PERSONAL LIABILITY OF CORPORATE OFFICERS AND DIRECTORS ASSOCIATED WITH YOUR COMPANY'S ENVIRONMENTAL ACTIVITIES

An Outline of Current Trends

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I. The issue of personal liability for corporate environmental wrongdoing blossomed with the advent of Superfund. 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 a holistic approach to the adverse health and environmental impacts associated with a history of improper hazardous waste disposal. [3] In enacting CERCLA, Congress sought to accomplish two overall goals. [4] The first was to provide for the removal and remediation of hazardous substances released into the environment; the second was to remedy a situation in which such a release is threatened.

II. 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.

III. 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 [*524] 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.

IV. 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]

V. 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.

VI. 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 [*530] 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 "active 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 [*531] 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.

VII. 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.

VIII. 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]

IX. Under *Kelley v. Arco Industries Corporation,* 723 F. Supp. 1214 (W.D. Mich. 1989) the Court held that a court trying to decide whether to hold a corporate officer or director personally liable under the CERCLA should weigh the factors of (1) the corporate individual's degree of authority in general and (2) specific responsibility for health and safety practices, including hazardous waste disposal. These factors should be applied in order to answer the question of whether the individual in the close corporation could have prevented or significantly abated the hazardous waste discharge that is the basis of the claim. Although liability under CERCLA is essentially a strict liability scheme, the case law indicates that where CERCLA seeks to impose liability beyond the corporate form, *an individual's power to control the practice and policy of the corporation,* and the responsibility undertaken by that individual in this area should be considered.

X. 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 [*541] 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]

XI. 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 [*542] 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.

XII. 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."

XIII. Shepards reports Bestfoods followed on 49 occasions, although most of these do not involve individual liability in the corporate context. One case that’s does involve individual liability where Bestfoods was cited favorably, is the Illinois Appellate Court’s 2004 decision in People v. Tang, 346 Ill.App.3d 277. In a case which seems to be a harbinger of where the courts are headed in light of Bestfoods, the court made an extensive analysis of the case law concerning individual liability in the corporate context. In this case, the State filed a complaint against Cyrus Tang, individually and as chairman and CEO of Pielet Brothers Scrap Iron and Metal L.P., an automobile shredding operation charging him with violations of the Illinois Environmental Protection Act, specifically, open dumping, improper waste disposal. The

complaint also contained an allegation that Tang "caused or allowed" the violations "as a part of his performance of, and as a direct result of, his duties as Chairman and Chief Executive Officer of the corporate entity. The complaint alleged that "Defendant Tang conducted an automobile shredding operation at the site through the business entities." It accused him of causing and allowing auto shredder residue and auto fluff to be piled outside for more than one year, resulting in the alleged pollution. The complaint was dismissed for failing to allege the personal involvement of Tang in any wrongdoing. The state appealed. Citing Bestfoods, among other decisions, the appellate court concluded that n order to state a claim for personal liability against a corporate officer under the Illinois Environmental Protection Act, 415 Ill. Comp. Stat. Ann. 5/1 et seq. (2000), a plaintiff must do more than allege corporate wrongdoing. Similarly, the plaintiff must allege more than that the corporate officer held a management position, had general corporate authority, or served in a supervisory capacity in order to establish individual liability under the Act. The plaintiff must allege facts establishing that the corporate officer had personal involvement or active participation in the acts resulting in liability, not just that he had personal involvement or active participation in the management of the corporation.

XIV. considered whether corporate officers and directors could be held liable under Section 107(a) of Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. section 9607(a) for response costs for cleanup of hazardous substances released by the corporation.

Section 107(a)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides a liability scheme for current owners or operators of facilities. 42 U.S.C.S. § 9607(a)(1). The statute makes owners and operators of facilities at which there are releases of hazardous substances liable for the government's response costs cleaning up the environmental damage. Similarly, under CERCLA § 107(a)(2), any person owning or operating a facility at the time of disposal of hazardous substances is liable for response costs incurred at the facility. 42 U.S.C.S. § 9607(a)(2).That statute reads in relevant part: Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in 42 U.S.C.S. § 9607(b), any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of shall be liable under this section.

A court trying to decide whether to hold a corporate officer or director personally liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) should weigh the factors of (1) the corporate individual's degree of authority in general and (2) specific responsibility for health and safety practices, including hazardous waste disposal. These factors should be applied in order to answer the question of whether the individual in the close corporation could have prevented or significantly abated the hazardous waste discharge that is the basis of the claim. *Although liability under CERCLA is essentially a strict liability scheme, the case law indicates that where CERCLA seeks to impose liability beyond the corporate form, an individual's power to*

control the practice and policy of the corporation, and the responsibility undertaken by that individual in this area should be considered.