The Corporate Officer as CERCLA Operator: Applying the Holding in *United States v. Bestfoods* to the Determination of Officer Liability

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I. INTRODUCTION

Passed in 1980, and amended thereafter by the Superfund Amendments and Reauthorization Act of 1986 (SARA),[1] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[2] represents Congress's holistic approach to the adverse health and environmental impacts associated with a

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1. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C.).

2. 42 U.S.C. §§ 9601-9675 (1997).

history of improper hazardous waste disposal.[3] In enacting CERCLA, Congress sought to accomplish two overall goals.[4] Congress's first and foremost concern was to provide for the removal and remediation of hazardous substances released into the environment or to remedy a situation in which such a release is threatened.[5] Consequently, CERCLA charted a new course in environmental law; whereas existing statutes functioned to regulate actions taken in the present, CERCLA's primary focus was placed on remedying the effects of past disposal practices.[6] However unique, this road less traveled needed paving; the enormity of the problems Congress sought to redress was overshadowed only by the costs of the solution.[7] Thus, CERCLA's second goal, to impose liability for cleanup costs on the parties responsible for disposal, provides the means for accomplishing the first.[8] Yet, more than merely a means to an end, holding the polluter

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3. *See* H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. CERCLA was the federal response to a series of high profile hazardous waste problems in the 1970s, with Love Canal being largely regarded as the major impetus for congressional action. *See, e.g.*, 126 Cong. Rec. 30.930-31 (1980) (remarks of Sen. Randolph, co-sponsor of CERCLA), *reprinted in* SENATE COMM. ON ENVT. & PUBLIC WORKS, 97TH CONG., 2D SESS., 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), at 682 (Comm. Print 1983) ("The problem of hazardous waste disposal in this Nation has reached frightening proportions. . . . Our Nation cannot afford more Love Canals."); *see also id.* at 683-84 (remarking that "[i]n the mid-1970's the Nation began hearing about chemical disasters" and listing examples of various problems throughout the country); Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 264-65 (1992) ("A series of environmental disasters throughout the 1970s, culminating in the much-publicized contamination at Love Canal, convinced Congress that [CERCLA] was needed to address environmental problems posed by hazardous waste produced and abandoned in the past.") (footnote omitted).

4. *See* H.R. REP. NO. 99-253, pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."); *see also* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990) (noting that CERCLA's two main purposes are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party"), *cited with approval in* Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996).

5. *See* H.R. REP. No. 99-253, pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038.

6. *See* 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, 116-17 (1998) ("Unlike the other environmental statutes that now constitute the canon of American environmental law, CERCLA is a remedial statute rather than a regulatory one. Its primary goal is to foster the clean-up of past problems rather than to regulate current or ongoing conduct.") (footnotes omitted).

7. An EPA estimate, published in 1989, calculated the cleanup costs per site to be in excess of $19 million (1988 dollars). *See* 54 Fed. Reg. 33,846, 33,850 (1989). *Cf.* Nicolas M. Kublicki, *The Federal Superfund Law: An Overview of the Comprehensive Environmental Response, Compensation, and Liability Act*, 28 BEVERLY HILLS B.A. J. 4, 5 (1994) (estimating a cost of $700 billion to cleanup all sites on the National Priorities List).

8. *See* H.R. REP. NO. 99-253, pt. 3, *supra* note 4, at 15.

liable lifts the financial burden from the backs of taxpayers, thereby generating public support for CERCLA's oft-heard battle cry: "Let the polluter pay!"[9]

CERCLA's groundbreaking remedial approach and noble goals have, however, been relegated to statutory language disdained by courts and commentators for its imprecision and incongruity.[10] This approach is quickly stymied, and the goals easily thwarted, when courts are left to grapple with ambiguous provisions to make threshold determinations of liability.[11] In theory, holding the polluter liable resounds with logic; however, in practice, simply determining who the polluter is has proven to be a difficult task susceptible to illogical results.[12] The outcome has often been a rote citation to

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9. *See* Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm'n, 66 F.3d 669, 681 (4th Cir. 1995) (noting that "the simplistic slogan, 'make the polluter pay,' may have helped propel CERCLA into law"); Silecchia, *supra* note 6, at 116; George C. Freeman, Jr., *Tort Law Reform: Superfund/RCRA Liability as a Major Cause of the Insurance Crisis*, 21 TORT & INS. L.J. 517, 529 (1986) (quoting Deroy C. Thomas, Pollution—The Tort System's Time Bomb, Speech to the Section of Corporation, Banking and Business Law of the American Bar Association, at 1-2 (July 1985)).

10. *See* Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986) (noting that CERCLA "is not a model of legislative draftsmanship"); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993) (referring to CERCLA as "a statute notorious for its lack of clarity and poor draftsmanship"); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (noting that "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions"); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is . . . marred by vague terminology and deleted provisions. . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.") (citations omitted), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (noting that CERCLA "leaves much to be desired from a syntactical standpoint"); *see also* Donald M. Carley, Comment, *Personal Liability of Officers Under CERCLA: How Wide A Net Has Been Cast?*, 13 TEMP. ENVTL. L. & TECH. J 235, 235 (1994) (noting that CERCLA "is not a model of clarity and precision"); Susan D. Sawtelle, *U.S. v. Bestfoods: Supreme Court to Issue First Ruling on Corporate Superfund Liability*, METRO. CORP. COUNSEL, May 1998, *available in* WESTLAW, METCC Database (referring to CERCLA as "the uniformly criticized environmental cleanup law"); Michael D. Hockley & Dianne Smith, *United States v. Bestfoods: The Supreme Court Adheres to State Corporate Veil Piercing in CERCLA Liability Actions* (visited Mar. 12, 1999) <http://www.spencerfane.com/publications/bestfood.html> (referring to CERCLA as "legislation that has become notorious for its imprecision").

11. *See generally* sources cited *supra* note 10; *see also* Oswald & Schipani, *supra* note 3, at 267 (noting that CERCLA's "imprecise statutory language [has] caused courts to struggle with the application and interpretation of its provisions") (footnote omitted).

12. *See Westfarm Assocs. Ltd. Partnership*, 66 F.3d at 681 (noting that the CERCLA "statutory scheme does not take a simplistic view of who is and is not a 'polluter'"); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) ("Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits."); Silecchia, *supra* note 6, at 117.

CERCLA's "broad remedial goals" and a resulting expansion of the scope of CERCLA liability.[13]

In the corporate arena, the trend toward expanding liability has seen parent corporations, lenders, and other corporate actors, such as individual officers, directors, and managers, subjected to varying standards of liability depending upon the court into which they are haled.[14] Much of the confusion and associated litigation in this area centers on the issue of a corporate actor's liability as an "operator" of a contaminated site.[15] Here, some courts have failed to harmonize corporate law principles of liability with the seemingly invasive

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13. *See, e.g.*, Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469, 1481 (9th Cir. 1995) (reasoning that courts are "obligated to construe [CERCLA's] provisions liberally to avoid frustration of the beneficial legislative purposes") (quotations omitted); Louisiana Pacific v. ASARCO, Inc., 24 F.3d 1565, 1575 (9th Cir. 1994) ("CERCLA is to be broadly interpreted to achieve its remedial goals."); United States v. Alcan Aluminum, 964 F.2d 252, 258 (3d Cir. 1992) ("As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals."); Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342-43 (9th Cir. 1992) (refusing to adopt a "crabbed interpretation that would subvert Congress's goal that parties who are responsible for contaminating property be held accountable for the cost of cleaning it up," and noting that "CERCLA 'is to be given a broad interpretation to accomplish its remedial goals'") (quoting 3550 Stevens Creek Assoc. v. Barclays Bank of Cal., 915 F.2d 1355, 1363 (9th Cir. 1990)); United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) ("In order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability . . . .") (quoting Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990)) (footnote omitted); California v. Celtor Chem. Corp., 901 F. Supp. 1481, 1490 (N.D. Cal. 1995) ("[T]he Court has an obligation to construe CERCLA broadly to accomplish its remedial goals."); Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1286 (E.D. Pa. 1994) (refusing to apply traditional rules of corporate liability that "would 'frustrate congressional purpose'" and applying a test for liability that will serve "CERCLA's broad remedial goals") (quoting United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984)); United States v. Mottolo, 605 F. Supp. 898, 901 (D.N.H. 1985) ("[T]he remedial intent of CERCLA requires a liberal statutory construction designed to avoid frustration of the Act's purpose."); *see also* Anspec Co. v. Johnson Controls, Inc., 788 F. Supp. 951, 958 (E.D. Mich. 1992) (noting "the judicial tendency to interpret CERCLA expansively in the hope of effecting its remedial goals"). *But see Edward Hines Lumber Co.,* 861 F.2d at 157 ("To the point that courts could achieve 'more' of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. . . . A court's job is to find and enforce stopping points no less than to implement other legislative choices.") (citation omitted).

14. Stephen W. Miller, *Officer Shareholder and Corporate Parent Liability Under Superfund*, METRO. CORP. COUNSEL, Apr. 1998, *available in* WESTLAW, METCC Database (noting "the potential for some individuals . . . to be caught in the net of Superfund liability merely because of where suit is brought"); *see generally* Geoffrey M. Dugan, *Liabilities of Corporate Individuals for Environmental Claims Under CERCLA: The Current State of the Law and Strategies for Coping*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,074 (Feb. 1993) (discussing CERCLA case law); Kristen L. Thompson et al., *Recent Developments in Officers', Directors', and Professional Liability*, 30 TORT & INS. L.J. 579, 593-96 (1995) (same).

15. *See* Miller, *supra* note 14 ("Ever since passage of CERCLA, federal courts have struggled with defining the meaning and reach of the term ["operator"], including its potential applicability to officers, shareholders and corporate parents.")

breadth of CERCLA's remedial goals.[16] The resulting holdings have led commentators to lament on the "erosion" of traditional corporate law doctrines and left much of corporate America questioning their expectations of protection under the common law.[17]

Until recently, the Supreme Court declined the opportunity to review questions of operator liability under CERCLA.[18] In 1996, responding to the chaos in lender liability generated by the Eleventh Circuit's holding in *United States v. Fleet Factors Corp.*,[19] and the Supreme Court's subsequent denial of certiorari, Congress took up the corporate cause and passed legislation limiting the liability of lenders and fiduciaries under CERCLA.[20] However, this actor-specific

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16. *See* Schiavone v. Pearce, 79 F.3d 248, 255 (2d Cir. 1996) (noting that many courts "find in the legislative intent . . . a willingness to extend CERCLA liability beyond the established bounds of corporate common law," while other courts refuse "to treat CERCLA as authorizing a departure from longstanding principles of corporate law"). *Compare* CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 571 (W.D. Mich. 1991) ("To the extent that liability under CERCLA is greater than under common law principles of tort and corporations, it is the result of CERCLA's statutory language and legislative intent, which the court is bound to follow unless it is altered by Congress."), *aff'd in part, rev'd in part sub nom*. United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997), *cert. granted sub nom*. United States v. Bestfoods, 118 S. Ct. 621 (1997), and *vacated*, 524 U.S. 51, 118 S. Ct. 1876 (1998), and Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (refusing to adopt a "restrictive interpretation" of operator that "would allow the corporate veil to frustrate congressional purpose"), and United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984) (reasoning that the corporate veil should not be allowed to frustrate congressional intent to hold responsible parties liable for cleanup costs), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), with Edward Hines Lumber Co., 861 F.2d at 157 (noting that the function of the court is to enforce the statute, not "to design rules of liability from the ground up"), and *id*. at 158 (refusing to manipulate elements of established common law doctrines to produce a definition of "operator" more favorable to liability).

17. *See, e.g*., John J. Little, *Towards Respect for Corporate Separateness in Defining the Reach of CERCLA Liability*, 44 SW. L.J. 1499 (1991); Richard G. Dennis, Liability of Officers, *Directors and Stockholders Under CERCLA: The Case for Adopting State Law*, 36 VILL. L. REV. 1367 (1991); Daniel H. Squire et al., *Corporate Successor Liability Under CERCLA: Who's Next?,* 43 SW. L.J. 887 (1990); Tom McMahon & Katie Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3-FALL NAT. RESOURCES & ENV'T 29 (1988); Todd W. Rallison, Comment, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA*, 1987 UTAH L. REV. 585. *But see* Oswald & Schipani, *supra* note 3 (arguing that traditional corporate law principles have not been eroded).

18. *See, e.g*., United States v. Gurley, 43 F.3d 1188 (8th Cir. 1994); Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327 (5th Cir. 1991); 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); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986).

19. 901 F.2d 1550 (11th Cir. 1990). *See* G. Van Velsor Wolf, Jr., *Lender Environmental Liability Under the Federal Superfund Program*, 23 ARIZ. ST. L.J. 531 (1991), for a comprehensive review of the confusion surrounding lender liability under CERCLA and the holding in *Fleet Factors*.

20. *See* Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, 42 U.S.C. §§ 9601(20)(A) to (G), 9607(n) (1997).

legislation did not address questions arising outside of the lender liability issue; the fate of parent corporations and individual corporate actors was left to the courts.[21] Nevertheless, soon after the enactment of the lender liability amendment, the liability of parent corporations captured the attention of the Supreme Court. After nearly two decades of confusion and conflict among the circuits, the Supreme Court entered the fray over CERCLA liability and, on June 8, 1998, handed down its ruling in *United States v. Bestfoods*,[22] bringing much needed closure to the issue of corporate parent liability.[23] Yet, open issues of corporate liability remain, as corporate officers continue to question the extent of their liability under CERCLA. This Comment seeks to answer those questions.

The *Bestfoods* decision is the Court's first substantive ruling on the application of CERCLA's operator liability provision.[24] Although the Court expressly addressed only corporate parent liability, its holding is implicative of a broader ruling on operator liability in the corporate context.[25] This Comment explores the legal implications of *Bestfoods* as guidance for courts considering the personal liability of individual corporate officers under CERCLA.

II. OVERVIEW OF THE CERCLA LIABILITY SCHEME

In an effort to further the dual congressional goals of remediation and polluter accountability, CERCLA provides two basic procedural approaches to cleanup actions. Where possible, the preferable approach is to have the polluter both initiate and complete the necessary remediation; all costs are thereby borne by a responsible party throughout the cleanup process. CERCLA facilitates this approach by providing the federal government with authority to issue orders requiring parties to undertake cleanup actions.[26] However,

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21. *See* 42 U.S.C. § 9601(20)(G)(iv) (1997) (defining the term "lender"); *see id.* § 9607(n)(5)(A) (defining the term "fiduciary").

22. 118 S. Ct. 1876 (1998).

23. *See, e.g.*, Silecchia, *supra* note 6, at 122 (noting that the Court's holding in *Bestfoods* provides "much needed direction and unity to the inconsistent voices of the lower courts").

24. The Court had previously ruled on other issues arising under CERCLA. *See* Key Tronic Corp. v. United States, 511 U.S. 809 (1994) (recoverability of attorney fees); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (liability of states), *overruled by* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Exxon Corp. v. Hunt, 475 U.S. 355 (1986) (preemption of state tax funds).

25. *See* Hockley & Smith, *supra* note 10.

26. *See* 42 U.S.C. § 9606 (1997). The EPA may either issue an administrative order or seek a judicial order to effectuate cleanup by a potentially responsible party. *See id.* § 9606(a). For the most part, administrative orders are the favored method of the EPA, largely because they are not subject to pre-enforcement judicial review, unlike judicial orders. *See id.* § 9613(h); *see*

actions taken under CERCLA are taken in response to a release or threatened release of a hazardous substance, or a substance which, when released into the environment, poses an "imminent and substantial danger to the public health or welfare."[27] Thus, immediate and decisive action may be necessary; protection of public health and welfare cannot be contingent upon the compliance of a party receiving a cleanup order, nor may the imminence of the danger be overlooked in the search for a responsible party. Here again, CERCLA accommodates and provides that the government may respond to a release or threatened release of a hazardous substance and remedy the danger to the public.[28] The goal of polluter accountability is not, however, foregone in favor of remediation. Under the CERCLA liability scheme, a party responsible for the release or threatened release is liable for the costs incurred in response, regardless of whether the costs were borne by governmental agencies or private parties.[29]

A party's liability for costs incurred in the performance of an order requiring cleanup, or for response costs in an action for cost recovery, in short, a party's liability under CERCLA *in toto*, is established by a showing of the following three elements.[30] First, there must be a release or threatened release of a hazardous substance from a facility.[31] Second, costs must have been incurred in response to the release or threatened release.[32] Lastly, the party's role with regard to the facility and the hazardous waste must place the party within one or more of the following four defined classifications of potentially responsible parties: (1) the current owner and operator of the facility, (2) any person who owned or operated the facility at the time of disposal of hazardous waste at the facility, (3) any person who

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also Kublicki, *supra* note 7, at 5. This is an extremely important distinction considering that a party may be fined $25,000 for each day of noncompliance with an order and may also be liable for punitive damages as a result of non-compliance, whereas a compliant party may seek reimbursement of costs incurred following cleanup. *See* 42 U.S.C. §§ 9606(b), 9607(c)(3) (1997). Thus, administrative orders promote the congressional goal of remediation by compelling parties to cleanup a site first and contest their liability second.

27. *Id.* § 9604(a)(1).

28. *See id.*

29. *See id.* § 9607(a). The federal government, a state, or an Indian tribe may recover "all costs" incurred in the cleanup action. *Id.* § 9607(a)(4)(A). Furthermore, any other party may recover "necessary costs of response." *Id.* § 9607(a)(4)(B).

30. *See id.* § 9607(a). A party who complies with the terms of a cleanup order may be entitled to reimbursement for costs incurred in the performance of the order if the party can "establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a)." *Id.* § 9606(b)(2)(C).

31. *See id.* § 9607(a).

32. *See id.*

arranged for disposal or treatment of hazardous waste at the facility, and (4) any person who transported hazardous waste to the facility, if such person selected the facility for disposal or treatment of the waste.[33]

Although all of these factors are, to varying degrees, litigable issues, this Comment is principally concerned with an individual corporate officer's liability as an "operator" under CERCLA. An officer's amenability to suit under CERCLA arises from the broadly defined terms used to establish the classifications of potentially responsible parties.[34] A "person," as defined by CERCLA, generically includes individuals, as well as corporations.[35] Likewise, nothing in the definition of "operator" precludes a court from considering an officer's liability as an operator of a facility—an "operator" is simply any person who operates a facility or who "operated, or otherwise controlled" a facility.[36] The likelihood that a corporate officer could have some degree of involvement in the control of a "facility" is substantial considering that a "facility" includes any property "where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[37]

Once liability is established under CERCLA, there is little hope of escape and every reason to surrender. The defenses to liability afforded a potentially responsible party are limited to a showing that the release or threatened release was the result of an act of God or war, or an act or omission of an unrelated third party.[38] A party unable to avail itself of one of these enumerated defenses is subject to a CERCLA liability scheme that holds responsible parties strictly liable[39] and imposes joint and several liability where a rational apportionment of damages cannot be shown.[40] Furthermore,

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33. *See id.*
34. *See generally id.* § 9601 (defining terms relevant to establish liability).
35. *See id.* § 9601(21).
36. *Id.* § 9601(20).
37. *Id.* § 9601(9).
38. *See id.* § 9607(b).
39. CERCLA's statutory language does not expressly provide for strict liability, but rather provides that the applicable standard of liability is the same as that found under section 311 of the Clean Water Act, 33 U.S.C. § 1321 (1997). *See* 42 U.S.C. § 9601(32) (1997). The courts have consistently held this standard to be one of strict liability. *See generally* New York v. Shore Realty Corp., 759 F.2d 1032, 1042-44 (discussing strict liability under CERCLA); United States v. Monsanto Co., 858 F.2d 160, 167 & n.11 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted [CERCLA] as establishing a strict liability scheme.").
40. As with the strict liability standard, joint and several liability arises from judicial interpretation, not from specific statutory language. *See, e.g.*, *Monsanto Co.*, 858 F.2d at 171 ("While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm."); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp.

CERCLA's concern with polluter accountability evinces congressional intent that the statute apply retroactively and the courts have interpreted it accordingly.[41] Thus, when viewed in light of its theoretical limits, the CERCLA liability scheme permits a party to be held liable for all damages where an indeterminate portion of the damages resulted from actions taken by the party in the past, which were not only considered reasonable by the prevailing standards of the time, but which were also in full compliance with then existing laws.

Clearly, CERCLA is the "big stick" in the federal arsenal and parties found responsible for the release or threatened release of a hazardous substance are sure to take a beating.[42] Following satisfaction of the three-part test for liability, and absent the unlikely event that one of the limited defenses applies, a liable party must comply with one of the most severe and unforgiving statutes within the corpus of federal law.[43] Not surprisingly, the assignment of liability is a fiercely litigated issue.[44] Given the ambiguity of CERCLA's liability provisions, the determination of whether a defendant qualifies as a potentially responsible party is wholly dependent upon judicial interpretation.[45] Despite the magnitude of this determination, the circuits have failed to articulate and apply a single, concise test for operator liability.[46] Instead, varying and inconsistent standards of liability have arisen at the appellate level, which, in the corporate context, has led to substantial confusion surrounding the liability of corporate actors under CERCLA.[47]

823, 844 (W.D. Mo. 1984) (finding that, under the facts of the case before the court, "joint and several liability is at least permissible, if not mandated"), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

41. *See Northeastern Pharm. & Chem. Co.*, 579 F. Supp. at 839-40.

42. *See* Carley, *supra* note 10, at 240.

43. *See* Kublicki, *supra* note 7, at 4.

44. *See, e.g.*, Kurt A. Strasser & Denise Rodosevich, *Seeing the Forest for the Trees in CERCLA Liability*, 10 YALE J. ON REG. 493, 496 (1993) ("[T]he assignment of [CERCLA] liability reportedly consumes as much, if not more, time and resources as the actual cleanups themselves."); *see also* Silecchia, *supra* note 6, at 117 ("[T]he amount of litigation since the passage of CERCLA . . . demonstrates that defining 'polluter' is not a straightforward task.").

45. *See* Oswald & Schipani, *supra* note 3, at 261-62 (noting that "[t]he judiciary has been forced to fill the void left by CERCLA's deficient drafting" regarding "who is ultimately 'responsible' for improper disposal").

46. *See infra* Part III.B.

47. *See id.*

III. CONFUSION IN CORPORATE OFFICER LIABILITY

A. The Traditional Doctrine of Officer Liability

Under traditional corporate law principles, which find their genesis in the laws of agency and tort, corporate officers are directly liable for the harm resulting from tortious acts in which they were a participant.[48] Although the doctrine of respondeat superior vests the actions of the agent upon the principal, the law of agency does not preempt the law of torts; the employee is not relieved of liability for wrongs committed in the scope of his or her employment.[49] Thus, it follows that a "corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort."[50] However, an officer's liability is independent of the liability of the corporate principal; whereas the rules of agency function to bind the principal through the actions of the agent, the corporate officer is not held accountable for the liability of the corporation.[51] Actual participation in, or direction over, the commission of a tortious act warrants the imposition of liability, mere status as a corporate officer does not.[52]

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48. *See* Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978); Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902 (1st Cir. 1980); Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 408-409 (10th Cir. 1958); *see also* Oswald & Schipani, *supra* note 3, at 270-72 (discussing corporate officer liability under the traditional doctrine).

49. *See* A. CONRAD ET AL., ENTERPRISE ORGANIZATION 145 (4th ed. 1987) ("The law of agency, which makes employers liable, does not repeal the law of torts, which makes negligent individuals liable."); RESTATEMENT (SECOND) OF AGENCY § 343 (1957) ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal."); *see also Donsco, Inc*., 587 F.2d at 606 ("The fact that an officer is acting for a corporation also may make the corporation vicariously liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility.").

50. *Donsco, Inc*., 587 F.2d at 606; *see also Escude Cruz*, 619 F.2d at 907 ("The general rule . . . is that an officer of a corporation 'is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority.'" (quoting Lahr v. Adell Chem. Co., 300 F.2d 256, 260 (1st Cir. 1962)).

51. *See* Armour & Co. v. Celic, 294 F.2d 432, 439 (2d Cir. 1961) ("The ordinary doctrine is that a director, merely by reason of his office, is not personally liable for the torts of his corporation; he must be shown to have personally voted for or otherwise participated in them."); *Lobato*, 261 F.2d at 409 ("[M]erely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation."); *see also* Oswald & Schipani, *supra* note 3, at 271.

52. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1144 (4th Cir. 1975) ("If a director does not personally participate in the corporation's tort, general corporation law does not subject him to liability simply by virtue of his office."); *Escude Cruz*, 619 F.2d at 907 ("What is required is some showing of direct personal involvement by the corporate officer in some decision or action which is causally related to" the harm).

B. Officer Liability Under CERCLA

Although many commentators contend that traditional doctrines of corporate liability have long been disregarded under CERCLA, others find support for corporate law principles in the prevailing CERCLA case law. One thing, however, is certain: substantial confusion exists among the courts and corporate advocates as to an officer's liability under CERCLA as an operator of a facility.[53] In the midst of, and adding to this confusion, two generally stated tests for officer liability have risen to prominence in the circuit courts: the "actual control" test and the "authority to control" test. Arguably, the mere existence of two different tests for liability at the circuit level may constitute cause for concern in the corporate community. However, more vexing concerns exist for parties on each side of the officer liability issue. The alacrity with which some courts articulate liability standards under the rubric of "actual control," but which depart measurably from the basic premise underlying the "actual control" test, raises significant questions regarding the role of the corporate doctrine in CERCLA liability determinations.[54] Furthermore, the recurrence of poorly articulated holdings regarding liability for "authority to control," which could easily be construed to further expand CERCLA liability, is equally unnerving.[55]

1. The Actual Control Test

A clear majority of courts that have considered the issue claim to adhere to a test for "actual control" and impose operator liability, in theory, only upon corporate officers who had actual control over the hazardous substances at issue in the CERCLA violation.[56] Thusly

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53. *See generally* sources cited, *supra* note 17. *Cf.* Carley, *supra* note 10, at 235-36 (concluding that "[a]lthough many courts and scholars have commented that there has been an erosion of traditional corporate law doctrine under CERCLA, a careful analysis of the case law demonstrates that the erosion is not as severe as many have feared," yet noting further "a noticeable trend in the case law to expand the scope of personal officer liability under CERCLA").

54. *See infra* notes 63-78 and accompanying text.

55. *See, e.g.*, Oswald & Schipani, *supra* note 3, at 272 (noting that "many courts have failed to articulate clearly the rationales for their holdings, giving rise to concerns that CERCLA has supplanted traditional corporate law"); Carley, *supra* note 10, at 235 ("The language contained in some loosely worded decisions . . . does cause concern that a serious erosion may occur if other courts rely on these decisions as support for holding officers liable based on their title alone.").

56. *See, e.g.*, Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994); Riverside Market Devel. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327 (5th Cir. 1991); United States v. Gurley, 43 F.3d 1188 (8th Cir. 1994); *see also* Miller, *supra* note 14 ("A clear majority approach has developed to determine CERCLA liability of individual corporate

stated, the actual control test is merely the application of the corporate law doctrine of officer liability.[57] An officer deemed to have had actual control over the hazardous substances released or threatened to be released into the environment can easily be considered a participant in the violation. The Seventh Circuit's holding in *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund* adhered closely to this "actual control" approach to officer liability by refusing to impose CERCLA operator liability upon an individual corporate actor where the plaintiff made no allegation of the actor's personal and direct participation in the conduct that led to the violation.[58] The court recognized that mere allegations of an individual's "general corporate authority" or "supervisory capacity" do not suffice to establish liability; the test for actual control requires "[a]ctive participation in, or exercise of specific control of, the activities in question."[59]

In like manner, the Fifth Circuit, in *Riverside Market Development Corp. v. International Building Products, Inc.*, affirmed the district court's grant of summary judgment to a corporate officer defendant, concluding that the plaintiffs failed to produce sufficient evidence that the officer "personally participated in any conduct that violated CERCLA."[60] Rather, the evidence put forth indicated that the officer's participation in the operation of the facility was confined to reviewing financial records and attending officer meetings.[61] Such "sparse evidence" failed to establish that the officer had any "opportunity to direct or personally participate in the improper disposal" of hazardous substances, thus the officer could not be considered an operator of the facility.[62]

In *United States v. Gurley*, the Eighth Circuit expressly adopted and interpreted a test for "actual control" in order to hold an

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officers, directors, and managers – that is involvement in specific environmental decision making is required."); Carley, *supra* note 10, at 244 ("This approach is the majority approach and has been applied approvingly in a myriad of cases dealing with personal liability for officers.").

57. *See* United States v. Wade, 577 F. Supp. 1326, 1341 (E.D. Penn. 1983) (articulating a test for CERCLA liability that holds a corporate officer liable "if he personally participates in the wrongful, injury-producing act"). The duality of the actual control test and the corporate law doctrine is further reflected in the fact that some commentators have chosen the term "personal participation" to refer to the same test for liability. *See, e.g.*, Oswald & Schipani, *supra* note 3, at 275 (noting that under the "personal participation theory" a corporate officer "who personally participated in the CERCLA violation may be held personally liable"); Carley, *supra* note 10, at 244 ("Under the participation test, courts hold corporate officers liable for their actual participation in acts that create CERCLA liability.").

58. 25 F.3d at 421-22 (7th Cir. 1994).

59. *Id.* at 422.

60. 931 F.2d at 330.

61. *See id.*

62. *Id.*

individual employee liable as an operator under CERCLA.[63] The court's adoption of the test followed from a well-reasoned analysis, wherein the court clearly articulated the rationale for its holding, giving due consideration to the alternative "authority to control" theory of liability.[64] As the court appreciated the issue, it could proceed along one of two available rationales for holding an individual liable as an operator under CERCLA.[65] Under the theory of "actual control," a defendant who "had actual responsibility for, involvement in, or control over the disposal of hazardous waste at a facility" is liable under CERCLA as an operator of the facility.[66] This theory of liability was in marked contrast to a less rigorous "authority to control" standard that imposed liability based upon a defendant's unexercised ability to control the general operations of the facility.[67] The court rejected the "authority to control" approach as "inconsistent with the term 'operator,'" a rather ironic conclusion given the ambiguity of the term as defined in CERCLA, to which the court had earlier cited.[68] Seeking to fill the void left by CERCLA's imprecision, the court assigned to the term "operator" its ordinary meaning and connotations, which the court read as requiring "some type of action or affirmative conduct," a requirement lacking in the "authority to control" approach.[69]

Yet, however well-reasoned its analysis, the court's final articulation of a test for "actual control" departed from its initial construction of the "actual control" test, which could be satisfied by a showing that the defendant had "control over disposal of hazardous waste at a facility."[70] Instead, the Eighth Circuit elected and adopted a test which, as stated, combines the theories of "actual control" and "authority to control" and requires that the defendant, to be held liable as an operator under CERCLA, "(1) had authority to determine whether hazardous waste would be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks."[71] A literal

63. 43 F.3d 1188, 1193 (8th Cir. 1994).
64. *See id.* at 1192-93.
65. *See id.*
66. *Id.*
67. *See id.* at 1193.
68. *Id.* at 1192-93 (observing that "it is not clear when an individual should be deemed to have 'operated' a hazardous waste disposal facility").
69. *Id.* at 1193.
70. *Id.* at 1192-93.
71. *Id.* at 1193.

reading of this test would actually afford the corporate officer more protection from liability than would the corporate doctrine, as an officer who directly participates in the release of a hazardous substance without the authority to do so would be shielded from liability under CERCLA.[72]

Adding further to the confusion in this area, the Eleventh Circuit, although expressly rejecting the "authority to control" standard and professing to apply a test for "actual control," has adopted neither the approach of the Eighth Circuit in *Gurley*, nor the Fifth or Seventh Circuits' basic requirement of actual control over or participation in the activities leading to the CERCLA violation.[73] In *Redwing Carriers, Inc. v. Saraland Apartments*, the Eleventh Circuit noted the test articulated by the Eighth Circuit, but refused to part with circuit precedent and provide the level of protection afforded officers by the rule in *Gurley*.[74] Instead, the court adhered to its reasoning in *Jacksonville Electric Authority v. Bernuth Corp.*,[75] and maintained the Eleventh Circuit's "actual control" standard that, while a showing of actual control over the disposal of hazardous substances suffices to establish liability, in order to be held liable as an operator under CERCLA, "an individual need not have actually controlled the specific decision to dispose of hazardous substances."[76] Rather, an individual could incur operator liability through a lesser showing of actual participation in either the operations of the facility or the corporation in charge of the facility.[77] In allowing liability to be imposed upon a corporate officer involved only in the general operation of the facility or corporation, without a minimal requirement that the officer has had actual control over or participation in decisions regarding hazardous substances, the

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72. The court's holding may, however, suggest against such a literal reading. Prior to articulating its test for liability, the court, seeking to rationalize the incongruous approaches of "actual control" and "authority to control," opined that:

> An individual defendant who has actual control over the operation of a facility presumably also has authority to control the operation of the facility, with the possible exception of an individual acting ultra vires, a situation not present in this case . . . . Thus, in reality, the two approaches differ in that one requires a plaintiff to prove that the defendant had both the authority to control the operation of the facility and actually exercised that authority, while the other requires a plaintiff to prove only that a defendant had the authority to control the operation of the facility.

Id.

73. *See* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1505 n.19 (11th Cir. 1996).

74. *See id.*

75. 996 F.2d 1107 (11th Cir. 1993).

76. *Redwing Carriers, Inc.*, 94 F.3d at 1505 n.19.

77. *See id.*

Eleventh Circuit's standard disregards the protections afforded the corporate officer under the traditional doctrine and provides for liability based solely upon an indicia of control that is merely a reflection of status in the corporate hierarchy.[78]

2. The Authority to Control Test

Under the "authority to control" test, courts determining a corporate officer's CERCLA liability consider the officer's authority or capacity to control the activities of the corporation, particularly those relating to the operation of the facility.[79] Whereas the test for actual control, when properly articulated and applied, is simply a restatement of the corporate doctrine, holding officers liable based solely upon their authority to control activities in which they were not a participant defies and erodes traditional corporate law principles.[80] Given the commonly diversified corporate structure, the "authority to control" test casts a wide net of liability that, if taken to its extreme, can ensnare scores of corporate actors who have the authority to control aspects of the corporation or facility wholly unrelated to hazardous waste operations.[81] This rather apocalyptic but potential

78. *Cf.* Vermont v. Staco, 684 F. Supp. 822, 832 (D. Vt. 1988) (holding that individual corporate actors, "as owning and managing stockholders," were "personally liable [under CERCLA] in their respective capacities in the corporate structure"), *vacated in part*, No. 86-190, 1989 WL 225428 (D. Vt. Apr. 20, 1989) (mem. and order dismissing plaintiffs' claims under the Federal Water Pollution Control Act and the Resource Conservation and Recovery Act for lack of jurisdiction); *see also* Dennis, *supra* note 17, at 1434 ("By diverting attention away from the actions of the officers and directors, and turning it instead toward their functions within the corporation . . ., the CERCLA cases have, in essence, held officers and directors liable solely by virtue of their offices.").

79. *See* United States v. Carolina Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992) (reasoning that actual control is not required for operator liability, "so long as the authority to control the facility was present," and concluding that the director of a company could be held liable as an operator because he "had a right to control" the operations of the facility) (internal quotations omitted); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d. Cir. 1985) (citing management of the corporation as sufficient to establish liability under CERCLA's "owner or operator" provision); City of N. Miami v. Berger, 828 F. Supp. 401, 409 (E.D. Va. 1993) (citing "authority to control" as the correct test for "operator" liability and expressly rejecting the "actual control" test); *see also, e.g.*, International Clinical Lab., Inc. v. Stevens, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,560, 20,561 (E.D.N.Y. 1990) (holding a president and principal shareholder of a corporation liable as an "operator" because he "had overall management responsibility").

80. *See, e.g.*, Dennis, *supra* note 17, at 1433-36 (discussing the differences between the CERCLA rules of direct liability for officers and traditional common law rules of direct liability and concluding that the "capacity to control" line of cases has "substantially modified" the traditional doctrine); *see also, e.g.*, Carley, *supra* note 10, at 248 (noting that, at least in theory, the "ability to control" approach "marks an erosion of traditional corporate law doctrine").

81. *See, e.g.*, Dennis, *supra* note 17, at 1388 (noting that liability based solely upon an officer's role in the general management of the corporation or facility "exposes to liability an extraordinary number of individuals who would not ordinarily be thought culpable").

application of the test may well be the reason that some of the relatively few courts that have adopted the test have sought to limit its scope to the actor's authority to control the disposal or release of hazardous substances.[82]

Such narrowing of the test for "authority to control" is readily apparent in *Nurad, Inc. v. William E. Hooper & Sons Co.*, wherein the Fourth Circuit affirmed the dismissal of CERCLA claims brought against two corporate officers and various other corporate defendants, although steadfastly adhering to an "authority to control" standard for liability.[83] The private-party plaintiff in *Nurad* sought to establish the defendants' liability as operators for cleanup costs incurred by the plaintiff in the removal of several underground storage tanks, which were leaking hazardous waste and had contaminated the surrounding soil.[84] On appeal, the plaintiff raised three primary objections to the district court's grant of summary judgment in favor of the defendants.[85] The plaintiff's initial allegation, that the district court too narrowly interpreted the term "operator" and had applied, in effect, an "actual control" standard, brought forth an immediate and summary denial, which unequivocally established "authority to control" as the standard in the Fourth Circuit: "The district court applied the correct standard in holding that the [corporate] defendants need not have exercised actual control in order to qualify as operators under [CERCLA], so long as the authority to control the facility was present."[86]

In responding to the plaintiff's remaining contentions, the *Nurad* court adhered to the test for "authority to control," yet substantially constricted the pool of potentially liable parties within its reach. For instance, the court was not persuaded by the plaintiff's argument that the term "facility" should be read to include the entire site.[87] Rather, the court concluded that the district court had properly defined the "facility" to include only the storage tanks, as operator liability

82. *See, e.g.*, United States v. Mexico Feed & Seed Co., 764 F. Supp. 565, 571 (E.D. Mo. 1991) (holding the president of a corporation liable as an owner and operator under CERCLA because he "was in charge of and directly responsible for all of the [corporation's] operations and, hence, possessed ultimate authority to control the disposal of hazardous substances"), *aff'd in part, rev'd in part*, 980 F.2d 478 (8th Cir. 1992); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848 (W.D. Mo. 1984) (considering a corporate officer's "capacity to control the disposal of hazardous waste" as a factor supporting CERCLA liability), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

83. 966 F.2d 837, 842 (4th Cir. 1992).

84. *See id.* at 840-41.

85. *See id.* at 842-43.

86. *Id.* at 842.

87. *See id.* at 842-43.

extends only to those who had the "authority to control the area where the hazardous substances were located."[88] This conclusion follows logically from the court's reasoning that CERCLA seeks to hold liable those who "possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority."[89] To this end, the definition of "facility" proposed by the plaintiff would impermissibly extend liability to parties lacking the requisite authority to act.[90] With specific regard to the corporate officer defendants and the plaintiff's final contention that the defendants possessed the requisite authority, regardless of the court's construction of the standard of liability, the Fourth Circuit agreed with the district court that the officers lacked the authority to control the facility or to prevent hazardous waste disposal.[91] Both defendants were vice presidents and minority stockholders of a corporation found liable, presumably as an owner and operator of the facility, for installing the tanks, disposing of hazardous substances in the tanks for nearly three decades, and then abandoning the tanks.[92] However, the court found operator liability to be unwarranted because each officer's authority was, at all relevant times, subordinate to that of the president and majority stockholder, who exercised "ultimate authority" and "absolute control" over the corporation.[93]

The *Nurad* court's approach, specifically its concern with an officer's unique authority to abate environmental harm, reflects the means by which courts can, and often do, limit the otherwise expansive scope of the "authority to control" standard.[94] However, the fact that the court did not find the corporate officers liable should not distract from the precedent established by the court's holding. Clearly, *Nurad* is appellate-level case law supporting the proposition

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88. *Id.* at 843.

89. *Id.* at 842; *see also id.* at 843 ("The statute places accountability in the hands of those capable of abating further environmental harm.")

90. *See id.* at 843.

91. *See id.* at 844.

92. *See id.* at 840, 844.

93. *Id.* at 844 & n.4.

94. *See, e.g.*, Robertshaw Controls Co. v. Watts Regulator Co., 807 F. Supp. 144, 152-53 (D. Me. 1992) (adopting a "prevention test" for officer liability based upon whether the officer "could have prevented the hazardous waste discharge"); United States v. Summit Equip. & Supplies, Inc., 805 F. Supp. 1422, 1430 (N.D. Ohio 1992) ("[I]n order to establish operator liability under CERCLA, the government must demonstrate that the individual had sufficient authority over the disposal operations to 'prevent or significantly abate' the release of hazardous substances that prompted the lawsuit.") (quoting Kelley v. Thomas Solvent Co., 727 F. Supp. 1554, 1561 (W.D. Mich. 1989)); Kelley *ex rel.* Michigan Natural Resources Comm'n v. ARCO Indus. Corp., 723 F. Supp. 1214, 1216-19 (W.D. Mich. 1989) (applying a test for officer liability based on the officer's authority to prevent and abate the release of hazardous substances).

that operator liability may be imposed upon an individual corporate officer absent any showing that the individual actually participated in activities or decisions leading to the CERCLA violation.[95] In this regard, the mere recurrence of "authority to control" as a basis for liability, aside from its actual impact upon the liability of corporate officers, has worked substantial confusion and concern among the corporate community.[96] "Authority to control" is often cited as, or implied to be, one of many factors supporting the imposition of liability and has therefore become the hallmark of poorly articulated and often inconsistent holdings that have the potential to greatly expand the liability of corporate actors.[97] Two leading circuit court opinions in this line of cases are the Fourth Circuit's decision in *United States v. Carolina Transformer Co.*,[98] and the holding of the Second Circuit in *New York v. Shore Realty Corp.*[99]

Approximately six months after its holding in *Nurad*, the Fourth Circuit handed down yet another opinion addressing the liability of corporate officers as operators under CERCLA. In *Carolina Transformer*, the Fourth Circuit affirmed the district court's grant of summary judgment against two corporate officers of the facility-owning corporation, finding that there were no material issues of fact as to whether the officers operated the facility from which hazardous substances were released.[100] Quoting extensively from the *Nurad* opinion, the circuit court concluded that each officer had the requisite "authority to control" the facility during the time when hazardous

95. *See, e.g.*, United States v. Carolina Transformer Co., 978 F.2d 832, 836-837 (4th Cir. 1992) (citing *Nurad* in support of an "authority to control" standard); City of N. Miami v. Berger, 828 F. Supp. 401, 409 (E.D. Va. 1993) (same); Farm Bureau Mut. Ins. Co. v. Porter & Heckman, Inc., 560 N.W.2d 367, 375 (Mich. Ct. App. 1996) (same); *see also* Carley, *supra* note 10, at 250 (noting that the "ability to control" approach in *Nurad* "illustrates that the traditional corporate law doctrine requiring personal participation may be eroding, at least in the Fourth Circuit").

96. *See generally* sources cited note 17 (discussing the "erosion" of traditional corporate law doctrines under CERCLA).

97. *See infra* notes 100-124 and accompanying text (discussing United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992), and New York v. Shore Realty Corp. 759 F.2d 1032 (2d. Cir. 1985)); *see also* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848 n.29, 849 (W.D. Mo. 1984) (noting that the defendant corporate officers participated in the planning and implementation of the corporation's disposal practices, yet citing each defendant's capacity to control hazardous waste disposal, authority to direct negotiations regarding waste disposal, and capacity to prevent and abate damage occasioned by hazardous waste disposal as sufficient to impose "owner and operator" liability), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986) (reversing district court determination that officers were liable as owners and operators).

98. 978 F.2d 832 (4th Cir. 1992).

99. 759 F.2d 1032 (2d. Cir. 1985).

100. *See Carolina Transformer*, 978 F.2d at 837.

substances were either deposited at, or released from, the facility.[101] The court, however, provided rather ambiguous support for its conclusion, citing the acknowledgement of one defendant "that he was 'in charge' of the company and that he was 'responsible' for what went upon the company's property," as well as an admission by the other defendant that "he operated or otherwise controlled operations on the property."[102] Further complicating matters, the court ended its liability analysis with the summation that operator liability was properly imposed because each officer had a "right to control" the operations of the facility.[103]

While the court's holding, particularly in its reliance on *Nurad*, clearly indicates that the Fourth Circuit standard of "authority to control" was maintained in *Carolina Transformer*, the substantive evidence upon which the court satisfied that standard is noticeably absent from the opinion. Indeed, the court conceded as much, noting that it had not discussed all of the relevant facts supporting the district court decision.[104] A brief analysis of the district court's reasoning and the facts before the court raises the question of whether the holding affirmed on appeal, under the standard of "authority to control," was actually one based, at least in part, upon a showing of "actual control."[105]

Among the facts found supporting the imposition of liability, the district court in *Carolina Transformer* noted that each officer was actively involved in the corporation's hazardous waste operations; one officer personally supervised the generation and handling of the waste, whereas the other officer exercised control over its disposal.[106] Furthermore, the court began its analysis of officer liability seemingly in accordance with the "actual control" standard, stating that corporate officers "can be held personally liable under CERCLA for activities over which they had direct control and supervision."[107] The court, however, quickly dismissed any anticipations of strict adherence to corporate law doctrines by listing a myriad of factors to be considered in the determination of officer liability, including factors which are commonly considered in a test for "authority to

101. *Id.* at 836-37.
102. *Id.* at 837.
103. *Id.*
104. *See id.*
105. *Cf.* Oswald & Schipani, *supra* note 3, at 287 (discussing the district court's holding in *Carolina Transformer*).
106. United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1037-38 (E.D.N.C. 1989).
107. *Id.* at 1036.

control."[108] Yet, while the court considered the majority of these factors in kind, it cited "significant participation" in the operations of the corporation, particularly those relating to the disposal of hazardous waste, as the "dominant consideration."[109] Thus, it would appear that the district court proceeded in its analysis of liability under a rather amorphous standard, giving substantial weight to a showing of actual participation in hazardous waste activities, yet notably not demanding such evidence.[110] Such an approach is certainly not precluded under the governing opinion in *Nurad*, wherein the court reasoned that a defendant's actual participation in disposal activities could justifiably be considered as evidence of the defendant's "authority to control" those activities, so long as the evidentiary significance of "actual control" was not inflated into a "dispositive legal requirement."[111] However, the circuit court's failure, in *Carolina Transformer,* to reference evidence of "actual control" with any degree of specificity, although readily available in the district court's opinion, suggests that the evidentiary significance of "actual control" in the Fourth Circuit is a mere fiction post-*Nurad*; "authority to control—not actual control—[is] the appropriate standard" in the Fourth Circuit.[112]

The Second Circuit's opinion in *New York v. Shore Realty Corp.* provides yet another avenue to liability for corporate officers, which is somewhat different than the Fourth Circuit approach though no less confusing.[113] Although some courts cite to *Shore Realty* in support of the test for "actual control,"[114] the holding is also regarded as one of the few circuit court decisions applying, in part, an "authority to control" standard.[115] In determining that the defendant officer and shareholder was liable as an owner or operator of a hazardous waste disposal site, the Second Circuit first noted a statutory exclusion in

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108. *See id.* at 1036-37.

109. *Id.* at 1037.

110. The court's continued liability analysis supports this conclusion. Following its consideration of "significant participation" and its resulting determination of liability, the district court noted that the defendants were "also liable under the theory that a corporate officer may be held individually liable for the torts of a corporation where the corporate officer participates in the tortious activity." *Id.* at 1038. Although it is hard to imagine a more definite statement of the corporate doctrine, the court again concluded that factors indicative of an "authority to control" standard may be considered to establish individual liability under the common law. *See id.*

111. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992).

112. *Id.*

113. 759 F.2d 1032 (2d Cir. 1985).

114. *See* United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994); *Nurad*, 966 F.2d at 842.

115. *See* Oswald & Schipani, *supra* note 3, at 285-86; *see also* Carley, *supra* note 10, at 248-49.

the definition of "owner or operator," provided as part of the lender liability amendment, for "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."[116] The court then read this exclusion to imply "that an owning stockholder who manages the corporation . . . is liable under CERCLA as an 'owner or operator.'"[117] Under this rationale, an exclusion from consideration as an "owner or operator" of a facility, provided for a lender or like other who holds an "indicia of ownership" in a facility for the purpose of protecting a security interest therein, but who has not participated in the management of the facility, in turn extends liability to individual shareholders involved only in the management of the corporation owning the facility.[118] Such a conclusion effectively construes an express statutory provision, limiting the scope of CERCLA liability, to provide cause to impose direct liability upon individual shareholders who would otherwise be protected by traditional notions of corporate separateness and limited liability.[119]

Possibly seeking to rest its holding on something more solid than this strained construction of the statute, the *Shore Realty* court abruptly ended its analysis of CERCLA liability with the conclusory statement that, "[i]n any event," the defendant was "in charge of the operation of the facility in question, and as such is an 'operator' within the meaning of CERCLA."[120] Yet, regardless of the basis relied upon to establish liability, the Second Circuit's reasoning does not preclude the inference, and in fact suggests, that liability may be

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116. 42 U.S.C. § 9601(20)(A) (1997); *see Shore Realty Corp.*, 759 F.2d at 1052. This exclusion was provided for in the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, 42 U.S.C. §§ 9601(20)(A)-(G), 9607(n) (1997). *See supra* notes 19-21 and accompanying text.

117. *Shore Realty Corp.*, 759 F.2d at 1052.

118. *See* United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989).

> Courts have generally concluded that the exemption from liability [found in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20)] gives rise to an inference that an individual who owns stock in a corporation and who actively participates in its management can be held liable for cleanup costs incurred as a result of improper disposal by the corporation.

Id. at 1203 (emphasis omitted) (alteration in original) (quoting United States v. Mirabile, No. 84-2280, slip op. at 4-5 (E.D. Pa. Sept. 4, 1985)); *see also* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848 n.15 (W.D. Mo. 1984) (concluding that section 9601(20)(A) "literally reads that a person who owns an interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste"), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

119. *Cf.* Dennis, *supra* note 17, at 1399 (noting and providing criticism of this approach to liability "for seemingly transforming an express statutory exception to liability for lenders into a new avenue of liability").

120. 759 F.2d at 1052.

imposed upon an individual officer or shareholder absent a showing that the individual had any actual control over or participation in activities involving the disposal of hazardous substances.[121] However, here again, further analysis of the court's decision reveals that considerations of "actual control" may have had a role in the ultimate outcome of the case.[122] In discussing yet another basis for liability, under state law for abatement of a nuisance, the court expressly recognized "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."[123] Thus, in marked contrast to its analysis of liability under CERCLA, the court adhered to the corporate doctrine to impose liability under state law, finding it "beyond dispute" that the defendant officer "specifically directs, sanctions, and actively participates" in the maintenance of the nuisance.[124]

Although the underlying facts of both *Carolina Transformer* and *Shore Realty* suggest that the defendants would have also been found liable under the alternative test for "actual control," and that therefore the courts reached the correct result, the precedential effect of these cases lingers as a threat to erode traditional principles of corporate law. If followed by other courts solely for their statements of law, the holdings of the Second and Fourth Circuits have the potential to expand the bounds of CERCLA liability beyond the corporate doctrine.

IV. *UNITED STATES V. BESTFOODS*

A. Background: Confusion in Corporate Parent Liability

Prior to the Supreme Court's holding in *United States v. Bestfoods*,[125] confusion similar to that surrounding the issue of officer liability plagued determinations of corporate parent liability under

121. *Compare* Dennis, *supra* note 17, at 1400 (arguing that courts mistakenly construe the lender exclusion to impose liability on persons "regardless of whether they are in fact owners or operators or otherwise actively involved in the release of hazardous substances"), *with* Oswald & Schipani, *supra* note 3, at 285 (noting that *Shore Realty* "arguably moves toward holding an individual personally liable based solely upon his or her status in the corporation"), *and* Carley, *supra* note 10, at 249 (noting that *Shore Realty* "appears to move toward holding an individual liable based on ability to control").

122. *See* Oswald & Schipani, *supra* note 3, at 285-86.

123. *Shore Realty*, 759 F.2d at 1052.

124. *Id.*

125. 118 S. Ct. 1876 (1998).

CERCLA.[126] The circuits had developed three prevailing and differing approaches to the issue of a parent corporation's liability as an operator of a facility owned or operated by its subsidiary. The standard most respectful of the corporate form, adopted by only the Fifth and Sixth Circuits, demanded that the corporate veil be pierced under traditional principles of corporate law before the parent could incur liability under CERCLA for the acts of its subsidiary.[127] An alternative, control analysis, adopted by a majority of the circuits, focused on the parent's control over the subsidiary corporation.[128] Under this standard, a parent corporation is held liable when it has exercised actual and substantial control over the activities of the subsidiary.[129] A final, more relaxed control analysis, substantially similar to the "authority to control" test under officer liability, was applied by the Fourth and Ninth Circuits.[130] This standard imposed operator liability upon a parent having the ability or authority to control the activities of the subsidiary.[131]

B. Analysis: The Supreme Court's Holding

The Supreme Court's decision in *Bestfoods* reduced the chaos of corporate parent liability under CERCLA to two distinct tests: derivative liability and direct liability.[132] A parent corporation may be held derivatively liable for its subsidiary's ownership or operation of a polluting facility only upon a showing that the corporate veil has been pierced.[133] However, when the parent itself has actively managed, and exercised control over, the operations of the facility, the parent may be held directly liable as a CERCLA "operator."[134] In establishing these

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126. *See* Silecchia, *supra* note 6, at 124-38 (discussing the nature and origins of the parent liability issue).

127. *See* Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990); United States v. Cordova Chem., 113 F.3d 572 (6th Cir. 1997), *vacated and remanded sub nom*. United States v. Bestfoods, 118 S. Ct. 1876 (1998).

128. *See* Silecchia, *supra* note 6, at 140 (noting that the actual control test is the "majority liability theory").

129. *See, e.g.*, United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990).

130. *See* United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992).

131. *See Carolina Transformer,* 978 F.2d at 832.

132. 118 S. Ct. 1876, 1884-87 (1998).

133. *See id.* at 1885-86 & n.10. Although the Court cited veil piercing as a "fundamental principle of corporate law," it declined to address the issue of whether a court, when determining whether the corporate veil has been pierced, should apply state law or federal common law. *Id.* at 1885 (noting "significant disagreement among courts and commentators over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing," yet declining to address an issue not presented in the case).

134. *See id.* at 1886-87.

tests, the Court went beyond concerns unique to parent corporations and addressed broader issues of corporate law and CERCLA operator liability. Accordingly, a thorough analysis of the Court's approach to the problem, which reveals the considerations of the Court in drafting these tests, may provide guidance to courts determining the liability of individual corporate officers.

1. Derivative Liability

The test for derivative liability reflects the Court's refusal to disregard traditional corporate law theories where the only argument for doing so is that the cause of action is based upon CERCLA.[135] Faced with a statute silent as to the specific liability of corporate actors, the Court refused to expand the statutory language of CERCLA so as to abrogate or rewrite foundational principles of corporate law so "deeply 'ingrained in our economic and legal systems.'"[136] Such principles cannot be overlooked in the often blinding search for ever deeper pockets, nor may they be abandoned simply because the focus of the search is more nobly stated in terms of CERCLA's remedial goals.[137] If the liability of a corporate actor may be derived from the acts of another, that derivative liability must be found in the existing body of corporate law, it may not be presumed from congressional silence.[138] Absent cause to pierce the corporate veil and disregard the corporate form, mere ownership and control of the subsidiary does not suffice to vest the actions of the subsidiary upon the parent, regardless of whether those actions implicate CERCLA liability.[139]

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135. *See id.* at 1885; *see also id.* at 1889 (citing as error the district court's treatment of "CERCLA as though it displaced or fundamentally altered common law standards limited liability").

136. *Id.* at 1884 (quoting Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929)); *see also id.* at 1889 (concluding that "a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability . . . does not arise from congressional silence, and CERCLA's silence is dispositive").

137. *See id.* at 1885 (upholding the doctrine of limited liability although "respect for corporate distinctions when the subsidiary is a polluter has been severely criticized") (citing Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986)); *see also* Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U.L.Q. 223, 282 (1994) ("CERCLA's policy objective of making the polluter pay should not be used to overcome traditional protections of the corporate form.").

138. *See Bestfoods,* 118 S. Ct. at 1885.

139. *See id.* at 1884-85.

2. Direct Liability

In establishing the test for direct liability, the Court was again respectful of corporate law doctrines and first sought justification under the common law for holding a corporate parent directly liable as an operator of its subsidiary's facility.[140] Applying traditional principles of agency law, the Court concluded that in the determination of direct liability, the parent-subsidiary relationship is irrelevant; nothing in the entire body of corporate law displaces the rule that a parent is directly liable for the acts of its agents.[141] Whereas derivative liability is limited by the rules of veil-piercing, the corporate veil cannot shield the parent from direct liability when the parent itself, through its agents, acts as an operator of the subsidiary's facility.[142] Turning to the language of the statute, the Court opined that "CERCLA's 'operator' provision is concerned primarily with direct liability for one's own actions."[143] CERCLA's silence regarding the specific liability of corporate actors does not foreclose parent liability. On the contrary, any operator of a polluting facility is directly liable under CERCLA; the operator's corporate status, or lack thereof, is immaterial to the issue of liability.[144]

As the Court aptly noted, articulation of the principle of direct liability is a rather unremarkable exercise, requiring only the application of hornbook law and a plain reading of the statute at issue.[145] The difficulty arises in defining that conduct which warrants the label of CERCLA "operator" and the resulting imposition of liability.[146] Seeking to refine a dictionary-derived definition "for purposes of CERCLA's concern with environmental contamination," the Court concluded that "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having

140. *See id.* at 1886.

141. *See id.* ("The fact that a corporate subsidiary happens to own a polluting facility operated by its parent does nothing, then, to displace the rule that the parent 'corporation is [itself] responsible for the wrongs committed by its agents in the course of its business' . . . . If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship . . . is simply irrelevant to the issue of direct liability." (quoting Mine Workers v. Coronado Coal Co., 259 U.S. 344, 395 (1922))).

142. *See id.* at 1886.

143. *Id.*

144. *See id.* ("Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. This is so regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice." (citation omitted)).

145. *See id.* at 1887 (concluding that a parent may be directly liable for operation of its subsidiary's facility and noting that "[t]his much is easy to say").

146. *See id.*

to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[147] Such conduct presupposes "something more than the mere mechanical activation of pumps and valves," and is to be distinguished from routine corporate behavior occasioned by the parent-subsidiary relationship.[148] Thus, a corporate actor whose involvement with the facility is akin to that of a prudent investor need not fear being held liable as a CERCLA operator; indirect involvement with the facility, through supervision of the general affairs of the facility-controlling corporation, is more appropriately considered oversight, not operation.[149]

V. APPLICATION OF *BESTFOODS* TO CORPORATE OFFICER LIABILITY

A. Application in Theory

In theory, the *Bestfoods* decision should at last focus the attention of all the circuits on the corporate officer's personal participation in the activities resulting in the CERCLA violation and reign in those circuits that have imposed liability upon a finding of less than "actual control." With regard to its treatment of corporate law, the Court's holding in *Bestfoods* clearly implies that courts addressing the issue of officer liability should seek to harmonize CERCLA's broad remedial goals with existing protections afforded corporate actors under the common law. The Court unequivocally held that CERCLA's silence regarding the liability of corporate actors, whether a reflection of congressional intent to preserve existing law or simply a result of poor statutory construction, cannot be interpreted so as to abrogate or rewrite well-established doctrines of corporate law.[150] Furthermore, the Court's statutory interpretation of CERCLA provides for the imposition of operator liability only upon those officers who "manage, direct, or conduct," or who are otherwise intimately involved in the corporation's hazardous waste operations.[151] Thus, findings of "authority to control" are inapplicable to the determination of liability; such evidence does not suffice as a basis for liability, nor should it be allowed to confuse the issue in a decision otherwise supported by a showing of "actual control."

147. *Id.*
148. *Id.* at 1889.
149. *See id.* (noting that "'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'" (quoting Oswald, *supra* note 137, at 282)).
150. *See id.* at 1885.
151. *See id.* at 1887.

However, while many commentators may applaud the Court for its respect for the corporate form,[152] some may find the Court's application of the veil-piercing doctrine in the context of operator liability rather surprising.[153] The Court expressly rejected any argument that a parent corporation could only incur derivative liability under CERCLA as an owner, concluding instead that a parent could be held derivatively liable as an operator of its subsidiary's facility.[154] Thus, while the Court's approach to the corporate doctrine appears marked by caution, so as not to expand the liability of corporate actors beyond traditional limits, the Court was nevertheless mindful of CERCLA's remedial goals and did not hesitate to allow the imposition of liability where such liability was not foreclosed under the common law. This willingness to interpret CERCLA to the limits of traditional corporate law suggests that the Eighth Circuit's test in *United States v. Gurley*, which required not only a showing of "actual control," but also a prerequisite authority to take such action, is an overly protective construction of the statute.[155] Indeed, in this regard, the Court in *Bestfoods* noted that "even a saboteur who sneaks into the facility at night to discharge its poisons out of malice" may be held liable as an operator under CERCLA.[156]

B. Application in Practice

Once in practice, the Bestfoods decision had an immediate impact upon the determination of individual corporate actor liability under CERCLA. Just seven days after delivering its landmark holding, the Supreme Court vacated the Sixth Circuit's ruling in *Donahey v. Bogle* and remanded for further consideration in light of *Bestfoods*.[157] The approach taken by the Sixth Circuit in *Donahey*, throughout the proceedings prior to remand, reflects the substantial

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152. *See, e.g.*, Hockley & Smith, *supra* note 10 (noting that "*Bestfoods* significantly will impact most of the circuits because the majority of circuits have abandoned the fundamental concepts of corporate limited liability in the context of CERCLA").

153. *See* Oswald, *supra* note 137, at 282 (arguing that operator liability may only arise directly from the parent's operation of the subsidiary's facility and that "[f]actors that tend to support piercing, . . . that are unrelated to the operation of the facility, should not give rise to liability").

154. *See Bestfoods*, 118 S. Ct. at 1886 n.10 ("If a subsidiary that operates, but does not own, a facility is so pervasively controlled by its parents for a sufficiently improper purpose to warrant veil piercing, the parent may be held derivatively liable for the subsidiary's acts as an operator.").

155. 43 F.3d 1188 (8th Cir. 1994); *see supra* text accompanying notes 59-68.

156. *Bestfoods*, 118 S. Ct. at 1886.

157. 129 F.3d 838 (6th Cir. 1997) (en banc), *cert. granted, vacated sub nom.* Donahey v. Livingstone, 118 S. Ct. 2317 (U.S. 1998).

confusion surrounding the issue of individual corporate actor liability, which the holding in *Bestfoods* is ripe to address. The district court initially determined that the defendant, an individual corporate officer and sole shareholder of an ostensibly liable corporation, could not likewise be held liable because he did not personally participate in the corporation's waste disposal operations.[158] Although as chairman of the board of directors he undoubtedly possessed the "authority to control" the disposal of hazardous waste, he never actually exercised such authority.[159] On appeal, the Sixth Circuit reversed, finding that the defendant's "authority to prevent contamination" established his liability as a matter of law.[160] The Supreme Court subsequently vacated the Sixth Circuit's judgment on other grounds and remanded the case for further consideration.[161] On remand, the Sixth Circuit found new law to apply and, this time around, determined that "stockholders, like parent corporations, are shielded from liability unless the requirements necessary to pierce the corporate veil are satisfied."[162] Applying only the test for veil piercing, the court affirmed the district court's initial holding that the defendant was not liable.[163] Once again, the Supreme Court vacated and remanded the Sixth Circuit's holding, directing the lower court to reconsider the defendant's liability under CERCLA in light of *Bestfoods*.[164]

Notably, the Supreme Court, by simply referencing the holding in *Bestfoods*, is able to provide the Sixth Circuit with a specific, and obviously much needed, directive; the Sixth Circuit's analysis should be limited to whether the defendant officer and shareholder exercised sufficient control over the facility to warrant the imposition of liability under CERCLA. Considering its recent decision in *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, the Sixth Circuit appears to have taken heed of this directive.[165] In *Carter-Jones Lumber*, the court determined that, pursuant to the holding in *Bestfoods*, the district court properly held the defendant corporate officer and sole shareholder personally liable for his "intimate participation" and

158. *See Donahey*, 129 F.3d at 840 (quoting post-trial Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan filed October 1, 1991).

159. *See id.*

160. Donahey v. Bogle, 987 F.2d 1250, 1254 (6th Cir. 1993), *cert. granted, vacated sub nom.* Livingstone, v. Donahey, 512 U.S. 1201 (1994).

161. Livingstone, v. Donahey, 512 U.S. 1201 (1994).

162. *Donahey*, 129 F.3d at 843.

163. *See id.* at 843-44.

164. *See* Donahey v. Livingstone, 118 S. Ct. 2317 (U.S. 1998).

165. 166 F.3d 840 (6th Cir. 1999).

active involvement in waste disposal activities.[166] Although considering the defendant's liability as a person who arranged for the disposal of hazardous waste, the court reasoned that the holding in *Bestfoods*, concerning operator liability, could logically be applied to determinations of "arranger" liability, as both "operators" and "arrangers" are considered potentially responsible parties under CERCLA.[167] Recognizing the distinction drawn by the Court in *Bestfoods*, the Sixth Circuit first noted that the defendant could be held derivatively liable in his capacity as sole shareholder if circumstances supported piercing the corporate veil under state law.[168] However, the court did not further discuss the issue of veil-piercing, as direct liability was sufficiently justified under the common law rule that "a corporate officer can be held personally liable for a tort committed while acting within the scope of his employment."[169] Thus, given the district court's initial findings in *Donahey*, and the Sixth Circuit's apparent mastery of CERCLA operator liability post-*Bestfoods*, the result in *Donahey* on remand appears predetermined.

Yet, while *Donahey* seems likely to produce an expected result, the outcome of the first substantive application of *Bestfoods* to the issue of officer liability under CERCLA was anything but expected. In *Browning-Ferris Indus., Inc. v. Ter Maat*, the district court, relying heavily on the holding in *Bestfoods*, held that CERCLA operator liability could only be attributed to an individual corporate officer "derivatively under state veil-piercing law."[170] Although the court concluded that the defendant, Richard Ter Maat, as an officer and director, "was involved in the operational decision-making at the site," it refused to impose liability where there was no cause to pierce the corporate veil under a traditional state common law analysis.[171] This conclusion is particularly confusing when one considers the reasoning employed by the court to hold liable the corporation of which the defendant was an officer and director. The court began its analysis of corporate liability by noting that, under *Bestfoods*, "[a]ny person or corporation who operates a site is directly liable for the costs of clean-up."[172] Further consideration of the holding in

166. *Id.* at 846.

167. *See id.*; *see also* United States v. Township of Brighton, 153 F.3d 307 (6th Cir. 1998) (applying the holding in *Bestfoods* to the determination of operator liability for a governmental entity).

168. *See* Carter-Jones Lumber Co. v. Dixie Dist. Co., 166 F.3d 840, 846 (6th Cir. 19).

169. *Id.*

170. 13 F. Supp. 2d 756, 765 (N.D. Ill. 1998).

171. *Id.* at 764.

172. *Id.* at 763.

Bestfoods led the court to the conclusion that the "dispositive question" in determining the corporation's liability under CERCLA was whether Ter Maat, in his capacity as officer and director, was acting on behalf of the corporation.[173] Thus, the court implicitly concluded that Ter Maat's conduct in relation to the facility was sufficient to give rise to operator liability under CERCLA; the determinative question was whether his actions could be vested upon the corporation. The court subsequently answered this question in the affirmative, concluding that the corporation was directly liable as an operator of the facility by virtue of Ter Maat's role in "operational matters at the site," specifically those pertaining to "pollution and clean-up issues at the site."[174]

If the court can justify the imposition of direct liability upon a corporation solely by reference to the actions of one individual, the logical conclusion is that the individual is likewise directly liable. However, the court's conclusion in this regard does not appear to be guided by logic. Although the court noted that under the Seventh Circuit precedent of *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund*,[175] direct operator liability could extend to corporate officers without regard to state veil-piercing law, it reasoned that this decision was effectively trumped by the Supreme Court's refusal in *Bestfoods* to expand CERCLA liability beyond "established corporate principles."[176] The court's reasoning is disturbing in that it effectively precludes direct liability for corporate officers, regardless of their personal participation in the operation of the facility. In an effort to respect corporate separateness under state law, the court fundamentally misreads the Court's holding in *Bestfoods*, and in the process tramples the traditional doctrine of corporate liability. Although the Court in *Bestfoods* first sought to secure liability under the common law, it did not rely upon veil-piercing law to establish direct liability; rather, it found the theory of direct liability fully supported by the corporate doctrine.[177] Moreover, pursuant to the dictates of the corporate doctrine, veil-piercing law is functionally irrelevant to the determination of a corporate officer's direct liability under CERCLA; "a corporate officer is personally liable for the

173. *Id.* at 764.

174. *Id.* at 764-65.

175. 25 F.3d 417 (7th Cir. 1994); *see supra* notes 58-59 and accompanying text (discussing the holding in Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994)).

176. Browning-Ferris Indus., Inc. v. Terr Maat, 13 F. Supp. 756, 765 (N. D. Ill. 1998).

177. *See supra* text accompanying notes 94-96.

tortious injury committed by him regardless of a piercing of the corporate veil."[178]

Whereas the holding in *Ter Maat* may foreshadow trouble to come, the district court's decision in *United States v. Green* provides reason to believe that *Bestfoods* can be properly applied.[179] In *Green*, the court relied upon the holding in *Bestfoods* to conclude that the defendant corporate officer and shareholder could not be found liable as an operator under CERCLA "unless he directly participated in the management of the facility's pollution control operations including decisions pertaining to the disposal of hazardous substances and compliance with environmental regulations."[180] The United States sought to recover costs incurred by the EPA in responding to the release of hazardous substances from a facility owned and operated by the corporation of which defendant Kevan Green was the president, treasurer and sole shareholder.[181] As an affirmative defense to liability, Green asserted that, although he owned and effectively controlled the corporation, he did not engage in any kind of activity that would justify holding him personally liable for the acts of the corporation.[182] In support of its motion to strike this defense, the United States relied upon the Second Circuit's holding in *New York v. Shore Realty Corp.*[183] for the proposition that CERCLA liability may be imposed upon corporate officers solely by virtue of their control over and involvement in the activities of the corporation; the corporate officer's actual involvement in the CERCLA violation, or in the tortious activities leading thereto, was allegedly irrelevant.[184]

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178. *In re* Interstate Agency, Inc., 760 F.2d 121, 125 (6th Cir. 1985); *see also* United States v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879, 20,883 (E.D. Mo. 1988) ("When a corporate officer's liability is based upon his personal participation in the creation of the hazardous waste site, it is not necessary to pierce the corporate veil to impose personal liability.") (citation omitted); Oswald & Schipani, *supra* note 3, at 274-75 (arguing that veil-piercing law should not be considered in the determination of CERCLA liability for corporate officers). Of course, if the corporate officer is also a shareholder of the corporation then both direct and derivative liability would apply. *See* Oswald & Schipani, *supra* note 3, at 274 n.75; *cf.* United States v. Bestfoods, 118 S. Ct. 1876, 1884 (1998) (noting that a parent corporation is "so-called because of control through ownership of another corporation's stock," and discussing the liability of parent corporations and shareholders interchangeably).

179. 33 F. Supp. 2d 203, 217 (W.D.N.Y. 1998).

180. *Id.*

181. *See id.* at 211-212, 216.

182. *See id.* at 216.

183. *See supra* notes 113-124 and accompanying text (discussing the holding in New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)).

184. *See Green*, 33 F. Supp. 2d at 216-217.

Notably, in light of the holding in *Bestfoods*, the district court found the government's reliance on *Shore Realty* misplaced.[185] The court correctly noted that the Second Circuit reached its holding in *Shore Realty* "without having distinguished between management of the corporation's financial aspects and management of the corporation's facility," whereas the Court in *Bestfoods* expressly prescribed, as a prerequisite to operator liability, that a shareholder manage operations at the facility specifically related to the handling of hazardous waste.[186] Accordingly, Green's affirmative defense was found legally sufficient, as the government did not allege his involvement in the management of hazardous waste operations, nor did he admit to any such involvement.[187] The district court's holding in *Green* is a clear and concise articulation of the standard of liability for corporate officers that follows logically from the test for direct liability established in *Bestfoods*. Furthermore, the court's application of *Bestfoods* to the determination of individual corporate actor liability under CERCLA recognizes that the Supreme Court's holding is equally applicable to issues of operator liability arising outside of the parent-subsidiary context.

VI. CONCLUSION

While some may debate whether we should abhor or applaud CERCLA's liability scheme, and while many may marvel in delight or disgust at the statute's retrospective reach, these issues, for better or for worse, are now largely academic. Strict liability for the release or threatened release of hazardous substances; joint and several liability where a rational apportionment of the damages resulting from a release cannot be determined, and retroactive application to hold parties liable for past actions that result in present damages have all proven to be the functional requirements of a statute that seeks to remedy the adverse health and environmental impacts of a nation's industrial growth and associated hazardous waste generation and disposal. Nevertheless, nearly two decades after its enactment, CERCLA continues to be one of the most controversial and litigated statutes in existence. Much of the controversy and associated litigation has centered on the role of the corporate doctrine in determinations of CERCLA liability for individual corporate actors.

185. *See id.* at 217-218.

186. *Id.*

187. *See id.* at 218. The court also noted an absence of any facts supporting veil-piercing to hold Green, a corporate shareholder, personally liable under CERCLA as an operator. *See id.*

The next few years will be pivotal in determining the fate of the corporate officer and the larger role of the corporate doctrine under CERCLA. As CERCLA has progressed from infancy into adolescence, and now stands on the verge of adulthood, issues of corporate officer liability have not subsided into mere academic debate, nor has the corporate community accepted the notion that traditional principles of corporate law are yet another necessary victim of CERCLA's broad remedial goals. The courts have struggled as well, offering varying and conflicting standards of liability in a seemingly futile attempt to harmonize traditional rules of limited liability with a statute whose only concerns are remediation and accountability for costs thereof. In this regard, specifically with respect to determinations of operator liability, the Supreme Court's holding in *United States v. Bestfoods* should serve as guidance for courts considering the personal liability of corporate officers under CERCLA. The Court's holding provides the basic means by which courts can further the remedial goals of CERCLA, although not at the expense of the corporate doctrine. The Court defined the term "operator," not with regard only to parent corporations, but with regard to "CERCLA's concern with environmental contamination," thus respecting CERCLA's remedial goals.[188] The Court required actual participation, not in the general management of the corporation or facility, but in "operations specifically related to pollution," thus respecting the corporate doctrine.[189]

188. United States v. Bestfoods, 118 S. Ct. 1876, 1887 (1998).
189. *Id.*