Journal of Natural Resources & Environmental Law

Volume 13
Issue 1 *Journal of Natural Resources & Environmental Law, Volume 13, Issue 1*

Article 7

January 1997

CERCLA Liability for Parent Corporations after *United States v. Cordova Chemical Company of Michigan*: Who Pays for Past Wrongs?

Matthew Leveridge
University of Kentucky

CERCLA LIABILITY FOR PARENT CORPORATIONS AFTER *UNITED STATES V. CORDOVA CHEMICAL COMPANY OF MICHIGAN*: WHO PAYS FOR PAST WRONGS?

MATTHEW LEVERIDGE*

INTRODUCTION

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act[1] (CERCLA) to address the problems regarding which parties should be held liable for past and future costs incurred in the cleanup of long-term environmental degradation.[2] The courts that have been faced with the problem of interpreting the CERCLA liability provisions are split on who bears liability for cleanup,[3] and the Supreme Court has not yet handed down a definitive answer to end the uncertainty of CERCLA liability. On May 13, 1997, the Court of Appeals for the Sixth Circuit decided *United States v. Cordova Chemical Company of Michigan,*[4] a case mainly concerning whether a parent corporation of the current owner

---

* Staff Member, Journal of Natural Resources & Environmental Law, J.D. expected 1999.

[1] Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9675 (West 1988 & Supp. V 1993).

[2] *See generally* New York v. Shore Realty Corp., 759 F.2d 1032 (2nd Cir. 1985) (holding individual liable as operator because of ability to control corporate actions); United States v. Kayser-Roth Corp., Inc., 910 F.2d 24 (1st Cir. 1990) (holding that a parent corporation can be directly liable as an operator if it exerts control over the subsidiary), *cert. denied*, 498 U.S. 1084 (1991); Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990) (holding that a parent corporation will be liable only if the elements necessary to pierce the corporate veil are met); *In re* Acushnet River & New Bedford Harbor Proceedings re. Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass 1987) (holding that a dissolved corporation was rightly revived to be accountable for its contribution to the contamination).

[3] *Compare* United States v. Kayser-Roth Corp., 910 F.2d 24 *and* Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993) *with* Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990) *and* United States v. Cordova Chem. Co. of Mich., 113 F.3d 572 (6th Cir. 1997) (en banc) (holding that a parent corporation can only be liable for the actions of its subsidiary when the elements necessary to pierce the corporate veil are met), *cert. granted, sub nom.* United States v. Bestfoods, 118 S.Ct. 621 (1997).

[4] United States v. Cordova Chem. Co. of Mich., 113 F.3d 572 (6th Cir. 1997).

on a hazardous waste site could be held liable for cleanup costs incurred in the release of several types of pollutants, where the release took place over many years under the watch of multiple corporate owners.[5]

This Comment will focus on the decision in the *Cordova* case and will analyze the various issues presented. Part I of this Comment will focus on the background of the case itself and will set forth the procedural history as well as the facts of the case. Part II will present an analysis of the legal background of the issues contained in the case. Part III will compare the court's reasoning with the standard set by previous decisions in this and other courts. Finally, Part IV will focus on this author's analysis of the decision which rejects the court's holding that operator liability will only extend to those parent corporations where the conduct necessary to pierce the corporate veil is present.

I. CASE HISTORY

From approximately 1957 to 1965, the Ott Chemical Company (Ott I) owned a site on which it operated a chemical manufacturing plant located in Dalton Township, Michigan.[6] CPC International (CPC) purchased Ott Chemical Company (Ott II) in 1965 and maintained ownership of the site until 1972.[7] During this period of ownership by Ott II, CPC exerted control over several aspects of the business operations of Ott II including finance, environmental, labor and management.[8] In June 1972 Ott II was sold to Story Chemical Company (Story);[9] however, in 1977 Story declared bankruptcy, and the bankruptcy trustee who gained title to the site began trying to find a new purchaser.[10]

In 1977, after Story's bankruptcy, the Michigan Department of Natural Resources (MDNR) visited the site to assess environmental damage.[11] Since the environmental problems at the site were so severe

---

[5] *Id.* at 575.

[6] CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 at 555 (W.D. Mich. 1991), *aff'd in part, rev'd in part, sub nom,* United States v. Cordova Chemical Co. of Mich., 59 F.3d 584 (6th Cir. Mich. 1995), *rehearing en banc and judgment vacated,* United States v. Cordova Chemical Co. of Mich., 67 F.3d 586 (6th Cir. Mich 1995) , *aff'd in part, rev'd in part,* United States v. Cordova Chemical Co. of Mich., 113 F.3d 572 (6th Cir. 1995), *cert. granted, sub nom.* United States v. Bestfoods, 118 S.Ct. 621 (1997).

[7] 777 F.Supp. at 555.

[8] *Id.* at 555-62.

[9] *Id.* at 562.

[10] *Id.*

[11] *CPC Int'l, Inc.*, 777 F. Supp. at 562.

and there was a lack of state funds to pay for the cleanup of the site, MDNR became involved in an effort to locate a buyer for the site who would be willing to take part in a cleanup effort.[12] From these efforts, MDNR began negotiations with Aerojet, Inc. (Aerojet) and its subsidiary, Cordova Chemical Company (Cordova/California).[13] As a result of these negotiations, Aerojet agreed to pay for some of the cleanup costs, and in return, Aerojet was assured that it would not be held financially responsible for future cleanup operation costs that resulted from contamination by prior owners.[14] The terms of this agreement between Cordova/California and MDNR were spelled out in a "stipulation and consent order" which was signed by both parties on October 13, 1977.[15] The following day, Cordova/California officially purchased the site from Story's bankruptcy trustee.[16] Not long before Aerojet began to produce chemicals at the site, it incorporated Cordova/Michigan as a wholly owned subsidiary of Cordova/California.[17] Ownership of the site was subsequently transferred to Cordova/Michigan.[18]

Under the control of Ott I and the subsequent owners, the site was used as a plant for the production of chemicals.[19] During the control of Ott I and Ott II, chemicals and waste products from the manufacturing processes were discarded into unlined lagoons located on the site.[20] Seepage from these lagoons resulted in the contamination of the groundwater below the facility.[21] Additionally, contamination occurred as a result of the burial of split chemical drums, spillage from train cars and overflows from the cement-lined equalization basin.[22] However, the district court found that "no disposal into the lagoons occurred during the Story or Cordova periods."[23]

The original action in this matter was decided by the United States District Court for the Western District of Michigan in *CPC International v. Aerojet-General Corporation.*[24] In *Aerojet*, Judge

---

[12] *Id.* at 563.
[13] *Id.*
[14] *Id.* at 563-64.
[15] *Id.* at 564.
[16] *CPC Int'l, Inc.*, 777 F. Supp. at 564.
[17] *Id.* at 568.
[18] *Id.*
[19] *Id.* at 555-56.
[20] *Id.* at 556.
[21] *CPC Int'l, Inc.*, 777 F. Supp. at 556.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 549.

Hillman held that CPC was liable as an operator of the facility under the "owned and operated" language of CERCLA.[25] This imposed a "new, middle ground" approach of liability on CPC for its direct involvement in several important aspects of the business of Ott II, involvement which amounted to actual control of the facility as envisioned by the drafters of CERCLA.[26] The court recognized that while that situation did not present itself here, a parent corporation might also incur liability for the actions of its subsidiary if the elements necessary to pierce the corporate veil were present.[27] Finally, the court held that MDNR did not incur arranger liability[28] since MDNR was reacting to an environmental emergency, and it made a good faith effort to find a buyer who was willing to assist the state in cleanup activities by defraying some of the cost.[29]

The case was then appealed to the Sixth Circuit Court of Appeals in *United States v. Cordova Chemical Company of Michigan*.[30] The appellate court rejected the imposition of operator liability on CPC for its control over Ott II and overruled the district court's "new, middle ground" approach to CERCLA liability.[31] Further, the court held that under the language of CERCLA, the only way a parent corporation could be liable for the actions of one of its subsidiaries is when the elements necessary to pierce the corporate veil are met.[32] The court found that the elements needed to pierce the corporate veil were not met with respect to CPC and consequently reversed the district court's imposition of operator liability on CPC.[33] The court further held that the lower court was correct in its analysis with respect to MDNR and affirmed that ruling.[34]

A petition for rehearing *en banc* was granted in the case.[35] On rehearing the Court of Appeals vacated the judgment of the earlier court and held that under the meaning of CERCLA, the only way a

---

[25] *Id.* at 580. *See infra* note 39 and accompanying text.

[26] *CPC Int'l, Inc.*, 777 F. Supp. at 573.

[27] *Id.* at 574 and 578.

[28] 42 U.S.C.A. § 9607 (a)(3) provides, in pertinent part, that an arranger is "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . by any other party or entity, at any facility . . . containing such hazardous substances."

[29] CPC Int'l, Inc. v. Aeorojet-General Corp., 777 F. Supp. at 577.

[30] United States v. Cordova Chem. Co. of Mich., 59 F3d. 584 (6th Cir. 1995), *vacated*, 67 F3d 586 (6th Cir. 1995).

[31] *Id.* at 589-90.

[32] *Id.* at 590.

[33] *Id.* at 591.

[34] *Id.*

[35] United States v. Cordova Chem. Co. of Mich., 67 F.3d 586.

parent corporation could be liable for the actions of its subsidiary was through the common law doctrine of piercing the corporate veil.[36] The court reasoned that Congress did not intend to extend a wider net of operator liability than the one that was already well established under the common law.[37] The court also upheld the reasoning of the previous courts in ruling that MDNR did not incur arranger liability through its part in the action since it was exempted under CERCLA for responding to an emergency situation that was the result of the actions of another person.[38]

II. ISSUES AND LEGAL BACKGROUND

CERCLA has a specific provision that provides liability for the owner or operator of a facility which releases hazardous substances into the environment.[39] 42 U.S.C.A. 9607(a) provides in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
> (1) the owner and operator of a vessel or facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed . . .
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State. . . not inconsistent with the national contingency plan. . . .

The courts that have had the opportunity to interpret this statute

---

[36] *Id.* at 580.

[37] *Id.* at 579-80.

[38] United States v. Cordova Chem. Co. of Mich., 113 F.3d 572 (6th Cir. 1997) (en banc), *cert. granted, sub nom* United States v. Bestfoods, 118 S.Ct. 621 (1997) (citing 42 U.S.C.A. §9607(d)(2)).

[39] 42 U.S.C.A. § 9607(a).

have come to differing views on the meaning of its language. These differing approaches are discussed in detail below.

A. Owner Liability Generally

CERCLA imposes liability on any person[40] who owned the site at the time of the contamination[41] and also on the person who is the current owner of the site, if that person is different from the one who owned the site at the time of the release.[42] Some courts have held that it is irrelevant whether the owner actually had any part in the operation of the facility, causing liability to attach regardless of whether or not the owner actually had a hand in the release of the hazardous substance.[43] Therefore, under CERCLA owner liability the pertinent factors are whether the entity owned the site at the time of the release or is the current owner of a contaminated site.[44]

While owner liability is a relatively straightforward concept with regard to whom liability attaches, CERCLA does provide for exceptions to the general rule.[45] Section 101(35) allows an exemption from liability for any person who can establish that she did not know nor had reason to know of the contamination at the time title to the site was acquired.[46] This allows for a person who, through reasonable investigation of a site for contamination, could not know of a release or threatened release to escape the burden of owner liability. Congress also holds exempt from owner liability any person who "without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[47] Therefore, a creditor who maintains an interest in ownership to protect a monetary interest, without more, will not incur owner liability.[48]

---

[40] 42 U.S.C.A § 9601(21) defines "person" as "an individual, firm, corporation, . . .commercial entity. . . ,or any interstate body."

[41] 42 U.S.C.A. § 9607(a)(2).

[42] 42 U.S.C.A. § 9607(a)(1).

[43] United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988).

[44] Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 841 (4th Cir. 1992).

[45] 42 U.S.C.A. § 9601(35) (exemption for owner who did not know and had no reason to know of contamination at a facility); 42 U.S.C.A. § 101(20)(A) (owner does not include a person who without participation in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest).

[46] 42 U.S.C.A. § 101(35)(A)(i).

[47] 42 U.S.C.A. § 101(20)(A)(i).

[48] Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098, 1104-05 (5th Cir. 1973).

B. Operator Liability Through Direct Control

1. Actual Control by an Individual

One of the earliest cases that dealt with direct liability was *State of New York v. Shore Realty Group*[49]. In *Shore Realty,* the Second Circuit held that an individual (Leo Grande) could be liable as an operator since he was "in charge of the operation of the facility in question and as such [was] an 'operator' within the meaning of CERCLA."[50] The court went on to state that Leo Grande was liable as an operator for his direct participation in the management of the facility as well as for his control over "corporate conduct."[51] The court stated that "a corporate officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation."[52] *Shore Realty* presented one of the first instances where direct control of a facility could cause a person to incur liability for the control of the violating facility;[53] however, while *Shore Realty* dealt with an individual, the holding was broad enough to spread to parent corporations as well.

In a similar case dealing with individual liability, the Eighth Circuit found an individual liable because his role as plant supervisor gave him actual knowledge of and control over the polluting events, even though he did not have actual possession of the hazardous substances at the time of release.[54] The court reasoned that the ability to control and stop the release of hazardous substances was enough for the plant supervisor to incur liability as an operator since he "personally participated in conduct that violated CERCLA."[55] Again, this case deals with individual liability; however, applying the same reasoning to a similar case where the parent corporation is in control of the corporate activities would be an easy step.

---

[49] New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

[50] *Id.* at 1052.

[51] *Id.*

[52] *Id.*

[53] Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65, 105 (1992).

[54] United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 745 (8th Cir. 1986).

[55] *Id.* at 744.

2. Ability to Control

a. Ability to control sufficient in the 1980's

Along with holding individuals liable for their direct actions as operators under CERCLA,[56] courts have held that the mere *ability* to control a corporation is enough to incur operator liability. In the first of these cases, *State of Idaho v. Bunker Hill Company*,[57] the District Court of Idaho held a parent corporation liable for the actions of its subsidiary for several reasons. The court held that the parent corporation was intimately familiar with the practices of hazardous waste disposal at the subsidiary and "had the capacity, if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and releases of hazardous waste at the facility."[58] The court imposed owner liability on the parent corporation, using language that suggested the ability to control waste disposal practices is enough to incur direct operator liability.[59]

In *Colorado v. Idarado Mining Co.*, the District Court for the District of Colorado held a parent liable under CERCLA as an operator because, *inter alia*, the parent had the "power to direct the activities of persons who control the mechanisms causing the pollution. The owner[-]operator has the power to prevent and abate the damage."[60] This court, like the *Bunker Hill* court, bypassed facts which pointed to a more direct involvement on the part of the parent and based liability simply on the parent's ability to control the subsidiary, leading to the conclusion that liability was based not on actual involvement but on the mere status as parent.[61]

Similarly, in *State of Vermont v. Staco*,[62] the court held that simply participating in the management of a facility was enough to incur operator liability, stating that "liability is based on responsibility rather than fault."[63] The *Staco* court, following the same line of

---

[56] *See supra* notes 53-59 and accompanying text.

[57] Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986).

[58] *Id.* at 672.

[59] *Id.*

[60] Colorado v. Idarado Mining Co., 18 ENVTL. L. REP. (Envtl. L. Inst.) 20578 (D. Colo. 1987).

[61] Healy, *supra* note 53, at 117.

[62] Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988), *vacated in part on other grounds*, Vermont v. Staco, Inc., 1989 WL 225428 (D. Vt. 1989).

[63] *Id.* at 831.

reasoning used by the *Bunker Hill* and *Idarado Mining* courts, stated that CERCLA imposes liability on the owner or manager of a facility from which there is a release of a hazardous substance regardless of a causal link between the actions of the owner or manager and the release of the substance.[64] That court, as had previous courts, ignored facts upon which direct liability could be based and instead based liability on the power of an owner or manager to control.[65] Additionally, in *United States v. Nicolet, Inc.*,[66] the court held that a parent corporation was liable for cleanup costs because the parent "was familiar with the waste disposal practices, had the capacity to control both the disposal and resultant release as well as to abate damage from such releases, and benefitted from the waste disposal practices."[67] The *Nicolet* court opined that a creditor could be liable for actions of the debtor corporation if the creditor participated in the day-to-day management of that corporation,[68] leading to the conclusion that participation in management is enough for operator liability.

b. More than ability to control necessary in the 1990's

Other courts have taken a different approach to the idea of direct operator liability and have held that merely the ability to control is not enough. These courts have required a definite showing that the parent has exercised actual, measurable control over the subsidiary. In 1997 the Third Circuit decided *Aluminum Company of America v. Beazer East, Inc.*, holding that the parent corporation had to meet the "actual control" test to incur liability as an operator.[69] In this case, the court stated:

> Under the actual control standard, a corporation will only be held liable for the environmental violations of another corporation when there is evidence of substantial control exercised by one corporation over the activities of the other. . . . A corporation cannot hide behind the corporate form to

---

[64] *Id.*
[65] *Id.*
[66] United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Penn. 1989).
[67] *Id.* at 1203-04.
[68] *Id.* at 1204-05.
[69] Aluminum Co. of Am. v. Beazer East, Inc., 124 F.3d 551, 563 (3d Cir. 1997).

> escape liability in those instances in which it played an active role in the management of a corporation responsible for environmental wrongdoing.[70]

In setting forth the "actual control" doctrine of direct liability, the court followed the intent of Congress in allowing responsible parties to be liable for environmental degradation; however, the net of CERCLA liability is not spread so broad as to catch innocent parties.[71]

In *Schiavone v. Pearce*, one year earlier, the Second Circuit held, as did the court in *Beazer East*, that the liability of the parent corporation stems directly from the control it exerts, completely independent of any action or liability on the part of the subsidiary.[72] The court noted that "[a] recognition of direct operator liability for parent corporations is both compatible with the statutory language and consistent with CERCLA's broad remedial scheme."[73]

The Third Circuit in Lansford-Coaldale Joint Water Auth. v. Tonolli Corp. rejected the "ability to control" test adopted by earlier courts[74] and held that a parent corporation will be liable as an operator if it exerts "actual control" over the actions of the subsidiary.[75] The *Lansford-Coaldale* court noted that Congress has expanded corporate liability through the "operator" language of CERCLA, and therefore despite common law limited liability, a corporation may be held liable for the actions of a subsidiary.[76] Further, the court noted that CERCLA's remedial purpose is "its 'essential purpose' of making 'those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.'"[77]

Similarly, the First Circuit held in *United States v. Kayser-Roth Corp.* that a parent corporation could be held liable as an operator of a facility if it had more than ownership and the normal control that accompanies it.[78] A parent must be actively involved in the activities of its subsidiary for a parent to incur liability for actions that are not its

---

[70] *Id.* at 563, *quoting* Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221-22 (3d Cir. 1993).

[71] Healy, *supra* note 53, at 124-28.

[72] Schiavone v. Pearce, 79 F.3d 248, 254 (2d Cir. 1996).

[73] *Id.* at 255.

[74] *See infra* notes 50-61 and accompanying text.

[75] Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3rd Cir. 1993).

[76] *Id.* at 1221.

[77] *Id.* (citing John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 405 (1st Cir. 1993)).

[78] United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990).

own.[79] In its opinion, the *Kayser-Roth Corp.* court noted that CERCLA was primarily a remedial statute designed to be an aid to the environment, and the terms of the Act should be construed liberally to help further the intent of Congress.[80] In this broad construction of the statute, a parent corporation can be seen as an operator, and as such will not be "protected from liability by the legal structure of [corporate] ownership."[81] Furthermore, "corporate status, while relevant to determine ownership, cannot shield a person from operator liability."[82]

3. Case Requiring Showing of a Sham Corporation

In 1990 the Fifth Circuit took a different approach to the idea of operator liability through direct control in *Joslyn Manufacturing Company v. T.L. James & Co., Inc.*[83] The *Joslyn* court held that a parent corporation who participated directly in the affairs of its subsidiary was not liable for the violations of the subsidiary[84] because "[v]eil piercing should be limited to situations in which the corporate entity is used as a sham to perpetrate a fraud or avoid personal liability."[85] In *Joslyn*, the court found that no fraud had been intended and declined to extend CERCLA liability beyond what has been traditionally followed in the common law veil piercing cases, a standard it did not feel Congress had intended to be changed.[86]

The *Joslyn* court declined to extend liability to include direct operator liability because it thought that doing so would weaken the common law standard set forth in a long line of precedent.[87] The court also found the fact that CERCLA did not define owners or operators to include parent corporations of the offending subsidiary important in reaching its conclusion.[88] This lack of specificity led the court to reason that Congress did not intend to catch parent corporations in this net of liability simply because they are parent corporations.[89] Instead, the court noted "[t]he 'normal rule of statutory construction is that if

---

[79] *Id.*
[80] *Id.* at 26.
[81] *Id.*
[82] *Id.*
[83] Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990).
[84] *Id.* at 81-82.
[85] *Id.* at 83.
[86] *Id.*
[87] *Id.*
[88] *Joslyn Mfg. Co.*, 893 F.2d at 82.
[89] *Id.*

Congress intends for legislation to change the interpretation of a judicially created concept, it makes the intent specific.'"[90] In view of this, "[w]ithout an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis."[91] From these ideas, the court opined that to hold a parent liable for the actions of its subsidiary without first meeting the elements required to pierce the corporate veil would "alter traditional concepts of corporation law."[92]

C. Derivative Operator Liability Through Common Law Piercing of the Corporate Veil

Courts that have had the opportunity to address the issue, even those that disagree on direct liability, agree that a parent corporation can be held liable for the actions of a subsidiary through piercing of the corporate veil, also known as derivative liability.[93] Under the rubric of derivative liability, there are differing opinions as to what elements are necessary to pierce the corporate veil.[94] Discussing piercing the corporate veil outside the CERCLA arena, the Sixth Circuit in *Bodenhamer Building Corporation v. Architectural Research Corporation* announced the elements necessary to reach beyond the corporate form were: "[F]irst, the corporate entity must be a mere instrumentality of another entity or individual; second, the corporate entity must be used to commit a fraud or wrong; third, there must have been an unjust loss or injury to the plaintiff."[95] At least one commentator has suggested that there are more elements to be met when deciding whether to pierce the corporate veil in the CERCLA arena.[96] In a speech to the 1991 Environmental Law Enforcement Conference, Deputy Assistant Attorney General George Van Cleve said that to pierce the corporate veil in a CERCLA action the following factors had to be met: (1) inadequate capitalization; (2) extensive

---

[90] *Id.* at 82-83.

[91] *Id.* at 83.

[92] *Id.* at 82.

[93] Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990); *In re* Acushnet River & New Bedford Harbor Proceedings re. Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass 1987).

[94] *Compare Bodenhamer*, 873 F.2d 109 *with* Deputy Assistant Attorney General George Van Cleve, Address at the 1991 Environmental Law Enforcement Conference, *Principles of CERCLA Liability — An Overview*, (Jan. 9, 1991).

[95] *Bodenhamer*, 873 F.2d at 112.

[96] Deputy Assistant Attorney General George Van Cleve, Address at the 1991 Environmental Law Enforcement Conference (Jan. 9, 1991).

control by the parent corporation; (3) intermingling of subsidiary and parent accounts and/or property; (4) lack of corporate separateness; (5) use of the subsidiary funds by the parent; (6) lack of corporate records and (7) misuse or non-use of officers or directors.[97]

Generally, courts do not go to such an in-depth degree of analysis when deciding whether to pierce the corporate veil;[98] instead, courts generally look at whether the subsidiary is an "instrumentality" of the parent and the separate corporate existence is used to perpetrate a fraud or to subvert justice.[99] In this regard, the forming of a corporation solely to avoid liability does not in itself subvert justice or perpetrate a fraud worthy of piercing the corporate veil when the parent abides by the appropriate use of the corporate form.[100] Therefore, when a parent does not use the subsidiary as an "instrumentality" warranting derivative liability or exert direct control over the subsidiary, the parent will not be liable for the actions of the subsidiary.[101]

III. OPINION AND REASONING

In *Cordova*, the Sixth Circuit held that a parent corporation would not be liable for its subsidiary's release of hazardous substances and the resultant costs associated with the cleanup of the site if the elements necessary to establish derivative liability were absent.[102] In coming to this decision, the court explicitly rejected the idea that the language of CERCLA provided for direct liability when a parent corporation actually controls many of the activities of the subsidiary.[103] The court stated that financial responsibility should fall on culpable parties, but "the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue."[104]

In reaching this conclusion, the court first turned to the issue of the remedial purpose of CERCLA which is to "protect and preserve

---

[97] *Id.*

[98] *But see In re* Acushnet River & New Bedford Harbor Proceedings re. Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass 1987).

[99] Seasword v. Hilti, Inc., 537 N.W.2d 221 (Mich. 1995).

[100] Gledhill v. Fisher & Co., 262 N.W. 371, 373 (Mich. 1935).

[101] Bodenhamer Bldg. Corp. v. Architectural Research Corp., 873 F.2d 109, 112 (6th Cir. 1989).

[102] United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 580 (6th Cir. 1997) (en banc), *cert. granted, sub nom* United States v. Bestfoods, 118 S.Ct. 621 (1997).

[103] *Id.* at 578.

[104] *Id.* at 580.

public health and the environment."[105] In this regard, the court emphasized that with CERCLA, a statute that is notorious for poor drafting and is an "eleventh hour compromise," it is difficult to determine Congress' specific intent in enacting the statute.[106] As such, the court reasoned that courts should not rely on the remedial purpose of CERCLA to fill in blanks that are left by the legislative history in order "to impose liability under nearly every conceivable scenario."[107]

The court then turned to the specific facts of the case and to the district court's analysis. It characterized the district court holding as placing liability on a parent corporation in two ways: first, through direct liability as an operator under the operator language of CERCLA, and second, through common law veil piercing.[108] The court found problems with the district court's "new middle ground" idea of direct operator liability, saying that it replaced the bright line test established by traditional veil piercing analysis, and it would deter private companies from participating in the cleanup of contaminated sites because they would be open to unlimited liability.[109] Additionally, the court found confusion with the "new middle ground" approach and therefore rejected the district court's imposition of direct operator liability, stating that "[w]e are not persuaded that . . . Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of an undefined 'new middle ground.'"[110]

To come to this conclusion and holding, the *Cordova* court rejected the majority view, which allows a parent to be liable as an operator for its direct actions over the subsidiary,[111] and instead went with the reasoning of the Fifth Circuit in *Joslyn*.[112] This reasoning appealed to the court because it found that nothing in CERCLA or its legislative history alluded to the idea of expansion of corporate liability beyond traditional common law concepts.[113] The court stated that "if Congress wanted to extend liability to parent corporations it could have

---

[105] *Id.* at 577 (citations omitted).

[106] *Id.* at 578.

[107] *Cordova*, 113 F.3d at 578.

[108] *Id.* at 578-79.

[109] *Id.* at 580.

[110] *Id.* at 579.

[111] Aluminum Co. of Am. v. Beazer East, Inc., 1997 WL 535176 (3rd Cir. Sept. 2, 1997); Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990).

[112] Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990).

[113] United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 579 (6th Cir. 1997) (en banc), *cert. granted, sub nom* United States v. Bestfoods, 118 S.Ct. 621 (1997).

done so and remains free to do so."[114]

Although the current trend in CERCLA liability analysis was moving toward a broad reading of the statute which would cover parent corporations who exerted enough control over their subsidiaries to warrant extending operator liability to them,[115] the *Cordova* court went with a contrary holding and declined to extend the scope of CERCLA operator liability.[116] This holding is inconsistent with the rulings of several other circuits.[117] The district court stated operator liability should be based on an actual control test using a "new, middle ground" analysis[118] and in doing so had followed a now accepted view that a parent corporation can incur liability based upon its control of a subsidiary, thereby nullifying the need for a derivative liability analysis in many cases.[119]

IV. CONCLUSION

CERCLA "is a remedial statute designed to protect and preserve public health and the environment."[120] As such, the language of the statute must be read broadly to avoid frustrating the legislative purpose.[121] The holding of the Sixth Circuit on the issue of operator liability through "actual control" of a subsidiary does not follow the intent of Congress and goes against the weight of authority on the subject.[122] Other circuits have stated that CERCLA is a remedial statute designed to be an aid to the environment and as such the terms should be construed liberally to further the intent of Congress.[123] Following from this reasoning the First,[124] Second,[125] Third,[126] and

---

[114] *Id.* at 579-80 (quoting *Joslyn Mfg. Co.*, 893 F.2d at 83).

[115] *Beazer East, Inc.*, 1997 WL 535176.

[116] *Cordova*, 113 F.3d at 572.

[117] CPC Int'l, Inc. v. Aeorojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991), *aff'd in part, rev'd in part, sub nom,* United States v. Cordova Chemical Co. of Mich., 59 F.3d 584 (6th Cir. 1995), *rehearing en banc and judgment vacated,* United States v. Cordova Chemical Co. of Mich., 67 F.3d 586 (6th Cir. 1995), *aff'd in part, rev'd in part,* United States v. Cordova Chemical Co. of Mich., 113 F.3d 572 (6th Cir. 1995), *cert. granted, sub nom,* United States v. Bestfoods, 118 S.Ct. 621 (1997).

[118] *Id.* at 573.

[119] United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990).

[120] *Id.* at 26.

[121] *Id.*

[122] *See supra* notes 73-86 and accompanying text.

[123] *See supra* note 88.

[124] *Kayser-Roth, Corp.*, 910 F.2d 24.

[125] Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996).

[126] Aluminum Co. of Am. v. Beazer East, Inc., 1997 WL 535176 (3d Cir. Sept. 2, 1997).

Eighth Circuits,[127] and several District Courts[128] have held that a parent can be liable as an operator if it exerts control over the subsidiary that is outside the realm of normal parent ownership and operation. Only the Fifth Circuit has rejected the idea of direct operator liability and gone solely with the theory of derivative liability to hold a parent liable for the actions of its subsidiaries.[129]

Further, the *Cordova* court wrongly assumes that to hold CPC liable for the actions of Ott II, the district court had to find CPC accountable for Ott II's environmental conduct.[130] This does not follow from the "actual control" test that was announced in *Lansford-Coaldale.*[131] To incur liability under this test, a parent corporation has to control enough of the subsidiary's operations to be seen as an operator of the facility responsible for the environmental violation. A parent would not have to actually control the environmental operations of the facility, just enough of the operations to be seen as operating the facility as a whole.[132]

The court also reasoned that the control test introduced by the district court would be an unworkable test because of its nebulous nature.[133] This characterization of the control test fails to look to the previous decisions in other circuits where those courts have experienced no difficulty in fashioning control tests that are not only workable, but also enhance the intent of Congress in enacting CERCLA.[134]

Additionally, the court stated that to replace the "bright line" test available in a veil piercing analysis with a control test would pose problems in future cases.[135] What the court failed to recognize is that several factors go into an analysis of when to pierce the corporate veil, and rarely do courts agree on what factors to apply in that test. Even assuming that a veil piercing analysis is a bright line test, it has only

---

[127] United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1995) (holding that ability to control is enough but still recognizing the idea of direct operator liability).

[128] *See generally*, Colorado v. Idarado Mining Co., 18 ENVTL. L. REP. (Envtl. L. Inst.) 20578 (D. Colo. 1987); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (both recognizing that ability to control, a broad version of direct operator liability, is enough for CERCLA liability under the "operator" language).

[129] Joslyn Mfg. Co. v. T.L. James Co., 893 F.2d 80 (5th Cir. 1990).

[130] United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 579 (6th Cir. 1997) (en banc), *cert. granted, sub nom* United States v. Bestfoods, 118 S.Ct. 621 (1997).

[131] Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993).

[132] *Id.*

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

[134] *See supra* notes 142-145.

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

become so over many years and with much work from the judiciary. In its early days, even a concept so "traditional" as veil piercing likely gave the courts problems with knowing which factors to apply in determining when derivative liability was appropriate. When veil piercing was a young concept, it too probably looked unworkable. Therefore, we cannot expect that a relatively new doctrine of liability, such as direct operator liability under CERCLA, will automatically be an easy test to administer. Like the veil piercing test, this "actual control" test can only become "traditional" with hard work and time.

In future cases, the Sixth Circuit and the Supreme Court should read the language of CERCLA to include direct operator liability for parent corporations when those parents are actually involved in the operation of a subsidiary which is responsible for environmental violations. This will not, as the court predicts, lead to unlimited liability because there is an innocent purchaser exemption written into the statute.[136] In addition, an expansive reading of the statute will be more in line with the purpose of CERCLA; it will also bring about a national standard among the circuits that would make liability a more definite matter.

In conclusion, the better standard is adopted by the Third Circuit in *Beazer East*.[137] The standard adopted by the Fifth and Sixth Circuits[138] frustrates the intent of Congress and compromises environmental integrity by allowing corporations to hide behind the corporate form when they should be participating in the cleanup of contaminated sites.

---

[136] *See supra* notes 52-54 and accompanying text.

[137] *See sources cited, supra* notes 74-77.

[138] Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990); United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 579 (6th Cir. 1997) (en banc), *cert. granted, sub nom* United States v. Bestfoods, 118 S.Ct. 621 (1997).