⁴⁶ *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 102-03 (1st Cir. 2001).

⁴⁷ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998) (individual shareholder and executive held liable). Note that this decision appears to be inconsistent with other decisions allowing provision of general administrative support.

⁴⁸ *BP Amoco Chemical Co. v. Sun Oil Co.*, 316 F. Supp. 2d 166 (D. Del. 2004) (outsourcing purchasing of chemicals and waste hauling did not trigger liability on facts presented).

⁴⁹ *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001) (allegation that parent actually controlled this process was sufficient at Rule 12 stage).

⁵⁰ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir.1999) (individual shareholder and executive held liable); *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat*, No. 92-20259, 2000 U.S. Dist. Lexis 16805 (N.D. Ill. 2000); *Carter Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840 (6th Cir. 1999); *BP Amoco Chemical Co. v. Sun Oil Co.*, 166 F. Supp. 2d 984, 987-991 (D. Del. 2001) (allegation that parent actually controlled this process was sufficient at Rule 12 stage); *United States v. Dell'Aquila*, 150 F.3d 329 (3d Cir. 1998); but see *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999) (participation in contract negotiations was permissible).

⁵¹ *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003) (individual shareholder and executive held liable); *United States v. Dell'Aquila*, 150 F.3d 329 (3d Cir. 1998); but see *Norfolk Southern Ry. v. Gee Co.*, No. 98 C 1619, 2001 U.S. Dist. Lexis 10784 (D. Ill. 2001) (no liability for executive based on merely meeting with consultants regarding contaminated soil removal and spill prevention).

⁵² *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998) (individual shareholder and executive held liable); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003) (individual shareholder and officer held liable).

⁵³ *Datron Inc. v. CRA Holdings Inc.*, 42 F. Supp. 2d 736 (W.D. Mich. 1999) (did not trigger liability but raised red flag).

⁵⁴ *Datron Inc. v. CRA Holdings Inc.*, 42 F. Supp. 2d 736 (W.D. Mich. 1999) (activity permissible); cf. *Carballo-Rodriguez v. Clark Equipment Co.*, 147 F. Supp. 2d 63 (D.P.R. 2001) (activity sufficient evidence to go to trial).

- Providing training to subsidiary's employees;⁵⁵
- Providing security for subsidiary's facility;⁵⁶ and
- Involvement in remediation at subsidiary's facility, especially where risk of exacerbating contamination.⁵⁷

Risky Activities (to be avoided). The following activities have been identified as "red flags" potentially triggering liability of a parent, especially in the aggregate, and should be avoided or mitigated where possible.

- "Mechanical activation of pumps and valves" at subsidiary's facility by parent-only employees;⁵⁸
- Dual officer's use of affiliate's letterhead or stationery, business cards, or signature authorization when conducting affairs for another affiliate (i.e., keep the hats and letterhead straight);⁵⁹
- Dual officer's abnormal behavior that benefits parent while disadvantaging subsidiary;
- Vendors sending correspondence and invoices to parent for subsidiary's facility;⁶⁰
- Making decisions about what waste is shipped or received, how waste is handled or where waste dumped;⁶¹
- Stating in correspondence or public statements that parent is responsible for day-to-day operations at subsidiary's facility; and⁶²
- Subsidiary's officers unaware of who is making environmental decisions.⁶³

C. Proof and Evidence

Bestfoods' focus on corporate norms raises interesting questions of proof and evidence that have not yet

⁵⁵ *Hoekstra v. Caribbean Cruises Ltd.*, 360 F. Supp. 2d 362 (D.P.R. 2005) (denying motion to dismiss).

⁵⁶ *Greene v. Long Island Railroad Co.*, 280 F.3d 224 (2d Cir. 2002).

⁵⁷ *RSR Corp. v. Avanti Dev. Inc.*, No. IP 95-1359-C-M/S, 2000 U.S. Dist. LEXIS 14210 (S.D. Ind. Mar. 31, 2000) (parent not liable for funding remediation, but parent employee's direct participation in cleanup activities that disturbed and spread contamination triggered operator liability); *AMW Materials Testing Inc. v. Town of Babylon*, 187 Fed. Appx. 24 (2d Cir. 2006) (allegations that fire department exacerbated and spread chemical spill during emergency response posed factual issue for trial whether fire company was an "operator" of the site).

⁵⁸ *Bestfoods*, 524 U.S. 51, 66-67 (1998) (noting that operator liability is broader than, but certainly includes, mechanical operation of facility equipment).

⁵⁹ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998); *New York v. B.B. & S. Treated Lumber Corp.*, No. 02-cv-1358, 2007 U.S. Dist. LEXIS 74456 (E.D.N.Y. Sept. 30, 2007).

⁶⁰ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998).

⁶¹ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, No. 92-20259, 2000 U.S. Dist. Lexis 16805 (N.D. Ill. 2000); *United States v. Davis*, 31 F. Supp. 2d 45 (D.R.I. 1998); *United States v. Kayser-Roth Corp.*, 272 F.3d 89 (1st Cir. 2001); *K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 472 F.3d 1009 (8th Cir. 2007) (shareholder personally liable for approving tank washing and waste disposal procedures).

⁶² *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, No. 92-20259, 2000 U.S. Dist. Lexis 16805 (N.D. Ill. 2000).

⁶³ *Carballo-Rodriguez v. Clark Equipment Co.*, 147 F. Supp. 2d 63 (D.P.R. 2001) (activity sufficient evidence to go to trial).

been fully delineated in the lower courts. For example, can corporate norms be established through lay witness testimony and documents, or must parties retain expert witnesses on corporate norms and business relationships? Are the relevant standards keyed to corporate norms at the time of the waste disposal in question (which, in CERCLA cases, can often date back several decades and not infrequently to well into the early part of the 20th century) or alternatively by the increasingly sophisticated environmental practices of the post-1970s era?

Also unclear is who will be qualified to testify as to corporate norms. In a number of cases where parties have presented law professors as “experts” on corporate relationships or veil-piercing law, these witnesses have been rejected to the extent they attempt to merely interpret the law for the court. *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005). However, experts have been allowed to testify as to how specific corporate activities diverged from or were consistent with corporate norms, although there is some question as to what showing must be made to satisfy the Supreme Court’s *Daubert* standard. In general, the preferred expert in *Bestfoods* cases will be one with substantial personal experience in the particular industry sector during the relevant time frame. *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) (admitting testimony from mining engineer with 40 years of experience in the mining industry, and industrial historian as experts); *BP Amoco Chemical Co. v. Sun Oil Co.*, 316 F. Supp. 2d 166 (D. Del. 2004) (retired oil industry executive offered as expert).

When considering *Bestfoods* liability prospectively, an effective corporate risk management program will align the parent-subsidiary relationship to *Bestfoods* considerations. As part of this process, companies should strive to clarify lines of command and duties and minimize potential misinterpretation of the corporate relationship by outside observers. Of course, CERCLA litigation frequently implicates “legacy” properties, in which the events and corporate relationships were forged decades ago. In these cases, the investigation, proof, interpretation, and characterization of historical evidence will be central to defending against charges of *Bestfoods* liability. Often CERCLA litigation is an archeological effort, involving dredging through dusty file cabinets, piecing together ancient board minutes, memos or advertising materials, and interviewing elderly former employees. Litigation counsel should conduct their investigation and discovery with an eye toward how similar evidence has played out in post-*Bestfoods* cases.

III. Derivative Parent Liability: Piercing the Corporate Veil

In addition to clarifying the standard for direct liability under CERCLA, the Supreme Court in *Bestfoods* reaffirmed the “equally fundamental principle of corporate law” that a parent corporation is not indirectly liable for the acts of its subsidiaries unless the particular circumstances warrant piercing the corporate veil. *Bestfoods*, 524 U.S. at 61. Nothing in CERCLA, the Supreme Court noted, “purport[s] to rewrite this well-settled rule, either, and against this venerable common-law backdrop, the congressional silence is audible.” Thus, after *Bestfoods*, a parent corporation can be held de-

derivatively liable for its subsidiary’s debts only when under traditional veil-piercing principles “the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”

Applying the Supreme Court’s directive, Judge Posner of the Seventh Circuit expounded on the principle of corporate separateness (applying his noted law and economics bent):

The general rule, of course, in Illinois as elsewhere, is that a shareholder qua shareholder, and a parent, subsidiary, or other affiliate, qua affiliate, is not liable for a corporation’s debts. . . . That is the principle of limited liability and it 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. But in some circumstances the corporate veil is pierced and the corporation’s debtor allowed to collect his debt from the shareholder or affiliate.

Browning-Ferris Indus. of Ill. Inc. v. Ter Maat, 195 F.3d 953, 959 (7th Cir. 1999). As illustrated by the Posner opinion, lower courts following *Bestfoods* appear to have accepted that direct and derivative liability should be analyzed separately, and that imposition of indirect or derivative liability should be guided by traditional corporate veil-piercing principles, rather than statutory law arising from CERCLA or other federal regulatory regimes in absence of any congressional intent otherwise.

An important question that remains following *Bestfoods* is whether federal common law or state law provides the veil-piercing test in a federal action such as under CERCLA. The *Bestfoods* court expressly declined to resolve this particular issue. *Bestfoods*, 524 U.S. at 64 n.9 (noting that “[t]here is significant disagreement among courts and commentators over whether, in enforcing CERCLA’s indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing”). However, the Court acknowledged the primacy of state corporation law and emphasized that CERCLA is silent on whether Congress intended to displace state corporation law and impose a federal common-law standard for derivative liability.

Since *Bestfoods*, lower courts remain split as to whether state or federal common law dictates the corporate veil-piercing analysis under CERCLA, as well as other federal statutes that are silent on this issue. *See, e.g., Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 195 F.3d 953, 959 (7th Cir. 1999) (recognizing “split of authority”); *United States v. Jones*, 267 F. Supp. 2d 1349, 1354 (M.D. Ga. 2003) (“There remains significant disagreement as to whether federal courts should apply state or federal common law to pierce the corporate veil under [CERCLA].”).

A survey of the decisions suggests that a majority of courts have determined that state, rather than federal, substantive law governing corporate relationships should apply to veil-piercing claims brought under federal environmental laws. *See, e.g., Carter-Jones Lumber v. LTV Steel*, 237 F.3d 745, 751 (6th Cir. 2001) (applying Ohio law); *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001) (applying Rhode Island law); *Redwing Carriers Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501

(11th Cir. 1996) (pre-*Bestfoods* decision finding that “[a]bsent a showing that state partnership law is inadequate to achieve the goals of CERCLA, we discern no imperative need to develop a general body of federal common law to decide cases such as this”) (internal quotation marks omitted); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 253 (6th Cir. 1994) (pre-*Bestfoods* decision explaining that state law governs the question of corporate successor liability under CERCLA); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant Inc.*, 159 F.3d 358, 363 (9th Cir. 1998) (noting that “[a]lthough often invoked in this context, there has been no real explanation of the need for uniformity in this particular area of successor liability—especially since state law will in many other instances determine whom the EPA may or may not look to for compensation”).

Nonetheless, a significant number of courts have concluded that a uniform body of federal common law is preferable in the context of federal regulatory regimes. See, e.g., *Board of Trustees, Sheet Metal Workers Nat’l Pension Fund v. Elite Erectors Inc.*, 212 F.3d 1031 (7th Cir. 2000) (involving ERISA, but noting in *dicta* that federal common law would apply in CERCLA cases); *In re Nextwave Personal Comm. Inc.*, 200 F.3d 43 (2d Cir. 1999) (indicating that some type of federal common law would apply in CERCLA cases); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (pre-*Bestfoods* case holding that “given the federal interest in uniformity in the application of CERCLA, it is federal common law, and not state law, which governs when corporate veil-piercing is justified under CERCLA”); *United States v. General Battery*, 423 F.3d 294, 300, 302 (3d Cir. 2005) (concluding that federal common law applies because “[a] more uniform and predictable federal liability standard corresponds with specific CERCLA objectives by encouraging settlements and facilitating a more liquid market in corporate and ‘brownfield’ assets”); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992) (pre-*Bestfoods* case concluding that a national rule is required by “[t]he national interest in the uniform enforcement of CERCLA and the same interest in preventing evasion by a responsible party.”).

Still other courts have applied federal common law, but look to traditional state law elements to flesh out the details of what constitutes federal law. See, e.g., *State of New York v. Panex Indus. Inc.*, No. 94-civ-0400E, 1996 U.S. Dist. LEXIS 9418 at *37 (W.D.N.Y. June 21, 1996) (pre-*Bestfoods* decision); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D. Mass. 1987) (pre-*Bestfoods* decision); *U.S. PIRG v. Atlantic Salmon of Maine LLC*, 261 F. Supp. 2d 17 (D. Me. 2003) (concluding federal Clean Water Act requires uniform national law, but applying usual state-law standard requiring “lack of corporate independence, fraudulent intent, and manifest injustice.”). Interestingly, prior to *Bestfoods*, the U.S. Environmental Protection Agency and the United States Department of Justice took the position that a federal common-law rule for piercing the corporate veil should replace the traditional state-by-state approach to veil piercing. Since *Bestfoods*, however, the government apparently has discontinued advocating a federal common-law standard for piercing the corporate veil.

Although an exhaustive survey of the case law is beyond the scope of this article, the discussion below highlights how veil piercing is typically considered under federal common law and state law.

A. State Veil-Piercing Standards

In most states, courts will not pierce the corporate veil and hold a parent derivatively liable for the acts of a subsidiary unless the corporate parent completely dominates the subsidiary to the extent that the subsidiary essentially is an “alter ego” or “mere instrument” of the parent corporation. In addition, most state courts will pierce the corporate veil only to “prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime, or when the parent so dominated the subsidiary that it had no separate existence.” See, e.g., *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) (internal quotations and citations omitted); *AT&T Global Information Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 863-64 (S.D. Ohio 1998) (applying Ohio law to find “grandparent” affiliate liable for disposal site).

In comparison to the federal standard, state common-law standards can be considered somewhat more protective of the principles of corporate separateness and limited liability. The tests employed and factors considered vary somewhat from state to state, as can be expected, but generally require a showing that the parent’s control over the subsidiary resulted in fraud, illegality or injustice to a third party. A full survey of state veil-piercing standards is beyond the scope of this article; however, companies should keep in mind the need to observe corporate formalities, train employees regarding corporate structure and lines of authority, and consider the prospect of veil piercing as part of their overall risk management and governance procedures and planning.

An important issue that arises when state-law standards are applied is whether the standards for piercing the corporate veil are determined by the law of the corporation’s state of incorporation or by the law of the state whose substantive law would apply to the case generally, usually the law of the state with the greatest interest in the lawsuit. Cf. *Stromberg Metal Works Inc. v. Press Mech. Inc.*, 77 F.3d 928, 933 (7th Cir. 1996) (the law of a corporation’s state of incorporation governs whether the corporate veil should be pierced); *Martin v. Safeguard Scientifics Inc.*, 17 F. Supp. 2d 357, 362 (E.D. Pa. 1998) (same); *Amoco Chem. Co. v. Texas Tin Corp.*, 925 F. Supp. 1192, 1201 (S.D. Tex. 1996) (same) with *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1101-1102 (E.D. Mich. 1997) (veil piercing determined under law of state having most significant relationship to lawsuit rather than law of state of incorporation).⁶⁴

⁶⁴ In federal actions involving state law claims, courts will likely apply the choice-of-law rules of the forum state to determine whether the law of the state of incorporation or the state with the greatest interest in the lawsuit supplies the veil-piercing rules. For example, two federal court cases have held that the law of the state with the most interest in the outcome of the lawsuit applies, unless a corporation has many shareholders who reside in different states, in which case the law of the state of incorporation should apply. See *Curiale v. Tober Holding Corp.*, 1997 WL 713950 (E.D. Pa. 1997); *Foster v. Berwind Corp.*, 1991 WL 21666 (E.D. Pa. 1991).

Therefore, jurisdictional or choice-of-law rules also may affect the risk profile for a particular facility or activity.

B. Federal Common-Law Standard for Veil Piercing

Many federal courts have adopted a federal common law of veil piercing that is similar, if not identical, to state law standards. However, some courts have applied a federal veneer to veil piercing by relaxing the usual "fraud or injustice" requirement in deference to CERCLA's broad remedial purpose. Not surprisingly, the federal common-law test in the context of CERCLA is better developed in those federal appellate circuits that have settled upon the need for a uniform federal common law of veil piercing. In the Second Circuit, for example, the corporate veil may be pierced under federal common law in the "interest of public convenience, fairness, and equity," suggesting a less rigorous standard than most state-law formulations. *See, e.g., State of New York v. Panex Indus. Inc.*, 1996 U.S. Dist. LEXIS 9418, at *37 (W.D.N.Y. 1996). In the Third Circuit, courts have echoed state veil-piercing decisions, noting that liability can be imposed based on a finding that "under a totality of the circumstances, the evidence demonstrates that the parent exercised such pervasive control over the subsidiary that the subsidiary was merely the alter ego of the parent." *United States v. Union Corp.*, 259 F. Supp. 2d 356, 389 (E.D. Pa. 2003). In contrast to many state common-law formulations, however, the Third Circuit test does *not* require proof of fraudulent intent to pierce the corporate veil. *See Trustees of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 194 (3d Cir. 2003).

Factors that are typically considered under the federal common-law standard vary, but the following relationships, either separately or in the aggregate, would be considered by courts:

- sharing of common directors or officers;
- sharing common business departments;
- filing consolidated financial statements and tax returns;
- financing the subsidiary;
- inadequately capitalizing the subsidiary;
- paying the salaries and other expenses of the subsidiary;
- deriving all of a subsidiary's business from the parent;
- using the subsidiary's property as its own;
- intermingling of daily operations of the parent and subsidiary; and
- disregarding basic corporate formalities, such as maintaining separate books and records and holding shareholder and board meetings.

See, e.g., Idylwoods Assoc. v. Mader Capital Inc., 915 F. Supp. 1290, 1305 (W.D.N.Y. 1996); *United States v. Jon-T Chems. Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985).

Obviously, some of these factors (such as sharing of common directors) would have little or no bearing on liability under a direct liability analysis under *Bestfoods*, yet they are considered when evaluating indirect (veil piercing) liability. Because veil piercing requires showing a level of domination (and potentially fraud), it is unlikely that typical corporate interaction, such as shar-

ing directors or inter-company cooperation, would alone lead a court to pierce the corporate veil. However, if presented with a prima facie case of domination or fraud, a court might view such otherwise "normal" interactions in a different light.

As with direct liability, the courts will look closely at the totality of the factual circumstances, including which "hat" corporate employees were wearing when they made decisions. A notable example is the decision in *Atlantic Salmon*, where a federal district court was clearly swayed by the CEO's "difficulty during his testimony in remembering which corporate hat he wore" when explaining the business activities of a parent and subsidiary. *U.S. PIRG v. Atlantic Salmon of Maine LLC*, 261 F. Supp. 2d 17, 28 n.10 (D. Me. 2003) (holding parent company liable under veil-piercing analysis). Ultimately, the court held that, even though the subsidiary had separate by-laws, record books, permits, employees and physical location, the parent so thoroughly dominated the subsidiary's salmon aquaculture business by controlling the supply of smolt, managing its finances, handling regulatory affairs, and requiring the subsidiary to sell all its harvested fish to the parent that the subsidiary was "simply a conduit" for the parent's business activities. Nonetheless, despite this level of control, the court may not have pierced the veil had the parent not engaged in "the wrongful purpose" of trying to sidestep a court injunction by using the subsidiary's fish pens instead of its own. *Id.* at 30. Such a decision reinforces the need to consider veil-piercing risks when structuring business activities and transactions, especially when potential environmental liabilities are implicated.

IV. The Reach of *Bestfoods*

Although the *Bestfoods* case arose in the context of CERCLA owner/operator liability, its holding has been extended to a variety of other contexts, and thus companies should be mindful of the direct and derivative liability analysis in all their transactions and operational decisions.

A. Application to CERCLA and Other Statutes

As could be expected, courts have applied the *Bestfoods* analysis to CERCLA arranger and transporter liability, which form the other bases for liability under Section 107 of CERCLA. *See, e.g., Carter Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840 (6th Cir. 1999) (applying *Bestfoods* to "arranger" liability under CERCLA); *Raytheon Constructors Inc. v. Asarco Inc.*, 368 F.3d 1214 (10th Cir. 2003) (same); *Cour D'Alene Tribe v. ASARCO Inc.*, 280 F. Supp. 2d 1094, 1130-34 (D. Idaho 2003) (same); *AT&T Global Information Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 863-64 (S.D. Ohio 1998) (same); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) (same); *Puerto Rico Ports Auth. v. PCI Int'l*, 200 F. Supp. 2d 61, 67-68 (D.P.R. 2002) (applying *Bestfoods* to analysis of "transporter" liability).

Bestfood's general reasoning and application of corporate law principles also has been extended to RCRA and other environmental statutes, and even to non-environmental statutes that impose status-based liability. *See, e.g., United States v. Dell'Aquila*, 150 F.3d 329 (3d Cir. 1998) (applying *Bestfoods* to examine operator liability under the Clean Air Act in connection with violations of air pollution standards for asbestos); *United*

States v. Alisal Water Corp., 114 F. Supp. 2d 927 (N.D. Cal. 2000) (applying *Bestfoods* to operator liability under the Safe Drinking Water Act to hold that “an ‘operator’ is someone who directs the workings of, manages or conducts the affairs of a public water system which are specifically related to obligations imposed by the SDWA and the regulations promulgated thereunder”); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003) (applying *Bestfoods* to determine liability under the Oil Pollution Act); see also *Greene v. Long Island Rail Co.*, 280 F.3d 224 (2d Cir. 2002) (applying *Bestfoods* in Federal Employers’ Liability Act context); *Wyatt v. Ford Motor Co.*, 2006 U.S. Dist. Lexis 39464 (W.D. Wa. 2006) (citing *Bestfoods* in employment discrimination claim against auto dealer franchise); *Pearson v. Component Tech. Corp.*, 247 F.3d 471 (3d Cir. 2001) (applying *Bestfoods* to examine liability under Worker Adjustment Retraining Notification Act); *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (applying *Bestfoods* to assess personal jurisdiction over corporate parent of multinational enterprise).

B. Application to Individual Shareholders and Officers

As noted above, the “bedrock” corporate law principles embraced by the Supreme Court in *Bestfoods* are not limited to corporate entities, but potentially apply as well to cases in which “the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management.” *Bestfoods*, 524 U.S. at 64 (quoting Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193, 207, 208 n.11 (1929)). Consistent with this concept, lower courts have applied *Bestfoods* beyond the parent-subsubsidiary relationship to determine whether individual shareholders, directors or officers are personally responsible for a corporation’s liabilities under a direct liability analysis. See *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003) (applying *Bestfoods* to determine whether an individual shareholder is liable as an operator under the Oil Pollution Act); *Harris v. Oil Reclaiming Co.*, 94 F. Supp. 2d 1210 (D. Kan. 2000) (applying *Bestfoods* to examine officer liability under Oil Pollution Act); *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, No. 92-20259, 2000 U.S. Dist. Lexis 16805 (N.D. Ill. 2000) (applying *Bestfoods* to determine whether a president of a corporation could be personally liable as an operator of a landfill); *City of New York v. New York Cross Harbor RR Terminal Corp.*, 2006 U.S. Dist. Lexis 4238 (E.D.N.Y. 2006) (sending case to trial based on evidence of president’s involvement in environmental permits and waste disposal); *City of Wichita v. Trustees of the APCO Oil Corp. Liq. Trust*, 306 F. Supp. 2d 1040 (D. Kan. 2003) (executive liable as operator for making decisions about environmental compliance); *United States v. Tarrant*, No. 03-3899, 2007 U.S. Dist. Lexis 30331 (D.N.J. 2007) (holding manager of plating operation liable for waste disposal where he had personal control over waste hauling contracts and made decision to withhold funds needed for environmental compliance).

Typically, these cases have involved smaller, closely held companies that are dominated by a single owner or proprietor and in which corporate governance has been sloppy. Often, the results have been stark for these individuals. See, e.g., *K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 472 F.3d 1009 (8th Cir. 2007) (principal shareholder held personally liable as an operator under CERCLA where he devised waste handling procedures, re-

tained approval authority over large expenditures, approved procedures for rinsing truck tanks containing pesticides, and was responsible for making decisions regarding compliance with environmental laws); *U.S. v. Capital Tax Corp.*, 2007 U.S. Dist. Lexis 1184, No. 04-4138 (N.D. Ill. 2007) (manager of paint manufacturing facility held personally liable for hazardous waste cleanup where “he was responsible for all decisions related to environmental issues at the Site”). In short, even though these individual liability cases have generally involved fairly egregious fact patterns, the principle that a company executive can be held liable for an entire environmental cleanup is a sobering prospect that must be carefully considered by risk managers, even in larger, well-run companies.

It bears keeping in mind that there is no principle of law that protects executives and officers from liability akin to the rule of corporate separateness that protects shareholders and parent corporations.⁶⁵ An instructive example is the *Ter Maat* case, in which the president of a landfill was held personally liable for hazardous waste violations, despite the fact that he was doing things that most “hands on” executives or facility managers would do, i.e., overseeing operations, making decisions about various tasks, and giving direction to consultants. See *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999). Thus, executives directly involved in environmental issues must take care to secure their personal assets against loss through indemnity or insurance for potential environmental liabilities.

C. Application to Unrelated Business Partners

Courts have even applied *Bestfoods* to determine whether a corporation is directly liable for the environmental liabilities of an unrelated business entity with which the corporation transacts business. See *Sierra Club Inc. v. Tyson Foods Inc.*, 299 F. Supp. 2d 693 (W.D. Ky. 2003) (applying *Bestfoods* to determine whether a company could be directly liable for statutory reporting violations at facilities owned by non-related business entities); *United States v. Atchison, Topeka & Santa Fe Railway Co.*, 2002 U.S. Dist. LEXIS 26495 (E.D. Cal. 2002) (applying *Bestfoods* to determine whether a company that sold and delivered a pesticide to a distributor was liable for contamination at the distributor’s facility). Although these cases are at the margins of judicial thinking on liability, companies should take care to structure relationships with suppliers, business part-

⁶⁵ *Browning-Ferris Indus. of Illinois Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999). As the court explained:

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. If *Ter Maat* did not merely direct the general operations of the [company’s facility] or specific operations unrelated to pollution . . . but 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.

Id. at 956 (citations omitted).

ners and others in a way that clarifies the arms-length nature of the interactions, including where possible, express written agreement regarding authority and responsibility for operations that could give rise to liability.

D. Enterprise Liability and Other Theories of Parent Liability

Courts have applied at least two other tests, thus far in non-environmental contexts, to determine whether a parent corporation is liable for the acts of its subsidiary: the integrated enterprise theory and the agency theory. Courts have applied the integrated enterprise theory predominantly in the labor and employment context, such as in federal employment discrimination cases, to determine whether a parent company should be considered an employer of its subsidiary's employees. Under the integrated enterprise test, courts consider the following four factors: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *See, e.g., Ferrell v. Harvard Indus. Inc.*, 2001 WL 1301461 (E.D. Pa. 2001); *Dunn v. Tutera Group*, 181 F.R.D. 653 (D. Kan. 1998).

Under an agency theory, the subsidiary and parent are separate legal entities, but the parent corporation has exercised such a significant degree of control over the subsidiary's decisionmaking such that the subsidiary can be viewed as the parent's agent. *See Phoenix Canada Oil Co. Ltd. v. Texaco Inc.*, 658 F. Supp. 1061, 1084-85 (D. Del. 1987) (holding that parent corporation is liable for acts of a subsidiary under an agency theory only if the parent "dominates" the subsidiary, e.g., day-to-day control over the subsidiary).

Thus far, there are no reported cases in which the integrated enterprise theory or the agency theory has been used in the environmental context or tested under *Bestfoods*. Although the theoretical underpinnings of such theories are dubious, there nevertheless is a significant body of academic literature on the topic, and it is possible that these theories could be adopted in the future.⁶⁶

V. Case Studies

Any examination of corporate affiliate liability is aided by looking at how courts have applied the *Best-*

⁶⁶ We have not found any decisions expressly extending *Bestfoods* to common-law causes of action. However, since *Bestfoods* was predicated on "fundamental" principles of American corporate law, courts may well adopt its reasoning in any context in which the parent-subsidiary relationship is examined, particularly where a plaintiff may allege that a parent company had some duty to oversee operations at a subsidiary's facility. Worker injury or product liability tort actions are likely candidates for such theories. Companies accused of liability in such a case should take the position that any legal argument that fails to distinguish between direct and derivative liability is inconsistent with the general corporate law principles articulated in *Bestfoods*, regardless of the underlying theory of substantive liability. Under *Bestfoods*, if the acts or omissions of the parent corporation are not sufficient to hold the parent liable under the asserted theory of substantive liability for its own actions, the "existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to issues of direct liability," regardless of what the subsidiary or other affiliate may have done. *Bestfoods*, 524 U.S. at 65.

foods principles in practice under the facts of actual disputed cases. The following case studies are instructive and illustrate the general trends in the federal courts' approaches to parent-subsidiary liability in the environmental context.

A. Litigation Case Study: The *Bestfoods* Remand and *Kayser Roth*

Perhaps as important as the Supreme Court's decision in *Bestfoods* itself is the outcome of the remand to the trial court, as reported in *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W.D. Mich. 2001). The *Bestfoods* case was initially brought on the basis of allegations that a parent company (CPC, formerly Corn Products Corp.) operated a manufacturing facility in Muskegon, Michigan owned by its wholly-owned subsidiary, Ott II. The Muskegon facility was contaminated by years of chemical manufacturing, stemming from unlined waste lagoons, dumping, buried drums and rail car spills. It was alleged that the parent company should be liable for cleanup costs because of the involvement of several parent company employees in the affairs of the Muskegon facility, including alleged direct involvement in environmental compliance and manufacturing processes. After a 15-day bench trial and a tortured procedural history, the case eventually arrived at the U.S. Supreme Court.

Although the Supreme Court remanded the case, rather than tackle the factual evidence head on, Justice Souter suggested that the trial court scrutinize the alleged involvement of the parent corporation, especially with regard to a Mr. Williams, a parent company employee who was alleged to have become "directly involved in environmental and regulatory affairs" at the facility and allegedly "issued directives" regarding environmental compliance. *Bestfoods*, 524 U.S. at 62.

On remand, the district court re-assessed the evidence in light of the Supreme Court's decision and concluded that the corporate parent CPC was *not* directly liable for contamination at a subsidiary's Muskegon facility despite the following facts:

- (i) the parent and subsidiary had interlocking boards;
- (ii) parent approval was required for subsidiary capital expenditures;
- (iii) a parent employee advised the subsidiary's facility workers on how to conduct the manufacturing process;
- (iv) chemical products developed by the parent were produced at the subsidiary's facility pursuant to detailed specifications supplied by the parent;
- (v) the parent's in-house lawyer provided legal advice regarding the hook-up of a wastewater treatment system at the subsidiary's facility, evaluated an agreement covering use of the system, and provided detailed negotiation advice;
- (vi) the parent's environmental affairs director demanded that the subsidiary inform him of pollution control problems, copy him on correspondence with state regulators, allow him to review the subsidiary's communications with government environmental officials prior to submittal; and even instructed the subsidiary to delay pollution control expenditures and not inform regulators of a treatment option that was considered too costly; and

(vii) the parent's environmental affairs director provided advice on corporate environmental policies, environmental permit applications, and regulatory information requests.

The Michigan district court's analysis of the actions of Mr. Williams (the individual singled out by Justice Souter) is keenly interesting. Williams was the parent corporation's director of environmental programs, and was an employee only of the parent. The court found that Williams "coordinated information on pollution control activities for CPC and its divisions and subsidiaries." As noted, Williams attempted to insert himself into the subsidiary's environmental compliance affairs at a fairly detailed level, even going so far as to insist that the subsidiary delay compliance and obstruct a state agency investigation. Ironically, despite Williams' attempts to micromanage the subsidiary, the trial court found that the subsidiary had largely ignored Williams' "directives" and in actuality handled its own environmental practices and compliance decisions independently. Rather than characterizing Williams' attempted meddling as direct operation under *Bestfoods*, the district court noted that the environmental director's desire to "keep his finger on environmental problems" was "fully consistent" with accepted norms of parental oversight and therefore acceptable under the *Bestfoods* analysis. Furthermore, the court emphasized that the environmental affairs director never visited the facility, and attended only one meeting with state regulators. Thus, on these facts, the trial court held that the parent company did not actually manage, direct or conduct environmental affairs at the facility. This, of course, begs the question of whether the parent would have been directly liable had the environmental director been more successful in micro-managing the subsidiary's environmental program.

The Michigan district court also held that that other areas of cooperation between the parent and subsidiary were likewise not grounds for operator liability under CERCLA. For example, it was alleged that a Mr. Wolf, a chemical engineer for the parent company, visited the Muskegon facility to advise subsidiary employees how to manufacture a particular product, including such details as manufacturing procedures and equipment temperature and pressure settings. The district court had little trouble finding that this involvement was consistent with a "custom manufacturing relationship" in which the subsidiary ultimately made its own decisions and operated its own plant. The court pointed to the facts that the subsidiary charged market rates to the parent, production of products for the parent was occasionally interrupted due to the subsidiary's other customer obligations, the subsidiary's employees physically operated the manufacturing process, and the subsidiary's managers authorized the production, all of which made the parent's involvement more akin to a consulting relationship than direct operation by the parent. *Id.* at 753-54.

In stark contrast, only three weeks after the *Bestfoods* remand decision, the First Circuit found a parent company liable under ostensibly similar circumstances in *United States v. Kayser-Roth Corp.*, 272 F.3d 89 (1st Cir. 2001). There, the parent corporation was found to be an operator under CERCLA because it exercised "pervasive control" over environmental matters at its subsidiary's facility. Specifically, the parent was found to have (i) issued a directive to its subsidiaries mandat-

ing that they notify the parent's legal department of any government agency or court contact concerning environmental matters, (ii) directed the subsidiary to conduct a cost-benefit study regarding the use of a particular scouring system that used the contaminant at issue in the case, (iii) approved the installation of that particular cleaning system, and (iv) made the final decision on settling an enforcement action brought by the government regarding an illegal waste water discharge. Additionally, the court emphasized that a particular employee of the parent with "no hat to wear but the parent's" exerted operational control over environmental matters at the facility by, for example, assessing alternatives for resolving wastewater issues and playing a central role in environmental compliance decisions, including settling the EPA enforcement action.

At first blush, the *Bestfoods* and *Kayser-Roth* decisions seem diametrically opposed. However, the comparison is complicated by the unusual procedural posture of the *Kayser-Roth* decision, which was heard on a Rule 60 motion to vacate a trial court judgment rendered prior to the Supreme Court's *Bestfoods* decision, and thus the standard of decision was arguably much lower.⁶⁷ Moreover, the overall level of control and parent interference in the subsidiary's manufacturing plant appears to have been greater in *Kayser-Roth* than in *Bestfoods*, not only with respect to environmental issues but on a broader corporate level. The lesson that emerges from this comparison is that, even though under the Supreme Court's teaching a parent's involvement in the general business of the subsidiary, as opposed to "operations specifically related to pollution," is theoretically irrelevant to determine environmental liabilities, the broader factual context and atmospheric could sway a court in the wrong direction in a close case.

B. Litigation Case Study: *Amoco v. Sun Oil*

The case of *BP Amoco Chemical Co. v. Sun Oil Co.*, 316 F. Supp. 2d 166 (D. Del. 2004), similarly highlights the intensively fact-based nature of the *Bestfoods* inquiry, as well as the need to prepare a strong evidentiary case and trial strategy built around the elements of *Bestfoods*.⁶⁸ The case involved the former Avisun polypropylene manufacturing plant in New Castle, Delaware. Avisun Corporation was formed in 1959 as a joint venture between Sun Oil Company and American Viscose Corporation (later acquired by FMC Corp.) to combine Sun's invention of plastic polymer technologies with Viscose's know-how in film and fiber manufacturing—a teaming arrangement that remains common in the business world today.⁶⁹ Sun and Viscose each owned 50 percent of the Avisun stock, and accordingly, for *Bestfoods* purposes, Avisun was considered a subsidiary or affiliate of both its parents, Sun and Viscose.⁷⁰

⁶⁷ See Fed. R. Civ. P. 60; *United States v. Kayser-Roth Corp. Inc.*, 103 F. Supp. 2d 74, 78 (D.R.I. 2000) (burden is on movant to prove "the existence of exceptional circumstances justifying extraordinary relief").

⁶⁸ The authors represented Sun Oil in this matter.

⁶⁹ As is common with joint ventures, the "Avisun" name was a combination of the parent company names, and reflected the joint ownership.

⁷⁰ American Viscose was later acquired by FMC Corp. FMC settled with Amoco before summary judgment.

During Sun's and Viscose's ownership, Avisun was separately incorporated and independently managed, it had its own board of directors (although with substantial overlap of directors with its parents), held title to the manufacturing plant, and sold products under its own name. In 1968, Amoco Chemicals purchased all Avisun stock. Avisun continued as a separate corporation for a time, but in 1970, Amoco elected to merge Avisun into itself, with Amoco as the surviving entity.

Thirty years later, Amoco sued Sun alleging that Sun should be liable to Amoco for remediation costs at several landfills used in the 1960s and 70s by Avisun, including the DS&G Landfill Superfund Site. Sun denied liability on the grounds, inter alia, that it was merely a shareholder in Avisun and never itself operated the Avisun manufacturing plant. In response, Amoco asserted that several Sun employees were so involved in manufacturing operations at the Avisun subsidiary that the parent should be held directly liable as an operator under *Bestfoods*. First, Amoco alleged that John Harron, a senior Sun refinery manager, was "loaned" to Avisun for a year to oversee manufacturing at Avisun's New Castle facility. Amoco also alleged that Harold Elkin, an environmental engineer for Sun, advised Avisun on environmental matters, and by doing so "directed, managed and conducted" operations at the facility. Another allegation focused on Avisun's outsourcing of engineering design work, purchasing functions (allegedly including waste-hauling contracts) and other administrative services to its parent company, which Amoco argued constituted direct operation of the subsidiary's facility.

In an initial ruling, the court held that Amoco's factual allegations were sufficient under the FRCP 12(b)(6) motion to dismiss standard, in recognition of the low threshold of notice pleading and the fact-intensive nature of the allegations. In ruling that Amoco's claims should proceed, the court noted that Amoco's allegations were similar to the facts highlighted by Justice Souter in the Supreme Court's *Bestfoods* case itself. The district court's description of the plaintiff's allegations, which were held sufficient to proceed to discovery, was reported as follows:

During the period in which Sun and FMC owned AviSun stock, both Sun and FMC participated in the management and control over the operations of two AviSun plants, the polypropylene plant located in New Castle, Delaware and the film plant also located in New Castle, Delaware at Route 9. Sun obtained at least one of the plant's environmental permits for air and water discharges and made managerial decisions regarding both plants' compliance with pollution and environmental laws. Sun assumed a dominant role in the development and selection of all chemicals used in the polypropylene plant's production and manufacturing processes. Sun employees were placed in charge of the polypropylene plant facility's day to day management and operations, including waste hauling and transportation and generation of alleged hazardous substances. In the spring of 1964, Sun and FMC assumed responsibility for both plants' materials and services procurement, which included obtaining raw materials for plant operations.

BP Amoco Chemical Co. v. Sun Oil Co., 166 F. Supp. 2d 984, 987-991 (D. Del. 2001).⁷¹

After extensive discovery, Sun moved for summary judgment and the court ultimately rejected Amoco's claims in their entirety. In its 2004 decision, the district court focused on the "critical question" under *Bestfoods* whether Sun's involvement with its subsidiary Avisun was "eccentric as compared to corporate norms." The court noted that, although the evidence showed that Mr. Elkin, a parent-only employee, assisted Avisun with environmental issues, "Amoco has not come forward with any evidence to prove that Mr. Elkin's activities were unusual, let alone eccentric, under accepted norms of parental oversight of a subsidiary's facility." *Id.* at 171. The alleged "loan" of Mr. Harron to Avisun for a year was seen by the district court as on the same footing and held to not trigger CERCLA liability. *Id.* at 173. In the absence of any showing on corporate norms, the court also rejected Amoco's assertion that outsourcing engineering design or purchasing functions from a subsidiary to a parent constituted "operation" under *Bestfoods* that would trigger CERCLA liability. *Id.*

Thus, in *BP Amoco v. Sun Oil*, the critical focus was less on the actual level of parent-subsidiary interaction as on the larger question of whether any aspect of that interaction was eccentric under accepted corporate norms. Importantly, while Sun had proffered a testifying expert on corporate norms in the 1960s (the relevant time period), Amoco had not qualified an expert to support the plaintiff's case. Because Amoco had failed to put forward evidence of any kind regarding corporate norms, the court did not rule whether expert testimony, as opposed to other forms of evidence, would be required to establish corporate norms or what qualifications and experience an expert on the subject must have. However, the most persuasive case would involve a combination of an expert (or experts) in corporate governance and practices, combined with lay testimony and documents profiling corporate practices in the relevant time period and industry sector – drawing from media, business periodicals, advertising or even popular culture.

VII. Conclusion and Recommendations

After *Bestfoods*, the analytical construct for assessing affiliate liability in corporate groups is clearer, and trial courts are less apt to confuse direct and derivative liability. However, corporate management and in-house counsel must be aware of corporate norms and should find it helpful to examine the developing body of post-*Bestfoods* case law in order to determine which interactions among corporate affiliates are acceptable. Assessment and management of potential *Bestfoods* liability is an essential component of a robust environmental risk management program. Companies with affiliates are advised to scrutinize inter-company conduct and to create a clear record of inter-company relationships and authorities, with an eye toward defense of potential litigation claims, especially with respect to manufacturing, chemicals, and waste management practices. Often

⁷¹ Technically, Sun had never moved for dismissal on the issue of CERCLA operator liability under FRCP 12, but since Amoco had briefed the issue, the Court elected to comment on the claims in obiter dicta in the course of granting summary judgment in favor of Sun on a contract indemnity claim.

such analysis will be conducted in the context of due diligence or compliance audits. Special care should be given in this context to preserving applicable privileges, while at the same time allowing the results to be shared as part of investor oversight.

Similarly, legal counsel should be consulted when structuring cooperative ventures between affiliates, when loaning or sharing employees, or transferring assets within the corporate family. Although many CERCLA cases focus on historic activity, consideration of *Bestfoods* is appropriate for many corporate transactions due to the risk of prospective direct or derivative liability. If litigation does arise, success will depend on effective marshalling of facts and witnesses, with an

emphasis on the proper characterization of facts, their setting in the context of the overall corporate relationship, and their comparison to relevant corporate norms.

Close examination of the outcomes of the various post-*Bestfoods* cases may be the surest method for analyzing prospective risk, as general principles are of limited utility to a corporate executive faced with practical decisions about structuring arrangements between affiliates. This article has attempted to synthesize some of the post-*Bestfoods* jurisprudence in order to make those corporate decisions a little easier.

* * *