

CONSUMER NEWS

Cost-Cutting Schemes Could End up Costing Parent Corporations

By Jeremy LaMarche¹

The Supreme Court of Illinois recently handed down a decision that may force parent companies to be more cautious when implementing new budgetary, financial, and marketing schemes. Recently, the Court decided *Forsythe v. Clark USA, Inc.* and held that a parent company could be liable to a subsidiary's employee.² The Court stated that the employee must prove that the parent company directed or authorized the implementation of its subsidiary's budget while disregarding the discretion and interests of the subsidiary.³

In 1995, Clark USA, a holding company, decided to implement a strategic business plan whereby it would replenish its cash reserve by decreasing capital spending to minimum sustainable levels.⁴ In order to accomplish this, the Directors of Clark USA created a new budget for its subsidiary, Clark Refining, which was aimed at positioning the subsidiary corporation as a low cost refiner and marketer.⁵ The Directors of both the parent and subsidiary met several times in order to discuss the implementation of the new budget.⁶ Paul Melnick, who served as President of Clark USA as well as CEO of Clark Refining, oversaw the planning.⁷

In 1996 and 1997, plaintiffs Marguerite Forsythe and Eliza-

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² *Forsythe v. Clark USA, Inc.*, 2007 WL 495292 at * 12 (Ill 2007).

³ *Forsythe*, 2007 WL 495292 at * 12.

⁴ *Id.* at *2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

beth Szabla, as special administrators of the estates of their late husbands, filed suit against Clark Refining and other defendants.⁸ The plaintiffs later added the parent company, Clark USA, as a defendant.⁹ On March 13, 1995, the plaintiffs' husbands Michael Forsythe and Gary Szabla, two mechanics who worked at Clark Refining, were killed in a fire on the job.¹⁰ Other Clark Refining employees caused the fire when they attempted to replace a pipe's valve without first ensuring that the flammable materials in the pipe had been depressurized.¹¹ The plaintiffs alleged that Clark USA breached its duty of reasonable care when it implemented its budget strategy.¹² More specifically, the plaintiffs alleged that Clark USA breached its duty by forcing Clark Refinery to employ unqualified employees as maintenance mechanics in order to conform to the new budget strategy.¹³ After the close of discovery, the trial court granted summary judgment in favor of Clark USA.¹⁴ Subsequently, the plaintiffs appealed and the Illinois Appellate Court reversed and remanded the summary judgment ruling.¹⁵ Following that decision, Clark USA petitioned the Supreme Court of Illinois for leave to appeal, and the Court granted the defendant's petition.¹⁶

There were two issues in front of the Supreme Court of Illinois in *Forsythe v. Clark USA*.¹⁷ The first issue was whether a parent company could be held liable under a theory of direct participant liability for controlling its subsidiary's budget in a way that led to a workplace accident.¹⁸ The second issue was, if such a theory of direct participation liability is recognized, whether the exclusive-remedy provision of the Workers' Compensation Act immunizes a parent company from liability.¹⁹ The exclusive-remedy provision of

⁸ Forsythe, 2007 WL 495292 at * 2.

⁹ *Id.*

¹⁰ *Id.* at * 1.

¹¹ *Id.*

¹² *Id.*

¹³ Forsythe, 2007 WL 495292 at * 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Forsythe, 2007 WL 495292 at * 1.

¹⁹ *Id.*

the Act prohibits an employee from bringing an action against his or her employer if compensation is already provided under the Workers' Compensation Act.²⁰

Ultimately, the Supreme Court of Illinois held that direct participation liability is a valid theory of recovery under Illinois law.²¹ The Court stated that in order for a parent company to be held liable to a third party or an employee under this theory of recovery, it must be shown that the parent company mandated an overall business strategy and carried out that strategy through specific direction or authorization, surpassing the control exercised as a normal incident of ownership, in disregard for the interests of the subsidiary company.²² The Court further noted that the key elements of direct participation liability included a parent company's "specific direction or authorization of the manner in which an activity is undertaken" as well as foreseeability that an injury will occur.²³ Further, the Supreme Court of Illinois held that the exclusive remedy provision of the Workers' Compensation Act did not bar suit against a parent company under a theory of direct participation liability.²⁴ The Court affirmed and remanded the case back to the circuit court to determine whether the direct participation theory should be applied to these particular facts.²⁵

Prior to the Supreme Court of Illinois' decision in *Forsythe*, a parent corporation could not be held liable for the acts of its subsidiary unless the corporate veil could be pierced.²⁶ This only occurred when the parent company exercised "complete domination" over the subsidiary and its decision-making.²⁷ Under this theory, the party seeking to pierce the corporate veil must make a substantial showing that the corporation is really a dummy or sham for another dominating entity.²⁸ The decision in *Forsythe* will not do away with the re-

²⁰ Workers' Compensation Act, 820 Ill. Comp. Stat. 305/5 (1995).

²¹ *Forsythe*, 2007 WL 495292, at *8.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at *11.

²⁵ *Id.* at *12.

²⁶ Brooks, Edward & Walls. *Court Allows Another Way to Pierce the Veil*. Chi. Daily Law Bull., February 2, 2006, available at www.drinkerbiddle.com/.../74bac382-38f2-48c1-b9fc-06e9b0f8eca1/CourtAllowsAnotherWayToPierceTheVeil.pdf (last visited May 8, 2007).

²⁷ Brooks, Edwards & Walls, *supra* note 26.

²⁸ *Jacobson v. Buffalo Rock Shooters Supply Inc.*, 278 Ill.App.3d 1084, 1088 (Ill. App. Ct. 1996).

quirements of the corporate veil theory in Illinois, however.²⁹

The Supreme Court of Illinois stated in its opinion that the direct participation theory of liability will only give rise to a duty in “limited circumstances.”³⁰ The Court pointed out that the direct participation theory of liability is not like piercing the corporate veil where the liability of the subsidiary is the liability of the parent.³¹ Rather, this form of liability is assigned when the “parent’s direct participation” supersedes the discretion and interest of the subsidiary and creates conditions that lead to a dangerous activity such as limiting the budget of the subsidiary.³² However, the decision in *Forsythe* will make parent companies more vulnerable to potential liability for the control they assert over their subsidiaries.

As a result of the direct participation theory of liability, parent companies might find themselves entertaining lawsuits from plaintiffs other than employees of their subsidiaries. For example, this theory of recovery would likely allow a non-employee of the subsidiary to recover from a parent company if the individual happens to be injured while on the subsidiary’s job site or by a subsidiary’s employee.³³ Further, this theory of liability may be used in scenarios where poor financial decisions by the parent company cause financial injury to the subsidiary and ultimately to those with a financial interest in the subsidiary.³⁴

Among other things, the Supreme Court of Illinois has put parent companies on notice that the financial and safety consequences of their decisions should be considered and weighed prior to implementing any major cost-cutting schemes. Parent companies will no longer be able to fully direct the finances of a subsidiary while at the same time hiding behind the exclusive remedy provision of the Workers’ Compensation Act.

²⁹ Brooks, Edwards & Walls, *supra* note 26.

³⁰ Forsythe, 2007 WL 495292, at *12.

³¹ *Id.* at *11.

³² *Id.*

³³ Susan Condon. *Illinois Opinion Increases Liability Exposure of Parent Corporations*. CM Reports. (August 2005) available at http://www.clausen.com/dir_docs/firm_pubs/fab31a04-60ef-48ee-a615-f8a58736f65a_pdfdocument.pdf

³⁴ Kirk Hartley, Mindy Finnigan & Kevin Mueller. *Parent Companies—Safe, Or Not, When Bad Things Happen At Subsidiaries?* (April 2006). [http://www.butlerrubin.com/web/br.nsf/0/9365A27FF400AA7A86257145006D0F89/\\$FILE/w0022594.pdf](http://www.butlerrubin.com/web/br.nsf/0/9365A27FF400AA7A86257145006D0F89/$FILE/w0022594.pdf)

Real Change or Just Hot Air? From Statehouses to Capitol Hill, Politicians Begin to Talk Global Warming

By Thomas A. McCann³⁵

After years of public ambivalence and political sidestepping on the national stage,³⁶ global warming may at last become the subject of substantive legislation on Capitol Hill as the 2008 election approaches.³⁷

The signs of a political shift have been proliferating recently. Anyone who watched the 2007 Academy Awards saw most of the Hollywood stars eclipsed by former Vice President Al Gore and his Oscar-winning documentary about the phenomenon of global warming and what world governments can do to stop it, "An Inconvenient Truth."³⁸ Additionally, the millions of Americans who "sprang forward" to daylight savings time three weeks earlier than usual this March did so because Congress believes it will reduce carbon emissions and help the environment.³⁹ Also, the European Union in March signed the most ambitious governmental program yet to fight global warming, pledging to reduce EU member countries' greenhouse gas emissions by 20 percent below 1990 levels by the year 2020.⁴⁰ EU leaders said the bloc's 27 members would commit to a

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³⁶ Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 Colum. L. Rev. 503, 505 (March 2007).

³⁷ Hil Anderson, *Analysis: GOP Bandwagon on Greenhouse Gas*, United Press Int'l, Feb. 22, 2007.

³⁸ *Oscars for Al Gore Global Warming Film*, Ass'd Press, February 26, 2007, available at <http://www.cbsnews.com/stories/2007/02/26/entertainment/ap/main2514063.shtml> (last visited on May 1, 2007).

³⁹ Richard Cowen, *U.S. Changes Clocks to Help Environment*, Reuters, March 12, 2007.

⁴⁰ Carsten Volkery, *EU Reaches Historic Greenhouse Deal*, Spiegel Online, March 9, 2007, available at http://www.businessweek.com/globalbiz/content/mar2007/gb20070309_755477.htm?chan=top+news_top+news+index_global+business (last visited May 1, 2007).

30 percent reduction if other nations followed suit.⁴¹ In Europe, climate control is already a top-tier political issue, with politicians across the continent vying to be seen as the most “green.”⁴²

In Washington, at least four major bills to reduce carbon dioxide emissions are circulating Capitol Hill, and House Speaker Nancy Pelosi is demanding that a climate bill be passed by the summer.⁴³ All the bills propose a “declining cap-and-trade” system. Under that approach, an overall emissions limit would be established for certain industries.⁴⁴ Companies could then engage in emissions trading, that is—bidding, buying or selling permits—so each could continue to operate profitably while the overall level of pollutants would go down.⁴⁵ Over time, as the cap is lowered, permits would decrease in value or be removed from circulation.⁴⁶

The rival federal bills are still in the jockeying stage. A proposal by Sens. John McCain (R-Ariz.) and Joseph Lieberman (D-Conn.) includes an aggressive cap-and-trade program along with controversial provisions for advancing nuclear technologies.⁴⁷ A bill offered by Sens. Barbara Boxer (D-Calif.) and Bernie Sanders (I-Vt.) would aggressively reduce emissions to 80 percent of 1990 levels by 2050.⁴⁸ Another bill introduced in the Senate by Sens. Olympia Snowe (R-Maine) and John Kerry (D-Mass.) would amend the Clean Air Act to freeze U.S. carbon emissions in 2010 and use a cap-and-trade program to reduce them so that they are 65 percent below 2000 emission levels by 2050.⁴⁹ The bill also includes a requirement that the U.S. derive 20 percent of its electricity from renewable sources by 2050.⁵⁰ At the other end of the spectrum, an as-yet-unintroduced

⁴¹ *Id.*

⁴² Arthur Max, *Politicians Vying for “Green” Credential*, Ass’d Press, March 13, 2007.

⁴³ Karoun Demirjian, *Taking Climate Legislation to the Hill: 4 Major Bills Battle for Congress’ Support*, Chi. Trib., March 8, 2007, at A1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ S. 280, 110th Cong. (2007) (entitled the Climate Stewardship and Innovation Act of 2007).

⁴⁸ S.309, 110th Cong. (2007) (entitled the Global Warming Pollution Reduction Act of 2007).

⁴⁹ S. 485, 110th Cong. (2007) (entitled the Global Warming Reduction Act of 2007).

⁵⁰ *Id.*

plan from Sen. Jeff Bingaman (D-N.M.) ties emission reductions to gross domestic product and does not guarantee any reduction in emissions.⁵¹ Several plans reward firms for taking early action to curb emissions.⁵²

However, Congressional leaders say getting climate control legislation passed depends on support from the Bush administration, and a presidential veto may be likely.⁵³ The White House has long opposed any such emission cap program, even with provisions that allow industries to reduce the cost, arguing arbitrary limits could harm economic growth.⁵⁴ Despite the politicians' increased interest in global warming, enacting emissions controls has proved an uphill battle up to now; there has not been a new, overarching law on the subject since the Clean Air Act of 1990.⁵⁵

This flurry of Congressional bills could spell a change from recent U.S. policies toward global warming. Until now, the U.S. government did nearly nothing to reduce the emission of greenhouse gases within the nation's borders, relying mostly on collecting information on emissions levels and encouraging further research.⁵⁶ One of the United States' principle goals has been to aspire to an 18 percent improvement in greenhouse gas "intensity" between 2002 and 2012, with intensity measured as emissions per unit of gross domestic product.⁵⁷ However, the emissions goal is not a requirement and, even if met, would still mean large increases in greenhouse gas emissions by 2012.⁵⁸ Up to now, the U.S. government has devoted most of its action on climate change to research programs.⁵⁹ In 2005, the federal government appropriated more than \$5 billion for climate change programs and energy tax incentives, and it planned a 4.8 percent increase for 2006.⁶⁰ Congress also has appropriated nearly \$2 billion for the Climate Change Science Program, a multi-agency pro-

⁵¹ H. Josef Hebert, *Emission Caps Unlikely without Bush Help*, Ass'd Press, March 12, 2007.

⁵² Demirjian, *supra* note 43, at A1.

⁵³ Hebert, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ Demirjian, *supra* note 43, at A1.

⁵⁶ Sunstein, *supra* note 36, at 509.

⁵⁷ *Id.*

⁵⁸ *Id.* at 509-10.

⁵⁹ *Id.* at 510.

⁶⁰ *Id.*

gram to analyze the problem of climate change and propose solutions.⁶¹ In addition, the Energy Department is required to file annual reports of aggregate greenhouse gas emissions in the United States, as mandated by the United Nations Framework Convention on Climate Change.⁶² The latest report, released in February, found that greenhouse gases in the United States increased more than 16 percent from 1990 to 2005.⁶³

The vanguard on climate-control legislation up to now has not been the federal government, but the states, both individually and working as regional collectives.⁶⁴ In February, the governors of California, Arizona, Oregon, New Mexico and Washington pledged to set a regional target for lower emissions within six months, and a year after that, to create a regional cap-and-trade program to allow polluters to buy and sell greenhouse gas pollution credits.⁶⁵ Arizona Gov. Janet Napolitano told reporters: "In the absence of meaningful federal action, it is up to the states to take action to address climate change and reduce greenhouse gas emissions in the country. . . [w]estern states are being particularly hard hit by the effects of climate change."⁶⁶ In New England, a group of 10 northeastern states have signed the Regional Greenhouse Gas Initiative, in which they pledge to reduce global warming pollution from power plants 20 percent by 2019.⁶⁷ California, in particular, has passed far-reaching legislation on climate control, including enacting laws to reduce emissions of greenhouse gases from automobiles, with a 22 percent reduction target by 2012 and a 30 percent reduction target by 2016.⁶⁸ In 2006, California also enacted legislation that would require statewide emissions to be capped at 1990 levels by 2020—which would require a 25

⁶¹ *Id.*

⁶² Sunstein, *supra* note 36, at 510. See also United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 165.

⁶³ John Donnelly, *EPA Reports a Rise in Greenhouse Gases*, Boston Globe, February 21, 2007, available at http://www.boston.com/news/nation/washington/articles/2007/02/21/epa_reports_a_rise_in_greenhouse_gases/ (last visited May 1, 2007).

⁶⁴ Sunstein, *supra* note 36, at 511.

⁶⁵ Juliet Eilperin, *Western States Agree to Cut Greenhouse Gases*, Wash. Post, February 27, 2007, at A08.

⁶⁶ *Id.*

⁶⁷ *Maine Bill Outlines Carbon Cap-and-Trade Strategy*, Ass'd Press, March 8, 2007.

⁶⁸ Sunstein, *supra* note 36, at 512.

percent cut from the levels that would be expected without regulation.⁶⁹

The feasibility of these regional initiatives and the prospect that the laws will result in actual emissions reductions is debatable, but they do present a step in the right direction and can serve as a model for Congress as it seeks to pass meaningful legislation to combat global warming. Nearly a dozen U.S. energy companies have joined to form the United States Climate Action Partnership and have begun lobbying the federal government to institute strict standards for emissions reduction.⁷⁰ The President and Chief Executive of General Electric recently spoke out on the need for a national climate change policy and that the job should not be left to the 50 individual states.⁷¹ As the climate change issue gains more legitimacy among the business elite and the American people, the prospects for national legislation become more favorable. However, backers of the Congressional bills still face a thicket of obstacles before anything gets signed into law. Myron Ebell, director of energy and global warming policy at the Competitive Enterprise Institute, a conservative think tank, still very much likes his chances of striking down any such Congressional climate control legislation: "It's going to be very complicated, with a huge amount of political infighting. . . We think we have a very good opportunity to stymie everything so that nothing will emerge."⁷²

⁶⁹ *Id.*

⁷⁰ Demirjian, *supra* note 43, at A1.

⁷¹ Scott Malone, *U.S. Needs National Energy, Climate Policy*, Reuters, March 11, 2007.

⁷² Demirjian, *supra* note 43, at A1.