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Liability of Parent Corporations Under CERCLA: Ambiguity and the Need for a Federal Common Law Standard

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LIABILITY OF PARENT CORPORATIONS UNDER CERCLA: AMBIGUITY AND THE NEED FOR A FEDERAL COMMON LAW STANDARD

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I. INTRODUCTION

The curtain shielding a parent corporation from the acts of its subsidiary under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹ ("CERCLA") is more like a shroud of mystery. Recently, the United States Supreme Court left undisturbed much of the choice of law confusion surrounding CERCLA veil-piercing analyses. While some courts and commentators have argued that this debate is essentially meaningless because state and federal veil piercing tests are purportedly consistent, this issue has generated a tremendous amount of litigation and is actually much more important than naysayers admit.

Shareholders generally are liable for corporate debts only to the extent of their investment capital in the corporation.² In certain circumstances, however, courts will disregard the corporate entity and hold shareholders personally liable for corporate obligations.³ This is known as the doctrine of "piercing the corporate veil."⁴ Circumstances warranting disregard of the corporate

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¹ 42 U.S.C.A. § 9607 (1998).

² See W. FLETCHER & C. VAN SWEARINGEN, *FLETCHER CYCLOPEDIA CORPORATIONS* § 14 (1983 rev. ed.).

³ See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 *CORNELL L. REV.* 1036, 1041 (1991).

⁴ *BLACK'S LAW DICTIONARY* 1147 (6th Ed. 1990).

entity vary widely and usually turn on questions of fact.⁵ While federal common law and all of the states have corporate veil-piercing tests which share some core principles, the similarities of these tests have been overstated.⁶

State common law and federal common law veil piercing analyses are currently used⁷ under CERCLA to determine individual shareholder liability for the actions of the corporation as well as parent corporation liability for the actions of a subsidiary.⁸ This article focuses on the relationship between parent corporations and their subsidiaries and attempts to explain why variation among veil-piercing tests presents an obstacle to the successful implementation of CERCLA and federal policies behind CERCLA.

Section II provides an overview of CERCLA liability. Section III explains *United States v. Bestfoods*,⁹ the most recent decision by the United States Supreme Court regarding parent corporation liability under CERCLA. The remainder of the article presents the existing confusing state of affairs and argues for a federal common law standard to be developed by the United States Supreme Court that will finally draw the curtain on this specter of litigious debate.

II. LIABILITY UNDER CERCLA

CERCLA is a remedial federal statute designed to foster the cleanup of past pollution problems.¹⁰ "While there are elements of CERCLA that influence on-going conduct, and while the specter of future liability for current carelessness may have a deterrent effect on wrongful conduct, the premise of CERCLA was and remains remedial."¹¹

CERCLA identifies four categories of "covered persons" who may be called upon to pay for CERCLA clean up.¹² Such persons are:

- (1) the owner and operator of a vessel or facility,

⁵ See Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F.L.REV. 421, 431 (1990).

⁶ See *infra* Section V.

⁷ See *infra* Section IV.

⁸ See Aronovsky & Fuller, *supra* note 5, at 439.

⁹ 118 S.Ct. 1876 (1998).

¹⁰ See Kamie Frischknecht Brown, *Parent Corporation Liability for Subsidiary Violations Under §107 of CERCLA: Responding to United States v. Cordova Chemical Co.*, BYU L. REV. 265, 268 (1998); Lucia Ann Silecchia, *Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and A Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115, 116 (1998).

¹¹ Silecchia, *supra* note 10, at 124.

¹² See 42 U.S.C.A. §9607.

- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . and
- (4) any person who accepts or accepted any hazardous substances for transport . . .¹³

While CERCLA defines "person" to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial activity, United States Government, municipality, commission, political subdivision of a state, or any interstate body," there is nothing in the language of the act that specifically refers to the liability of a parent company for the acts of its subsidiary.¹⁴

Thus, a major problem with the statute is that it has proven very difficult to determine who is a corporate polluter responsible for cleanup costs. Section 107(a) of the statute imposes potential liability on current or past "owners" or "operators" of facilities where there is a release or a threatened release of a hazardous substance. The precise definition of "owner" and "operator" has generated a tremendous quantity of litigation,¹⁵ much of which is consumed often by choice of law debates rather than substantive discussions of responsibility.

In today's world of complex corporate structure, pinning liability on a corporation under CERCLA can be very complex. When a subsidiary corporation controls a problematic facility, there is no debate that the subsidiary is an "operator" of the facility under CERCLA. However, when a parent corporation of a subsidiary is sued, the problem becomes more complex. The United States Supreme Court took up this issue in late December of 1997, granting certiorari to a Sixth Circuit Court of Appeals decision.¹⁶ The resulting *United States v. Bestfoods*,¹⁷ issued in June of 1998, settled some questions and left others unanswered. *Bestfoods* is significant because it is "the Court's first substantive ruling in nearly twenty years on the question of CERCLA liability."¹⁸

¹³ *Id.*

¹⁴ See Silecchia, *supra* note 10, at 126; Frischknecht Brown, *supra* note 10, at 270.

¹⁵ See Silecchia, *supra* note 10, at 117.

¹⁶ See *United States v. Bestfoods*, 118 S.Ct. 1876, 1884 (1998).

¹⁷ 118 S.Ct. 1876.

¹⁸ Lisa K. Seilheimer, *October 1997 Term: United States v. Bestfoods*, 5 ENVTL. L. 303 (1998).

III. UNITED STATES V. BESTFOODS

In *Bestfoods*, the United States commenced an action against Ott Chemical Company, the owner of a chemical plant, for the costs of cleaning up industrial waste intentionally and unintentionally generated by the plant.¹⁹ Also named as defendants were CPC International Inc. ("CPC"), which had incorporated a wholly-owned subsidiary ("Ott II") to purchase Ott Chemical Company's assets, and Aerojet-General Corporation ("Aerojet"), the parent of a wholly-owned subsidiary which had purchased the plant once operated by Ott II.²⁰

The District Court for the Western District of Michigan held that a parent corporation can be held liable as an operator when it operates the facility directly, and, indirectly, when the corporate veil can be pierced.²¹ The District Court asserted that a parent which exercises control and participation over a subsidiary's functions and decision-making creates direct operator liability whereas a parent which merely exercises oversight of its subsidiary's business does not.²² Under this framework, the District Court held CPC and Aerojet directly liable as operators of the chemical facility.²³

The Court of Appeals for the Sixth Circuit reversed the District Court's decision, holding "that where a parent corporation is sought to be held liable as an operator pursuant to [CERCLA] based upon the extent of its control of its subsidiary which owns the facility, the parent will only be liable when the requirements necessary to pierce the corporate veil are met."²⁴ Applying Michigan veil-piercing law, the Court of Appeals held that neither CPC nor Aerojet was liable for the actions of its subsidiaries.²⁵ Under Michigan law, piercing the corporate veil requires "a unity of interest and ownership [such] that the separate personalities of the corporation and its owner cease to exist" and "circumstances . . . such that adherence to the fiction of separate corporate

¹⁹ See *Bestfoods*, 118 S.Ct. at 1881. Cleanup costs were expected to run into the tens of millions of dollars. See *id.* at 1882. "[T]he land [around the chemical facility was] littered with thousands of leaking and even exploding drums of waste, and the soil and water [was] saturated with noxious chemicals." *Id.* The groundwater "contained foam and a brownish color like root beer." *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 562-63 (W.D. Mich. 1991), *rev'd*, 59 F.3d 584 (6th Cir. 1995), *rev'd*, 118 S.Ct. 1876 (1998).

²⁰ See *Bestfoods*, 118 S.Ct. at 1882.

²¹ See *id.* at 1883.

²² See *id.*

²³ See *id.*

²⁴ *Id.*

²⁵ See *id.* at 1884.

existence would sanction a fraud or promote injustice.”²⁶ The Court of Appeals held that CPC and Aerojet’s ownership and control of the subsidiaries did not indicate that the corporate form was utilized to perpetrate a “fraud or wrong”.²⁷

The United States Supreme Court granted certiorari, vacated the Court of Appeal’s decision, and remanded the case for a decision consistent with its opinion.²⁸ The Court held that a parent corporation can be liable for its subsidiary’s actions both directly and indirectly.²⁹ The parent can be held directly liable if it acts as an operator of the facility in question.³⁰ The Court defined an “operator” as an entity which “directs the working of, manages, or conducts the affairs of a facility... specifically related to the pollution.”³¹ The direct operation test used by the Court differed from that used by the District Court because the Court focused on the relationship between the parent and the facility rather than the parent and the subsidiary.³² The Court stated, “[t]he 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.”³³

The Court held that the District Court erred by premising liability on the parent corporations’ ownership and control of the board of directors of the subsidiaries.³⁴ Such normal corporate oversight of a subsidiary can be distinguished from actual control by an officer over the subsidiary’s facility.³⁵

[A]ctivities that involve the facility but which are consistent with the parent’s investor status, such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability. The critical question is whether, in degree and detail, actions directed to the facility by an

²⁶ *United States v. Cordova Chem. Co. of Mich.*, 59 F.3d 584, 591 (6th Cir. 1995), *rev’d* 118 S.Ct. 1876 (1998).

²⁷ *See id.* at 591-92.

²⁸ *See Bestfoods*, 118 S.Ct. at 1884.

²⁹ *See id.* at 1886.

³⁰ *See id.*

³¹ *Id.* at 1887.

³² *See id.*

³³ *Id.* (quoting Oswald, *Bifurcation of the Owner and Operator Analysis under CERCLA*, 72 WASH. U.L.Q. 223, 269 (1994)).

³⁴ *See id.* at 1888.

³⁵ *See id.* at 1889.

agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.³⁶

The Court declined to settle an issue of significant disagreement, namely whether state law or federal common law should apply in indirect veil piercing analyses, because neither party raised the issue in lower court proceedings.³⁷ The Court set the stage, however, for addressing this issue in the future. The Court spelled out two competing principles of law. First, it is a deeply ingrained principle in our economic and legal systems that a parent corporation will not be held liable for the actions of its subsidiary.³⁸ However, an equally fundamental principle of law holds that the parent-subsidary veil may be pierced and the parent corporation shareholder held liable when the corporate form is used to accomplish wrongful purposes.³⁹ Nothing in CERCLA addresses the issue of when and under what principle a corporate veil should be pierced.⁴⁰ CERCLA gives no indication whether "the entire corpus of state corporation law should be replaced simply because a plaintiff's cause of action is based upon a federal statute."⁴¹ "In order to abrogate a common-law principle, the statute must speak directly to the question addressed by common law."⁴²

The *Bestfoods* Court left untouched the Sixth Circuit's application of state law principles to its piercing analysis,⁴³ but in no way endorsed the Sixth Circuit's approach as correct. In fact, in a footnote of the opinion, the Court noted that a dispute exists whether state or federal law should apply.⁴⁴ The Court did not address a second issue: if state law applies, which states laws should apply?

IV. INDIRECT LIABILITY: VEIL PIERCING

Veil piercing analyses under CERCLA are subjects of great disagreement and confusion. Such analyses present not only a question of whether state or federal common law should apply, but also of which state law should apply. There are four possibilities courts could utilize: (i) federal common law; (ii)

³⁶ *Id.*

³⁷ *See id.* at 1886 n. 9.

³⁸ *See id.* at 1884.

³⁹ *See id.* at 1885.

⁴⁰ *See id.*

⁴¹ *Id.* (quoting *Burks v. Lakser*, 441 U.S. 471, 478 (1979)).

⁴² *Id.* (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

⁴³ *See Frischknecht Brown*, *supra* note 10, at 277.

⁴⁴ *See Bestfoods*, 118 S.Ct. at 1886 n.9.

the veil piercing formula of the state wherein a parent is incorporated; (iii) the forum state; or (iv) the state where the activity took place. While some courts have argued that it makes little difference which test is used,⁴⁵ the choice is, in fact, significant. State veil-piercing analyses often differ from one another⁴⁶ and the parties contemplating a lawsuit may be uncertain as to which law applies.

The various federal circuits take different approaches to the issue of which state's laws apply in veil piercing analyses and more than one circuit has held that federal common law, rather than state law, is the appropriate source of guidance. Left to the circuits, this issue has become confused. This section demonstrates the variation among circuits by examining the choice of law approaches of several of the circuits which have dealt with it directly or indirectly.⁴⁷

In the First Circuit, courts have held that the decision whether to disregard corporate separateness in CERCLA contexts is governed by federal common law.⁴⁸ The Second Circuit also looks to federal common law.⁴⁹ According to both the First and Second Circuits, the following factors are relevant in descending order of importance:

- (1) inadequate capitalization in light of purposes for which the corporation was organized [;]
- (2) extensive or pervasive control by the shareholder or shareholders [;]
- (3) intermingling of the corporation's properties or accounts with those of its owner [;]
- (4) failure to observe corporate formalities and separateness [;]
- (5) siphoning of funds from the corporation [;]
- (6) absence of corporate records [;]
- and
- (7) nonfunctioning officers or directors.⁵⁰

Similar to the First and the Second Circuits, the Third Circuit has held that federal common law, rather than state law, governs corporate veil piercing

⁴⁵ See, e.g., *Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 33 (D.Mass. 1987) ("[T]he choice between state and federal [veil-piercing law] may in many cases present questions of academic interest, but little practical significance.")

⁴⁶ See *infra* Section V.

⁴⁷ As of January 1999, on the issue of choice of law under CERCLA, research indicates that not all of the circuits have spoken. For the purpose of this discussion, those several circuits which have spoken on this issue directly or indirectly will be considered.

⁴⁸ See *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 19, 20 (D.R.I. 1989); *Acushnet River*, 675 F. Supp. at 31.

⁴⁹ See *Town of Oyster Bay v. Occidental Chem. Corp.*, 987 F. Supp. 182, 202 (E.D.N.Y. 1997); see also *City of New York v. Exxon Corp.*, 112 B.R. 540, 552-553 (S.D.N.Y. 1990), *aff'd in part*, 932 F.2d 1020 (2d Cir. 1991).

⁵⁰ *Town of Oyster Bay*, 987 F. Supp. at 203; *Acushnet River*, 675 F. Supp. at 33.

under CERCLA.⁵¹ Important factors include whether corporate formalities were adhered to, whether the two corporations entered into business transactions at arm's length, and whether the subsidiary was undercapitalized.⁵²

The Fifth Circuit applies state law to CERCLA veil-piercing analyses.⁵³ While the Fifth Circuit has not directly spoken on the issue of choice of law,⁵⁴ it applies the law of the state of incorporation when a corporation's internal affairs are implicated and applies the law of the state with the most significant relationship when non-internal affairs are implicated.⁵⁵ Internal affairs are "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders[.]"⁵⁶ In non-internal matters, the choice of law principles stated in The Restatement (Second) of Conflicts §301 are relevant in identifying the state with the most significant relationship.⁵⁷ The Restatement proposes that:

When there is no [statutory] directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.⁵⁸

The Sixth Circuit also applies state corporate law to CERCLA veil-piercing analyses.⁵⁹ The Sixth Circuit applies a significant relationship test

⁵¹ See *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3rd Cir. 1993).

⁵² See *id.*

⁵³ See *Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F. Supp. 222, 226 (W.D. La. 1988); see also *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n.6 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

⁵⁴ See *Jon-T Chemicals*, 768 F.2d at 690 n.2 ("[W]e find no need to determine whether a uniform federal alter ego rule is required, since the federal and state alter ego tests are essentially the same.").

⁵⁵ See *Askanase v. Fatjo*, 130 F.3d 657, 670 (5th Cir. 1997); *Maher v. Zapata Corp.*, 714 F.2d 436, 464 (5th Cir. 1983).

⁵⁶ *Askanase*, 130 F.3d at 670 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)).

⁵⁷ See *Askanase*, 130 F.3d at 671.

⁵⁸ RESTATEMENT (SECOND) OF CONFLICTS §301.

⁵⁹ See *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1101 (E.D. Mich. 1997); see also

similar to the Fifth Circuit, but spells out the test somewhat differently. In *Chrysler Corp. v. Ford Motor Company*,⁶⁰ the United States District Court for the Northern District of Ohio examined this issue as one of first impression and held that “[i]n matters of internal corporate governance, the law of the state of incorporation will ordinarily govern; while in matters external to the corporation, more general choice of law rules apply.”⁶¹ In matters not of internal governance, the state with the most significant interests will be the state whose law governs.⁶² In tort cases, the following factors are important: “(a) the place of injury; (b) the place of conduct causing the injury; (c) the domicile, residence, nationality, place of incorporation and place of business between the parties; and (d) the place where the relationship between the parties is centered.”⁶³ In contract situations, such as actions where there is an absence of effective choice of law provisions, the following factors are important: “(a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.”⁶⁴ Note that under this approach, the state of incorporation is the determining factor in matters of internal governance, and it is a factor considered in external matters.

Courts in the Seventh Circuit have held that efforts to pierce the corporate veil under CERCLA are governed by the law of the state of incorporation.⁶⁵

V. ARE STATE VEIL PIERCING LAWS THE SAME?

In *Chrysler*, the District Court Judge stated, “the choice between [the two states’ laws] is not material so far as piercing the corporate veil is concerned, since the legal standards in the two states are substantially similar.”⁶⁶ The *Chrysler* court articulated a common misconception among commentators and courts, namely that all state laws regarding piercing the veil are essentially similar. For example, consider the neighboring states of Pennsylvania and Ohio. In Pennsylvania, the following factors are considered when determining whether to disregard the corporate form: undercapitalization; failure to adhere

Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1246, 1248 (6th Cir. 1991); AT&T Global Information Solutions Co. v. Union Tank Car Co., 29 F. Supp. 2d 857, 865 (S.D. Ohio 1998).

⁶⁰ 972 F. Supp. 1097 (1997).

⁶¹ *Chrysler*, 972 F. Supp. at 1102.

⁶² *See id.* at 1103.

⁶³ *Id.* at 1104.

⁶⁴ *Id.*

⁶⁵ *See Stromberg Metal Works, Inc. v. Press Mechanical, Inc.* 77 F.3d 928, 933 (7th Cir. 1996); *Browning-Ferris Industries of Ill., Inc. v. Ter Maat*, 13 F. Supp. 2d 756, 765 (N.D. Ill. 1998).

⁶⁶ *Chrysler*, 972 F. Supp. at 1104.

to corporate formalities; substantial intermingling of corporate and personal affairs; and the use of the corporate form to perpetrate a fraud.⁶⁷ In Ohio, courts apply a three-part test different from that in Pennsylvania. The corporate form may be disregarded "when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporations by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong."⁶⁸ Not only are the elements different in the Ohio and Pennsylvania tests, but their significance varies as well. In particular, the Ohio elements are requirements whereas the Pennsylvania elements merely are factors. Thus, in Pennsylvania the use of the corporate form to perpetrate a fraud is not required to pierce the corporate veil if the other factors weigh in heavily.⁶⁹ In Ohio, however, the use of the corporate form to perpetrate a fraud or an illegal act is a requirement; without it, the corporate form can not be pierced.⁷⁰

To illustrate the difference between Ohio and Pennsylvania law, consider the relationship between CPC and Ott II in *Bestfoods* under Pennsylvania and Ohio veil piercing tests. The affairs of CPC and Ott II were closely intermingled. CPC fully owned Ott II.⁷¹ Officers from CPC participated on and at times had a majority control over Ott II's Board of Directors.⁷² There was a cross-pollination of CPC and Ott II officers who were involved in decision-making and daily operations.⁷³ CPC officers actively participated in environmental matters at the site.⁷⁴ CPC exerted financial control over Ott II through the approval of budgets and capital expenditures.⁷⁵

Certainly, Ohio law would result in the same conclusion that the Sixth Circuit Court of Appeals reached applying Michigan law.⁷⁶ Ohio law requires

⁶⁷ See *Lumax Indus., Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995); *Miller v. Brass Rail Tavern*, 702 A.2d 1072, 1074 (Pa. Super. Ct. 1997).

⁶⁸ *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Companies, Inc.*, 617 N.E.2d 1075, 1086 (Ohio 1993).

⁶⁹ See *Lycoming County Nursing Home Ass'n v. Department of Labor Prevailing Wage Appeal Bd.*, 627 A.2d 238, 249 (Pa. Commw. Ct. 1993) ("The corporate existence can be disregarded [under Pennsylvania law] without a specific showing of fraud whenever it is necessary to avoid injustice or when public policy requires.").

⁷⁰ See *id.*

⁷¹ See *CPC Int'l, Inc.*, 777 F. Supp. at 575.

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *infra* Section III (describing veil piercing requirements under Michigan law).

control exercised in such a manner as to commit fraud or an illegal act. "While these factors reveal a parent that took an active interest in the affairs of its subsidiary, none of them indicate that CPC utilized the corporate form to perpetrate a 'fraud or wrong' as required before a court can pierce the veil."⁷⁷

Pennsylvania veil piercing law, as described above, allows for consideration of several factors in its test. Under this analysis, there was substantial intermingling of CPC and Ott II's financial affairs. There was cross-pollination of officers between the two corporations, and CPC's officers actively participated in environmental matters at the site. The service of CPC officers on Ott II's Board could raise questions whether corporate formalities were adhered to. For the purposes of this hypothetical application of Pennsylvania law, assume that Ott II was vastly undercapitalized.⁷⁸ Under Pennsylvania's veil-piercing laws, a strong argument can be made that the curtain shielding CPC should be pierced. Pennsylvania's caselaw supports this interpretation.

In *Lycoming County Nursing Home Association v. Department of Labor Prevailing Wage Appeal Board*,⁷⁹ the Commonwealth Court of Pennsylvania affirmed a decision of the Department of Labor and Industry's Prevailing Wage Appeal Board and held that a nonprofit corporation which had contracted for the construction of a nursing facility was the alter-ego of Lycoming County and that the corporate veil of the nonprofit corporation could be pierced.⁸⁰ To reach its decision, the court relied exclusively on the control exerted by three county commissioners over the nonprofit corporation.⁸¹ The commissioners filed the Articles of Incorporation for the nonprofit corporation and initially served as its Board of Directors.⁸² Furthermore, the chairperson of the commissioners signed the agreement authorizing construction of the nursing home by the new corporation.⁸³

The Commissioners, and therefore the County, controlled the project from its inception.

⁷⁷ *Cordova Chem. Co. of Mich.*, 59 F.3d at 591.

⁷⁸ Empirically, inadequate capitalization may be the most important factor U.S. courts using balancing approaches rely on in piercing the veil analyses. See Chuan Roger Peng, *Limited Liability in China: A Partial Reading of China's Company Law of 1994*, 10 COLUM. J. ASIAN L. 263, 273 (1996).

⁷⁹ 627 A.2d 238 (Pa. Commw. Ct. 1993).

⁸⁰ See *Lycoming County Nursing Home Ass'n*, 627 A.2d at 244.

⁸¹ See *id.*

⁸² See *id.* at 240.

⁸³ See *id.* at 241.

The attempts to disassociate the County from the Association did not overcome the fact that the Association was the instrumentality of the County. We clearly do not wish to convey the idea that the Commissioners' acts were fraudulent. However, the corporate existence can be disregarded without a specific showing of fraud whenever it is necessary to avoid injustice or when public policy requires.⁸⁴

The control element relied upon in *Lycoming* is also apparent in *Bestfoods*. CPC exerted control over both Ott II's financial affairs and over its Board of Directors. While the *Lycoming* court perhaps would hold that this alone is sufficient to pierce CPC's corporate veil, the hypothetical undercapitalization of Ott II would undeniably strengthen this position.

In summary, the facts of *Bestfoods* applied to Pennsylvania and Ohio law would potentially result in different legal conclusions. CPC's corporate veil would probably remain unbroken under Ohio law but it could realistically be breached under Pennsylvania law.

While it would be impracticable to spell out the nuances of every piercing test used by every state, similar variations exist across the board.⁸⁵ Clearly, the notion that state common law is uniform in this area is erroneous. This lack of uniformity is even more unwieldy because different bodies of cases must be used to interpret each test. Pennsylvania cases must be used to interpret Pennsylvania's test; Ohio cases must be used to interpret Ohio's test.

⁸⁴ *Id.* at 244.

⁸⁵ *See, e.g.,*

A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights. . . . Some of the relevant factors in determining whether to disregard the corporate entity on the basis of fraud are: (1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.

Wolf v. Walt, 530 N.W.2d 890, 896 (Neb. 1995);

In general, the two requirements for applying the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice.

Communist Party of the United States v. Valencia, Inc., 41 Cal. Rptr. 2d 618, 625 (Cal. Ct. App. 1995).

VI. ARGUMENT FOR FEDERAL COMMON LAW

"There is always a simple way of saying things."⁸⁶

Federal common law principles should apply where: (1) there is "an area of uniquely federal interest," and (2) "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law."⁸⁷ Both of these criteria are clearly satisfied in piercing the veil analyses under CERCLA.

CERCLA is a nationwide program enacted to provide rapid responses to threats posed by improperly managed hazardous waste sites.⁸⁸ CERCLA's legislative history indicates that Congress expected federal courts to adopt federal common law to supplement the statute.⁸⁹ During the House proceedings to enact the bill, Representative James J. Florio stated, "[t]o insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area."⁹⁰

Where a federal interest requires a uniform rule, the entire body of state law conflicts and must be replaced with federal law.⁹¹ "A [CERCLA] liability standard which varies in the different forum states would undermine the policies of the statute by encouraging illegal dumping in states with lax liability laws."⁹² As it stands today, CERCLA is subject to non-uniform application inconsistent with these principles. For example, under Ohio law, a corporation can exert a tremendous amount of control over a subsidiary and still avoid CERCLA liability if fraud or an illegal act is missing.⁹³ Michigan law is equally protective of the parent, prohibiting the veil to be pierced absent

⁸⁶ Fritz Leiber, *THE THREE OF SWORDS* 453 (1973).

⁸⁷ *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988).

⁸⁸ See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S. D. Ohio 1983); see also 5 U.S. Code Cong. & Ad. News 6119, 6119-20 (1980); David C. Clarke, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300, 1309 (1990) ("CERCLA is a nationwide federal program directly implicating important federal rights and interests.").

⁸⁹ See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3rd Cir. 1988); *United States v. Bliss*, 667 F. Supp. 1298, 1308 n.8 (E.D. Mo. 1987); *Chem-Dyne Corp.*, 572 F. Supp. at 808.

⁹⁰ 126 Cong. Rec. H11787 (Dec. 3, 1980).

⁹¹ See *Boyle*, 487 U.S. at 508.

⁹² *Chem-Dyne Corp.*, 572 F. Supp. at 809; see also 126 Cong. Rec. at H11787; *Report to Congress, Injuries and Damages From Hazardous Wastes—Analysis and Improvement of Legal Remedies*, 97th Cong., 2d Sess. (1982).

⁹³ See *infra* Section V.

fraud or wrongdoing.⁹⁴ However, Pennsylvania law uses a more liberal balancing approach, which results in a different and perhaps less protective scheme for the parent corporation.⁹⁵

CERCLA piercing analyses should not be left to the vagaries of state law. As the previous sections demonstrate, state laws do differ in their guiding principles for piercing the corporate veil. Moreover, using a particular state's laws incurs the added burden of using that state's case precedent to interpret the piercing principles. Because some circuits choose to apply the law of the place of incorporation, there is also a distinct possibility that this federal statute could be placed at the whim of a foreign country's laws or lack thereof.

Adoption of a federal common law standard would not cause a dramatic divergence from state law standards. Federal common law would not be a wholly alien body of law. While differences do exist among the piercing laws of various states, federal common law would likely draw upon them all for guidance.⁹⁶

It is simply not in the best interest of parent corporations and parties seeking environmental clean-up costs to be placed at the whim of the uncertainty and the lack of uniformity in the current framework. Without a unifying federal common law standard, the parties in CERCLA cases have been placed in the unenviable position of litigating this choice of law issue in case after case rather than actually spending their dollars arguing the substantive requirements of the test itself.

A federal common law standard is not without support. More than one circuit has adopted the standard in its CERCLA veil piercing analyses⁹⁷ and several commentators have expressed support for a federal standard.⁹⁸ The primary article cited in support of the status quo is an article by Richard G. Dennis.⁹⁹ Dennis argues that the case for uniformity may not be as strong as it first appears because there is no "readily apparent" congressional intent in favor of uniformity and CERCLA does not need uniformity to execute the federal mandate.¹⁰⁰ Representative Florio's comments and the fact that several

⁹⁴ See *infra* Section III.

⁹⁵ See *infra* Section V.

⁹⁶ See *Acushnet River*, 675 F. Supp. at 33.

⁹⁷ See *infra* Section IV.

⁹⁸ See, e.g., *Lansford-Coaldale*, 4 F.3d 1209, 1225 (arguing that there is a federal interest in the uniform application of CERCLA); Evelyn F. Heidelberg, Comment, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 PAC.L.J. 854 (1991).

⁹⁹ *Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law*, 36 VILL. L. REV. 1367, 1445, 1455, 1459 (1991). This article was among those cited by the *Bestfoods* Court to demonstrate scholarly disagreement on this issue. See *Bestfoods*, 118 S.Ct. at 1885 n.9.

¹⁰⁰ See Dennis, *supra*, note 99, at 1445, 1455, 1459.

circuits have decided to apply federal common law clearly evidence a congressional intent and a recognized need for uniformity.

Dennis supports his argument by stating that “the federal government does not have an overriding need under CERCLA to make quick and uniform responses.”¹⁰¹ What then is the point in even having CERCLA? If the *Bestfoods* facts do not warrant a quick and uniform federal response, one can hardly imagine a scenario under a federal statute requiring one. “[T]he land [around the chemical facility was] littered with thousands of leaking and even exploding drums of waste, and the soil and water [was] saturated with noxious chemicals.”¹⁰² The groundwater “contained foam and a brownish color like root beer.”¹⁰³ As one court has stated, “CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection.”¹⁰⁴

As an additional factor supporting his argument, Dennis cited the lack of uniformity even in federal common law piercing tests and the impracticability of this issue reaching the Supreme Court based on its caseload.¹⁰⁵

Cases that have addressed the potential development of a federal common law in other contexts have come to different conclusions, based on principles that can be applied to the area of CERCLA liability.

Generally speaking, the impracticality of a uniform federal common law results from the improbability of general agreement among the twelve circuit courts. The United States Supreme Court is the only forum that can create true uniformity, and such uniformity is unlikely to be forthcoming given the present caseload of the Supreme Court.¹⁰⁶

While the variation Dennis refers to is evident in differences between the Third Circuit federal common law piercing test and the First and Second Circuit federal common law piercing tests described in Section IV above, the First and Second Circuits apply the same factors to their tests. Nevertheless, the potential for variation in federal common law evidences a need for a federal common law standard developed by the United States Supreme Court. A heavy caseload of the Court is a weak foundation for Dennis’ assertion that

¹⁰¹ Dennis, *supra* note 99, at 1458.

¹⁰² *Bestfoods*, 118 S.Ct. at 1882.

¹⁰³ *CPC Int’l, Inc.*, 777 F. Supp. at 562-63.

¹⁰⁴ *Acushnet River*, 675 F. Supp. at 31.

¹⁰⁵ See Dennis, *supra* note 99, at 1463.

¹⁰⁶ *Id.* at 1463.

the status quo is appropriate. Our entire legal system is overburdened with cases. A heavy caseload could be raised as an argument in every legal debate in every court. Under this rationale, law is unable to evolve merely based on a crowded docket. Dennis made his prediction in 1991,¹⁰⁷ but *Bestfoods* demonstrates that the Court has in fact addressed liability under CERCLA. While the Court was unable to address choice of law principles for CERCLA veil piercing because no party raised this issue, the Court seemingly did set the stage to conclude this matter in a future case.¹⁰⁸

VI. CONCLUSION

Parent companies use CERCLA interpretations for guidance in order to assess what kind of activities could result in liability.¹⁰⁹ While *Bestfoods* left many questions unanswered, it answered others. For example, the decision makes clear that direct CERCLA liability will not attach to a corporate parent whose oversight actions are consistent with its role as an interested investor.¹¹⁰

Bestfoods did not, however, clear up the controversy surrounding indirect liability under CERCLA. Whether state or federal common law applies to veil piercing is still a litigious subject. More appropriately, the debate is *which* state's law applies or whether federal common law applies. Unfortunately, until the Supreme Court has an opportunity to address this issue directly, courts and corporations will be left with the specter of uncertainty.

¹⁰⁷ *See id.*

¹⁰⁸ *See infra* Section III.

¹⁰⁹ *See* Seilheimer, *supra* note 18.

¹¹⁰ *See Bestfoods*, 118 S.Ct. at 1889.