U.S. v. Bestfoods Postscript: Developments In Parent "Operator" Liability Under Superfund

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In June 1998, the Supreme Court decided *United States v. Bestfoods* ("*Bestfoods I*"),[1] addressing the circumstances under which a parent corporation may be held liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[2] for the cleanup of a subsidiary's facility. In this decision, the Court clarified the two primary avenues of parent liability under CERCLA: (1) derivative liability for the subsidiary's activities, which can be imposed only where the corporate veil can be pierced; and (2) direct liability, where the parent's activities make it an "operator" of a subsidiary facility in its own right, and therefore directly liable under the statute.

The Court's conclusion that derivative liability is limited to veil piercing raised few new issues.[3] However, the Court's discussion on direct operator liability raised numerous questions regarding the types of activities in which a parent corporation may – or may not – engage with respect to a subsidiary's facility without being deemed directly liable as an "operator." Since *Bestfoods I*, several lower courts, including the District Court to which *Bestfoods I* was remanded, have applied the principles set forth by the Supreme Court, providing additional guidance on direct parent liability.

Recap Of The Supreme Court's Holding In *Bestfoods I*

In *Bestfoods I*, the United States and the State of Michigan claimed that CPC International ("CPC"), the parent of Ott Chemical Company ("Ott"), should be liable for cleanup expenses incurred as a result of releases at an Ott chemical manufacturing facility. The Supreme Court concluded that traditional principles limiting parent liability were not displaced by CERCLA, and held that a parent can be held derivatively liable under CERCLA only where the circumstances support piercing the corporate veil. Because none of the parties in *Bestfoods I* challenged the appellate court holding that the veil could not be pierced, the Court did not address derivative liability in detail.

Instead, the Court focused on direct liability, holding that a parent's activities at a subsidiary facility can result in direct liability if those activities are sufficient to make the parent an "operator" under CERCLA. The Court defined "operator" under CERCLA as follows: "[A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of the facility . . . an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." [4]

The Court recognized three general situations where direct parent liability might occur. First, liability can arise when the parent operates the facility "in the stead of its subsidiary or alongside the subsidiary in some sort of a joint venture." [5] Second, a dual officer or director "might depart 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," [6] overcoming the general presumption that such dual executives act for the subsidiary. Third, "an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility." [7]

In determining whether a parent is directly liable as an "operator" under *Bestfoods I*, accepted norms of corporate behavior are crucial reference points. The Court remanded for a reevaluation of CPC's activities at the Ott facility under these principles.

Post-*Bestfoods I* Decisions

The District Court opinion on remand, *Bestfoods v. Aerojet-General Corporation* ("*Bestfoods II*")[8], and several other lower court decisions, provide potentially helpful guidance in applying *Bestfoods I* to specific parent activities.

Parent Employee Involvement in Subsidiary Environmental Matters. In *Bestfoods II*, the activities of CPC's environmental affairs director were claimed to be "eccentric" under accepted norms of parental oversight. The director asked Ott to keep him informed regarding pollution control problems and to copy him on correspondence. Among other things, he advised Ott to delay pollution control expenditures, and not to inform regulators of a costly treatment option. He also asked to review Ott's environmental survey responses prior to submission to regulators. However, he never visited the facility, and attended only one meeting with state regulators.

Despite this advice, Ott did not hide options or seek to delay pollution control expenditures, and responded to information requests without prior parent consultation. In addition, correspondence between Ott and state regulators regarding compliance issues, including spills of hazardous materials, were not copied to the director.

The court concluded that the director's involvement was consistent with "articulation of overall corporate policies and procedures," which does not give rise to direct operator liability under *Bestfoods I*. The court found that he did not have control over the facility or its waste disposal practices. Rather, his desire to "keep his finger on environmental problems" at Ott was "fully consistent with CPC's parental oversight role." [9]

At least three other courts have rejected claims that parent involvement in environmental matters should result in operator liability. In *Datron, Inc. v. CRA Holdings, Inc.*,[10] the parent's risk manager sought environmental insurance for the subsidiary, its safety director conducted inspections, and its general counsel was involved in subsidiary environmental legal matters. In *Schiavone v. Pearce*,[11] a parent employee solely guided contract negotiations with the owner of contaminated sites leased by the subsidiary, parent officers were copied on correspondence regarding environmental matters, and the subsidiary utilized the parent's legal department. In *U.S. v. Friedland*,[12] a parent officer/director was involved in decisions regarding subsidiary mine operations and parent mining engineers frequently visited the mine. In all of these cases, the courts found that the parent companies were engaged in normal oversight and not facility "operation."

In at least one case, *U.S. v. Kayser-Roth Corporation*, the parent corporation was found to be an operator, largely due to the control exerted by a parent officer who was neither an officer nor director of the subsidiary with "no hat to wear but the parent's" [13] Among other things, the parent officer directed the subsidiary's cost studies, considered alternatives for resolving wastewater issues, played a central role in environmental compliance decisions, including settling EPA claims, and made the decision to use the contaminant at issue in the case.

Legal Advice by Parent Attorneys. Several cases, including *Bestfoods II*, addressed whether the provision of legal advice on subsidiary facility environmental matters is sufficient to impose liability on the parent. In *Bestfoods II*, a CPC lawyer provided legal advice regarding the connection to a wastewater treatment system by the Ott facility. He evaluated a stipulation and an agreement covering use of the system, and provided detailed negotiation advice. The court found this inadequate to impose parent liability, stating that "[t]he 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." [14]

Courts have come to similar conclusions in at least two other cases, *Datron*[15] and *Schiavone*.[16] In *Datron*, the parent's general counsel sought outside counsel to handle subsidiary environmental matters, assisted in negotiations to settle an EPA complaint, and discussed terms of a rainwater drainage easement. In *Schiavone*, the general counsel of the subsidiary was also employed by the parent, and the parent's legal department reviewed and approved a contract between the subsidiary and the owner of the property where the facility was located. In neither case was the involvement by the parent lawyer sufficient to make the parent liable.

Parent Involvement in Subsidiary Production Processes. In *Bestfoods II*, the governments argued that parent CPC actually "operated" portions of the facility when chemical products developed at CPC were produced at the subsidiary's facility pursuant to detailed CPC specifications. In some instances, Ott had to expand production capacity and alter the plant's processes. In one case, a CPC employee advised facility workers how to conduct the manufacturing process, including pressure and temperature settings.

The District Court concluded that the cooperation between CPC and Ott was consistent with a custom manufacturing relationship, rather than actual operation of the facility by CPC. The court noted that Ott employees actually operated the manufacturing process and that Ott managers authorized the production. The court determined that the role of the CPC employee was akin to that of a consultant providing manufacturing information. The District Court also noted that Ott charged market rates to CPC, and that production planning was sometimes changed or interrupted due to Ott's other obligations.

Parent Involvement in Subsidiary Financial Matters. Parent involvement in subsidiary financial matters, including control over some facility-specific environmental expenditures, has been found in several cases to be consistent with a traditional parent-subsidiary relationship, and thus not a basis for parent operator liability. In *Bestfoods II*, parent approval was required for subsidiary capital expenditures in excess of certain amounts, and a detailed financial plan had to be prepared for approval by the parent. The court characterized these activities as "general financial oversight" and determined that they are not "facts tending to prove CPC's control for purposes of direct liability." [17]

The issue was analyzed in greater detail in *Schiavone*,[18] where the parent, Union Camp, was found not liable in spite of heavy oversight of its subsidiary. Among other things, Union Camp supplied its subsidiary with capital to acquire a contaminated creosoting facility and controlled the subsidiary's capital financing and expenditures. The court found that providing capital for facility acquisition, and control of subsidiary capital financing and expenditures, including decisions concerning physical improvements to the facility, were typical parent actions.

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Virtually all of the post-*Bestfoods I* cases involved a number of parent activities, and no single activity or factor has emerged as dispositive. Interestingly, most of the cases address the parent activities separately, and provide little guidance on how or whether a pattern of conduct could, in the aggregate, lead to parent liability.

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[1] *524 U.S. 51 (1998*).

[2] *42 U.S.C. §§ 9601* et seq.

[3] *There is one notable exception. The Supreme Court in* Bestfoods I *expressly declined to address whether state law or a federal common law of veil piercing applies under CERCLA. This question is beyond the scope of this article.*

[4] *524 U.S. at 66-67.*

[5] Id. *at 71.*

[6] Id.

[7] Id.

[8] *173 F. Supp. 2d 729 (W.D. Mich. 2001).*

[9] Id. *at 71*

[10] *42 F. Supp. 2d 736 (W. D. Mich. 1999).*

[11] *77 F. Supp. 2d 284 (D. Conn. 1999).*

[12] *173 F. Supp. 2d 1077 (D. Colo. 2001).*

[13] *272 F. 3d 89, 103-04 (1st Cir. 2001).*

[14] *173 F. Supp. 2d at 751.*

[15] *42 F. Supp. 2d at 747-48.*

[16] *77 F. Supp. 2d at 290-292.*

[17] *173 F. Supp. 2d at 748.*

[18] *77 F. Supp. 2d at 292.*

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