



Volume 61 | Issue 3

Article 4

10-24-2016

Close Encounters with Piercing the Corporate Veil

Richard A. Booth

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Richard A. Booth, *Close Encounters with Piercing the Corporate Veil*, 61 Vill. L. Rev. 393 (2016).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol61/iss3/4>

This Article is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

CLOSE ENCOUNTERS WITH PIERCING THE CORPORATE VEIL

RICHARD A. BOOTH*

WHEN I sat down to choose an article from the sixty-year history of the *Villanova Law Review* (VLR) upon which to reflect, I decided the best way to do so was to find the most influential article in an area I knew something about. So I went to Lexis to look for VLR pieces cited by the Supreme Court. My search turned up just one such article—which was surprising. But the Supreme Court is famously hostile to legal scholarship. Still, it turned out that the one case I found was a case I knew pretty well and in more ways than one: *United States v. Bestfoods*.¹

Incidentally, my search was flawed. According to *The Bluebook*, the proper abbreviation for VLR when cited is “Vill. L. Rev.”² But it turns out that the Supreme Court has cited VLR many times—incorrectly—without the proper spaces in the abbreviation: “Vill.L.Rev.” and at least once by spelling out *Villanova*. Lexis is quite literal about such things. So none of these many other citations was listed in my search results.³ That is what we

* Martin G. McGuinn Chair in Business Law and Professor of Law, Villanova University Charles Widger School of Law.

1. 524 U.S. 51 (1998).

2. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 466 tbl.T.13 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

3. I should note that it is only because Amy Spare of the VLS Library heard my preliminary presentation of this paper at a faculty lunch that I was set straight. For the record, VLR has been cited more than ten other times by the Supreme Court. Thanks again to Amy Spare for this tidbit. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 n.23 (1996) (citing David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994)); *Herrera v. Collins*, 506 U.S. 390, 408 (1993) (citing Lester B. Orfield, *New Trial in Federal Criminal Cases*, 2 VILL. L. REV. 293, 304 (1957)); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 n.17 (1987) (citing Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 508–12 (1978)); *Solorio v. United States*, 483 U.S. 435, 444 nn.8 & 12 (1987) (citing Comment, 15 VILL. L. REV. 712, 718 n.38, 719 (1970)); *City of Newport v. Iacobucci*, 479 U.S. 92, 101 (1986) (Stevens, J., dissenting) (citing *Recent Developments—Constitutional Law*, 19 VILL. L. REV. 177, 185 (1973)); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 769 n.3 (1975) (citing Comment, *The Decline of the Purchaser–Seller Requirement of Rule 10b–5*, 14 VILL. L. REV. 499 (1969)); *Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974) (citing Warren E. Burger, *Our Options Are Limited*, 18 VILL. L. REV. 165, 167 (1972)). Chief Justice Burger’s article was cited in another case decided the same day as *Pell*. See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 861 n.7 (1974); see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) (citing Eugene R. Baker & Daniel J. Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962)); *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 409, n.4 (1972) (Douglas, J., dissenting) (citing Arthur Selwyn Miller, *Toward the “Techno—Corporate” State?—An Essay in American Constitutionalism*, 14 VILL. L. REV. 1 (1968)); *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971) (citing Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 157–59 (1957)); *Labine v. Vin-*

in academe call a teachable moment—especially in the context of a law review symposium. Accordingly, I can say that this Article is about the one Supreme Court case that *properly* cites to VLR. But it is a very important case for many reasons—both professional and personal.

Before I dig any deeper into *Bestfoods*, I should note that the piece cited therein by the Supreme Court (per Justice Souter) is an article by Richard G. Dennis, *Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law*.⁴ CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, a federal statute that establishes the so-called Superfund.⁵ Simply stated, the Superfund was established to cover the costs of cleaning up hazardous waste sites. But after doing so, the fund may then seek reimbursement from the responsible parties in order to repeat the process.⁶

The Dennis piece is one that might be described as a classic battleship article of the sort a junior faculty member might publish to impress a tenure committee.⁷ But the author was a practicing lawyer at Weil, Gotshal & Manges in Houston, Texas, when the piece was published. And he remains a practicing lawyer today with AT&T in Bedminster, New Jersey.

The article runs 145 pages in print and appears to digest every CERCLA decision rendered before its publication that addressed the issue of whether officers, directors, and stockholders of companies found liable under CERCLA may also be held liable either under the statute itself or under the common law of piercing the corporate veil (PCV). Dennis first analyzes CERCLA cases addressing direct (statutory) and indirect (PCV) theories of liability. He then analyzes both federal and state common law as to direct and indirect liability of officers, directors, and stockholders—using California, New York, and Texas as representative states. Finally, he

cent, 401 U.S. 532, 545 n.10 (1971) (Brennan, J., dissenting) (citing George A. Pelletier & Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 VILL. L. REV. 323 (1966)); *Humphrey v. Moore*, 375 U.S. 335, 344 n.5 (1964) (citing Cox, *supra*, at 172–75).

4. 36 VILL. L. REV. 1367 (1991) (note the spaces).

5. See 42 U.S.C. §§ 9601–9675 (2012). The word *super* was used to excess in the 1980s, much as the word *awesome* has been used to excess in the 2000s.

6. CERCLA is a remarkable legal innovation. By establishing the Superfund with an independent existence and standing to seek replenishment against polluters, Congress effectively founded an enterprise whose business was to invest in cleanup projects. The one flaw in the model is that the Superfund can never do better than break even. Cf. *Bartle v. Home Owners Coop.*, 127 N.E.2d 832 (N.Y. 1955) (declining to pierce corporate veil (PCV) where subsidiary construction contracting business had been operated so as to break even over vigorous dissent arguing failure to seek profits is sufficient justification for PCV). Nevertheless, the Superfund is an important step in the direction of addressing the problem of social cost (as it has been called). See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), available at <http://science.sciencemag.org/content/sci/162/3859/1243.full.pdf> [<https://perma.cc/D3MA-N5AJ>].

7. Thanks to my former Maryland colleague Ted Tomlinson for this construction.

analyzes the differences between these two bodies of law, that is, CERCLA-specific law and the more general law of officer–director–stockholder (ODS) liability.⁸

Dennis drills down deepest in identifying five different rules adopted by the various federal courts of appeal but ultimately concludes that there is little difference among them. Moreover, and more important, he concludes that the courts in CERCLA cases had (as of 1991 when the article appeared) largely dispensed with the traditional requirement for both direct and indirect ODS liability that plaintiffs demonstrate some sort of *inequity* visited upon the victim. Rather, the courts appear to have been satisfied with a showing that the defendant had the *power* to prevent the harm.

This subtle shift may have been attributable to the fact that the United States—rather than a private party—was the plaintiff in such cases. It is difficult for a regulator to argue from equity since economic interests inure to private parties. Then again, CERCLA is different because of the Superfund.

Having identified a material difference in the two approaches, Dennis then proceeds to apply the test laid down by the Supreme Court in *United States v. Kimbell Foods, Inc.*⁹ to determine whether the federal courts should develop their own law in this area—or rather should continue to do so. Not surprisingly, the author answers each of the *Kimbell Foods* questions so as to militate against the need for a federal standard:

Question: Is there need for uniformity? Answer: NO

Question: Will state law frustrate federal goals? Answer: NO

Question: Will federal standard disrupt commerce? Answer: YES.

Accordingly, Dennis concludes that these issues should be resolved under state law. The Supreme Court seems largely to have agreed, arguably because of Dennis. But to explain, we need to consider the facts of the case.

The central issue in *Bestfoods* was whether a parent corporation could be held liable for the actions of a wholly-owned subsidiary resulting in the pollution of soil and groundwater. Specifically, the offending subsidiary was Ott Chemical Company (Ott I), a publicly traded Michigan corporation. Ott I was founded by Arnold Ott in 1957.¹⁰ The company, which

8. Curiously, and quite ironically as it turned out, Dennis missed one of the relatively few pieces expressly to address officer liability. See Christine White Booth, *Real Persons, Corporate Persons and Vicarious Liability*, 38 CASE W. RES. L. REV. 453 (1988).

9. 440 U.S. 715 (1979).

10. Arnold Ott owned 30% of the common stock of Ott I. See *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 557 (W.D. Mich. 1991), *aff'd in part, rev'd in part sub nom. United States v. Cordova Chem. Co.*, 59 F.3d 584 (6th Cir. 1995), and *aff'd in part, rev'd in part en banc sub nom. United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997), *vacated sub nom. Bestfoods v. Aerojet-General Corp.*, 524 U.S. 924 (1998). “[T]he next largest stockholder owned only about 5%” of the common stock. *Id.* So Arnold Ott was quite clearly the control-

was located near Muskegon, Michigan, was engaged in the production of a variety of synthetic organic intermediate chemicals used for pharmaceutical, veterinary, and agricultural purposes—including phosgene.¹¹ In 1965, Ott I was bought by Corn Products Company, which later changed its name to CPC International, Inc. and still later to Bestfoods (after a spinoff). (For purposes of this Article, I use CPC to refer to all.)¹²

Shortly after Ott was acquired by CPC, one William Turner White, Jr. joined Ott as Vice President for Manufacturing, eventually rising to president (but not CEO) of the company. White grew up in Wilmington, Delaware and was a member of the Dartmouth College class of 1944.¹³ Thereafter, White worked at DuPont, based first in New York and then in

ling stockholder. Accordingly, he served as president and CEO of the company. *See id.* He also sat on the board of directors—which he chaired for a time. *See id.* In addition to Arnold Ott, James Eiszner served as vice president of marketing and apparently sat on the Ott I board of directors, as well. *See id.* In 1963, Alexander McFarlane—who was the chairman of the board of directors of Corn Products Company (CPC), a publicly traded company based in New York City—joined the Ott I board of directors. *See id.* McFarlane was quickly impressed by the Ott management team and in 1965 began to talk with Ott about the possibility of CPC acquiring Ott I and having Ott and Eiszner join the CPC management team. *See id.* As a result, Ott and Eiszner moved to New York (or New Jersey). *See id.* In New York, Ott worked closely with Harold Hellman, who was assistant to the CPC chairman. *See id.* Ott also occupied several high-level officer positions with CPC. *See id.* Eiszner went on to become CEO of CPC. *See id.* at 558. Harold Hellman may have been related to the mayonnaise Hellmanns, whose family business was bought by Bestfoods (of California) in 1932. Bestfoods acquired Rosefield Packing Company (makers of Skippy Peanutbutter) in 1955, and Bestfoods itself was acquired by CPC (then called Corn Products Refining Company and makers of Mazola Corn Oil, Karo Syrup, and Argo Cornstarch) in 1958. (Waste not. Want not.) In 1997, CPC split into two companies, CPC and Bestfoods. Bestfoods was then bought by Unilever in 2000.

11. Although phosgene was used as a poisonous gas in World War I and thus retains a dicey reputation, it is today widely used in the manufacture of pharmaceuticals.

12. Technically, CPC formed a subsidiary (hereinafter Ott II), which bought the assets of Ott I and assumed designated liabilities thereof. *See CPC Int'l, Inc.*, 777 F. Supp. at 557. But Ott I remained liable for all other liabilities, including those for wrongful acts such as environmental harms. *See id.* Ott I remained in existence and maintained liability insurance for three years under the new name Muskegon Chemical Company—but it did not operate as a business. *See id.* at 558. In the sale of assets transaction, CPC issued 75,300 CPC shares to Ott I in exchange for substantially all of the assets of Ott I. *See id.* at 557. This deal structure would later prove important since it left Ott I with nothing but an interest in its own parent company—and little or no cash despite having retained significant liabilities. *See id.* at 578. Presumably, the CPC shares were either distributed in kind to Ott I stockholders or sold and the cash so distributed.

13. White's mother always referred to the school as *that awful Dartmouth*, suggesting that its reputation for rowdiness—famously depicted in the movie *Animal House*—was well-established some time ago. *Cf. Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (wherein Daniel Webster famously stated during oral argument that it is “a small college. And yet there are those who love it.”), transcript of oral argument available at <https://www.dartmouth.edu/~dwebster/speeches/dartmouth-peroration.html> [<https://perma.cc/5VS6-TRKK>].

Chicago. He resigned from DuPont because the prospects of rising much further in the company seemed to be dim. In addition, with two daughters nearing college-age, moving to Michigan to take the Ott job would mean in-state tuition at the University of Michigan. I know all of this because White was my father-in-law.

In 1972, CPC sold the Ott facility to Story Chemical Company, a Georgia corporation.¹⁴ White resigned almost immediately thereafter, following a meeting with Story executives in which he was apparently presented with some sort of ultimatum to the effect that he would need to go along to get along. Thereafter, White was unemployed for more than a year. He nevertheless dressed in a classically-tailored suit every day of the workweek, most of which he spent in his home office. In 1973, White acquired a 60% interest in Webb Chemical Services Corporation in Muskegon Heights—which he operated as a model of environmental responsibility for the next eight years.

Meanwhile, back at Story Chemical, according to the district court opinion in *Bestfoods*, the company (as of 1974) was “beset by financial problems[] [and] abandoned regular use of the purge well system installed during the Ott II era to eliminate contaminants from the groundwater. This abandonment increased the spread of contamination migrating away from the site.”¹⁵

Story operated the facility until 1977, when it was adjudicated bankrupt.¹⁶ The Ott site was acquired by Cordova Chemical Company of California (a subsidiary of Aerojet-General Corporation) in 1976 or 1977 in cooperation with the Michigan Department of Natural Resources (MDNR) as part of an effort to salvage some value from the facility and to clean up the site.¹⁷ It was so operated until 1986.

Although *Bestfoods* arises under CERCLA, most of the events outlined here occurred before the enactment thereof in 1980. The Environmental Protection Agency (EPA) did not become involved in cleanup efforts until 1981—the same year that White died in a plane crash. And it was not until

14. This is according to the Supreme Court, whose use of the word *facility* suggests that the transaction may have been a conveyance merely of the site. See *Bestfoods*, 524 U.S. at 57. More likely, the transaction was a sale of the Ott business by a sale of assets (rather than a merger). No doubt the Court characterized the transaction as a sale of the facility because *facility* is the word used in CERCLA.

15. *CPC Int'l, Inc.*, 777 F. Supp. at 562.

16. See *id.*

17. The MDNR is now known as the Michigan Department of Environmental Quality (MDEQ). It is worth noting that Michigan was, at the time, the one and only state found by the federal EPA to be sufficiently vigilant and competent to handle its own environmental protection affairs without the assistance of the federal government. The intervention by the EPA in the efforts of the MDNR conjures the image in the movie *Dog Day Afternoon*, where the FBI intervenes in a hostage situation that seems to be well under control by the NYPD by displaying a badge much as one might display a cross to a vampire: *In hoc signo vinces*. The FBI agent might well have stated: “I am from the government, and I am here to help.” To add insult to injury, the MDNR was named as a defendant in *Bestfoods*.

1989 that the EPA sued CPC, Aerojet/Cordova, and Arnold Ott (who settled on the eve of trial), as well as MDNR.

The fifteen-day bench trial (in 1991) focused solely on whether CPC and Aerojet could be held liable in their capacities as parent corporations. The Dennis article appeared that same year. But it was not until 1998 that the Supreme Court handed down its decision in *Bestfoods*.

There was little doubt in the case that the subsidiary corporation (Ott) itself could be held liable under CERCLA for the cost of cleaning up the hazardous waste site. Indeed, the parties appear to have stipulated as much.¹⁸

In the absence of CERCLA, the question of *parent* liability would involve a straightforward application of the law relating to PCV. To be sure, PCV law itself is anything but straightforward. But CERCLA provides that liability extends to “any person who at the time of disposal of any hazardous substance *owned or operated* any facility”¹⁹ So the question is whether the statute means something *more* than or at least *different* from PCV.

Before *Bestfoods*, various courts had answered this question in various ways. In some cases, the courts applied PCV law—either as borrowed from the states or developed under federal common law. In some cases, the courts construed the phrase “owner or operator” independently under the statute. And in some cases, the courts did both. All of this is well documented in the Dennis piece, which had become a virtual bible on the subject for environmental litigators.²⁰

The trial court—the Western District of Michigan, Douglas W. Hillman USDJ (Senior)—held the parent corporation liable as an operator (under the statute) because of exerting power or influence over the subsidiary by actively participating in and exercising control over the subsidiary’s business during a period of hazardous waste disposal.²¹ While the court stated that statutory operator liability was broader than PCV, the court also stated that mere oversight consistent with investment relationship does not give rise to operator liability.²²

Although the court did not attempt to define the space between the two standards, it seems clearly to have held that operator liability may obtain in some cases even though liability under PCV would not obtain. Nevertheless, the court applied essentially the same standard (perhaps minus the requirement of inequity) in holding that the parent here was liable as an *operator* as that word is used in CERCLA.

18. See *CPC Int’l, Inc.*, 777 F. Supp. at 556.

19. 42 U.S.C. § 9607(a)(2) (2012) (emphasis added).

20. This is according to Villanova University School of Law alumnus Charlie Howland (VLS 1985), who litigated many such cases at the time and was in attendance at the Shachoy conference where this paper was presented.

21. See *CPC Int’l, Inc.*, 777 F. Supp. at 571–76.

22. See *id.* at 573.

Sitting en banc, the Sixth Circuit reversed, holding that statutory operator liability can obtain only by PCV and that the test for PCV under Michigan law had not been met.²³

The Supreme Court granted certiorari because of a conflict among the circuits. The Fifth and Sixth Circuits had ruled that a parent corporation could be held liable only on grounds of PCV. The First, Second, Third, and Eleventh Circuits had held a parent corporation could be held liable directly as an operator under the statute. And the Fourth Circuit, ever the renegade on such matters, had held that a parent corporation could be held liable only if it had authority to operate the facility.²⁴

As one might have predicted, the Supreme Court reversed the holding of the Sixth Circuit. (Why grant certiorari just to affirm a lower court?) In a unanimous opinion by Justice Souter, the Court sided essentially with the majority of circuits. The Court ruled that, although the Sixth Circuit was correct that a parent corporation could be held *indirectly* liable only on grounds of PCV, it was wrong that a parent corporation could be held liable *only* in this way since the parent corporation could have operated the facility itself.²⁵

According to the Supreme Court, no one challenged the holding by the Sixth Circuit that a case for PCV had not been established. Nevertheless, the Court noted—in a lengthy footnote—significant disagreement among courts and commentators over whether state or federal (common) law of PCV should be applied, citing only Dennis as clear authority for the idea that state PCV law should apply. Admittedly, the Sixth Circuit seems so to have held in *Bestfoods* itself, but it did so without any analysis.²⁶ Still, the Sixth Circuit's statement that state PCV law governed and (implicitly) that the standard thereunder had not been met must be seen as more than dictum under the circumstances.

So the Supreme Court was compelled to consider whether PCV was the exclusive route to parent liability under CERCLA. And but for the Dennis piece, the Court might have considered more seriously the possibility of affirmance. But because Dennis so cogently argued for a state-by-state approach under the Court's own *Kimbell Foods* test, the Court came face to face with the implications of reliance on PCV. In other words, Dennis may have helped induce the Court to rule as it did because of the prospect of dealing with the alternative—a morass of conflicting multi-factor tests developed by state courts—tests that are almost universally regarded as nebulous at best. So we cannot really say that the Court relied

23. See *United States v. Bestfoods*, 524 U.S. 51, 59–60 (1998).

24. See *id.* at 60 n.8.

25. The case was argued for the United States by Lois Shiffer, whom I got to know as a staff attorney at the Center for Law & Social Policy (CLASP) in Washington when I spent an intensive semester there as a law student in 1975.

26. See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir. 1997), *vacated sub nom.* *United States v. Bestfoods*, 524 U.S. 51 (1998).

on the Dennis piece in ruling as it did in *Bestfoods*. Still, “they also serve who only stand and wait.”²⁷

Incidentally, this story is quite consistent with the thesis advanced by my colleague Professor Todd Aagaard—at the same 2015 Norman Shachoy conference where I presented this paper—to the effect that the progress of environmental law since 1980 has depended on supplanting various state law theories (such as nuisance)—which operated inconsistently in addressing problems that were inherently interstate in nature—with federal statutory law.²⁸

In any event, the decision of the Supreme Court in *Bestfoods* focuses solely on *operator* liability under the statute. The essence of the Court’s decision is that the Sixth Circuit was wrong that PCV is the *only* way to hold a parent corporation liable because operator liability is an express and independent theory under the statute.

This result seems so obvious that one wonders how the Sixth Circuit could have gotten it wrong. Presumably, a parent corporation could be held liable on grounds of PCV even if the statute were utterly silent on the matter (assuming that the subsidiary is liable on some theory) since a parent can always be held liable on grounds of PCV. But the statute extends liability to anyone who is an *owner or operator* of an offending facility. These words must mean something. So they must mean something in addition to the possibility of PCV.

The phrase *owner or operator* is a minor variation on common usage. Even non-lawyers may refer now and again to someone who *owns and operates* a business. We all know what we mean when we say that Joe Blow owns and operates the local hookah bar or vape shoppe—or phosgene mill. Or do we?

Before we dig into what it means to *operate* a business or facility, we should pause to consider what it means to *own* a business or facility. It might mean merely to own the stock of a corporation that owns the facility. Or it might mean to own the facility itself—to be the name that appears on the deed or in a contract with a supplier or customer. This question was not before the Court. Nevertheless, the Court notes that Congress could not have intended to abolish the corporate veil in such a cavalier way.

The only question that was before the Court was whether the defendant, *Bestfoods*, could be held liable as an operator. But operator liability is its own can of worms. What exactly would it mean for a parent corporation to be an operator? Clearly, operator liability requires more than ownership of stock. Indeed, owner liability requires more than ownership of stock.

27. Thanks to John Milton for this insight.

28. See Todd S. Aagaard, *Environmental Regulation and Environmental Rights*, 61 VILL. L. REV. 385 (2016).

The Court could have answered this question—what it means to operate a facility (or business)—by reference to agency concepts or by riffing on what it means to participate in an activity to such an extent that one may be liable for the consequences.²⁹ Indeed, the Court toyed with this possibility in noting that a saboteur may qualify as an operator.³⁰

Rather than answer the question clearly posed, the Court resorted to the time-honored tactic of making up a new question to answer using its own dichotomy. According to the Court, the question is not whether the parent runs the *subsidiary*, but whether the parent runs (operates) the *facility*.³¹ But the answer to this question could almost be called off the wall. As the Court then stated: “The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are *eccentric* under accepted norms of parental oversight of a subsidiary’s facility.”³²

It is reasonably clear what the Court means by the word *eccentric* here. But it is nonetheless a strange word to choose rather than using some more conventional construction, such as *inconsistent with the corporate norm* or something similar. Again, it could well be that the Court wanted to be clear that the rule of the case would be seen as federal law and not the application of a borrowed state law standard.

Note also that this holding effectively moots the PCV question. By focusing the inquiry on operation of the facility, the Court renders the PCV question irrelevant. Although it remains possible to extend liability to the parent corporation by PCV, proving that the parent operated the facility to the extent of eccentricity overlaps little (if at all) with making out a classical case of PCV. Rather, it conjures an image of meddling more than manipulation.

In any event, having answered its own question, the Supreme Court engages in a little postmortem about how the lower courts went wrong. In other words, the Court sees this as its teachable moment.

According to the Supreme Court, the district court confused itself by focusing on directors and officers who wore multiple hats. (Perfectly normal. Nothing wrong with that.³³) But the Sixth Circuit overreacted by

29. See *Bestfoods*, 524 U.S. at 65; cf. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (holding that participation in securities fraud requires speaking to public).

30. See *Bestfoods*, 524 U.S. at 65; cf. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.) (holding Coast Guard liable for vandalism by drunken seaman even though owner of vandalized property could have prevented damage at less expense by installing lock and thus should have been denied recovery under Coase Theorem).

31. See *Bestfoods*, 524 U.S. at 68. I am reminded here of a question that White himself was quite fond of posing: Do you walk to school or carry your lunch?

32. *Id.* at 72 (emphasis added).

33. For example, a stockholder—even a controlling stockholder—may also be a creditor of the corporation—not to mention a director or officer thereof—despite the fact that such dual roles may raise questions about whether the stock-

limiting the concept of operator to a joint venture with the subsidiary. (Or so says the Supreme Court). It could be that an agent of the parent corporation—with only one hat to his name—pulled all the strings. Of course, one might say that a puppeteer wears yet another hat. But that might be an overuse of metaphor. The Supreme Court decides where the metaphors end.

To be fair, both the trial court and the Sixth Circuit saw their decisions twisted by the Supreme Court, presumably because the Supreme Court wanted to speak on the subject. The district court probably thought it had found operator liability (pretty much as thereafter defined by the Supreme Court) without the need to resort to PCV. And the Sixth Circuit probably thought the trial court had mistakenly done just that. So the Supreme Court had an opening to say that both lower courts were wrong.

On the other hand, the statement by the Supreme Court that the Sixth Circuit was correct in stating that PCV is the *only* way the parent can be held liable *indirectly* seems quite gratuitous. It could be intended to be tautological. PCV may refer simply to the *result* that the parent is liable for the sins of the child. But one could argue (and many would) that PCV refers to a particular theory of parent liability—however ill-defined it may be. In other words, there may be other theories. For example, the parent may have deputized the subsidiary as its agent for pursuing the business purposes of the parent.³⁴ Or the parent may have been in partnership with the subsidiary and, as a partner, would be held jointly and severally liable for any wrongful act of the partnership.³⁵ Indeed, the Sixth Circuit itself suggested that a parent could be liable if engaged in a joint venture with the subsidiary.

To be fair to the Sixth Circuit, while this is the only example it mentions, that does not necessarily mean that it held it was the only way the parent could be held liable indirectly. I would argue that PCV should be seen as a generic term that comprises all of these theories—including perhaps operator liability. The Dennis piece more or less proves the point in identifying at least five different approaches to PCV in five different circuits. Indeed, I would argue that PCV is not really a theory of liability at

holder as creditor has been unduly favored by the stockholder as stockholder. *See, e.g., In re Lifschultz Fast Freight*, 132 F.3d 339 (7th Cir. 1997); *see also* MODEL BUS. CORP. ACT § 6.40 (AM. BAR ASS'N 2003) (establishing test for determining whether stockholder debt is on par with outside creditor debt).

34. *See, e.g., A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981); Booth, *supra* note 8. *See generally* RESTATEMENT (SECOND) OF AGENCY § 343 (1958). Curiously, the Booth piece was not cited by Dennis (or the Supreme Court), although it may be the only law review article to address officer liability in any significant detail. Incidentally, the author is the daughter of William T. White.

35. *See* UNIF. P'SHIP ACT § 15 (1914); *cf. Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966) (suggesting that separately incorporated taxicabs might be liable for each other as partnership). *See generally* Richard A. Booth, *Partnership Law and the Single Entity Defense*, 18 STAN. J.L. BUS. & FIN. 1 (2012) (discussing in context of antitrust law idea that two or more corporations may function as partnership with each other).

all. Rather it is a remedy. Or more precisely a collection of remedies. One might even say that it is merely a descriptor for the *result* that a parent corporation is held liable for a harm or obligation that is primarily attributable to another corporation—usually a subsidiary but not always.³⁶

Nevertheless, I suspect that most practicing lawyers would say that it is one thing to argue PCV and quite another to argue that a subsidiary has been operated as the mere agent of the parent or as its partner or even as an undercapitalized independent contractor. In other words, most litigators would argue that the Supreme Court's statement that PCV is the *only* way to establish indirect liability is significant in that it forecloses the application of any other theory of indirect liability. But it seems unlikely that the Court would so blithely cut off so many lines of argument. It seems much more likely that the Court sees PCV as I do—as a collection of theories or as a mere description of the remedy.

If so, one might also argue that operator liability is just another example of PCV. And it may be that the Sixth Circuit saw it so. In other words, the Sixth Circuit may have reasoned that if operator liability applies, PCV will also apply. Although that may *almost always* be the case, operator liability is different in that the subsidiary need not be involved at all in an act giving rise to liability (except for the fact that it owns the facility). Thus, there may be some daylight between PCV and operator liability after all.

It is odd that lawyers and scholars and even judges so often lose track of the simple proposition that an actor is liable for his/her/its own acts

36. Yet another collection of similar theories is the doctrine of successor liability, whereby a corporation that buys the assets of a tortfeasor corporation without assuming the liabilities thereof may nonetheless be held responsible for such liabilities. *See, e.g.*, Knapp v. N. Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974) (noting bargain price suggests bad faith plan to avoid liabilities); Nissen Corp. v. Miller, 323 Md. 613 (1991); *see also* LaFountain v. Webb Indus. Corp., 951 F.2d 544 (3d Cir. 1991); Conway v. White Trucks, 885 F.2d 90 (3d Cir. 1989); Ray v. Alad Corp., 19 Cal. 3d 22 (1977); Franklin v. USX Corp., 87 Cal. App. 4th 615 (2001) (discussing product-line theory requiring virtual destruction of source of recovery); Van Nocker v. A.W. Chesterton Co. (*In re* N.Y.C. Asbestos Litig.), 789 N.Y.S.2d 484 (App. Div. 2005) (discussing continuity of enterprise theory). *But see* N. Shore Gas Co. v. Salomon Inc., 152 F.3d 642 (7th Cir. 1998) (applying de facto merger doctrine under CERCLA where offending business had been spun off from holding company), *overruled on other grounds by* Envision Healthcare, Inc. v. PreferredOne Ins. Co., 604 F.3d 983 (7th Cir. 2010); Polius v. Clark Equip. Co., 802 F.2d 75, 80 (3d Cir. 1986) (arguing that product-line theory is unprincipled because its application is limited to products liability claims). The district court in *Bestfoods* considered these theories in the initial trial but declined to rule thereon unless it became relevant to apportionment of damages. *See* CPC Int'l Corp. v. Aerojet-General Corp., 777 F. Supp. 549, 575 (W.D. Mich. 1991), *aff'd in part, rev'd in part sub nom.* United States v. Cordova Chem. Co., 59 F.3d 584 (6th Cir. 1995), *and aff'd in part, rev'd in part en banc sub nom.* United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997), *vacated sub nom.* Bestfoods v. Aerojet-General Corp., 524 U.S. 924 (1998). On remand, the United States argued that the CPC purchase of Ott I assets had constituted a de facto merger (presumably in part because the consideration was CPC stock). But given that CPC had divested itself of Ott, it would be odd to do so. And indeed, the trial court declined to do so. *See* Bestfoods v. Aerojet-General Corp., 173 F. Supp. 2d 729 (W.D. Mich. 2001).

that cause harm to third parties. A banana vendor who incorporates his one-man business and carelessly leaves discarded peels around his stand gets no protection from the corporate veil as an employee of his own corporation. He may not be liable as a stockholder, but he is liable (if he himself tends the stand) for the consequences of his own actions and inactions. And if a parent corporation uses—or, more precisely, *utilizes*—a subsidiary corporation as its agent to act on behalf of the parent, the parent is liable as if the parent did the deed. *A fortiori*, if the parent itself does the deed using subsidiary property, the parent is liable. As the Court noted, the parent may assume direct control of a subsidiary facility without the help or assistance or even permission of the subsidiary—just as a saboteur might do.³⁷

The point for present purposes—and the central thesis here—is that the Supreme Court in *Bestfoods* wanted to encourage the development of a unique body of federal law relating to parent–subsidiary relations in the context of CERCLA (if not elsewhere). So the obvious question is how has the law evolved in the meantime? Does PCV remain a frequently used remedy? Or has operator liability become the rule? I cannot say for sure, but it appears that PCV is alive and well and applied in some cases even though operator liability does not obtain.³⁸ Moreover, the courts continue to apply state law with regard to PCV.

Thus, *Bestfoods* seems ultimately to have been about semantics. Or is it heuristics? Or maybe semiotics? The case seems not to have made much practical difference. But I do not practice law. I profess law.

37. For some reason, it can be difficult to maintain the idea that a corporation is a discrete entity (or person) that can have the same legal relationships that other people can have. On the other hand, it can also be difficult to keep in mind that a corporation is nothing more than a collection of natural individuals who have bound themselves together in an elaborate, largely standard form contract. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

38. See *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212 (2d Cir. 2014) (PCV but no operator liability).