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Joslyn Manufacturing Co. v. T.L. James & Co.- Should the Sins of the Children Be Answered Upon the Heads of the Parents?

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Joslyn Manufacturing Co. v. T.L. James & Co.—Should the Sins of the Children Be Answered Upon the Heads of the Parents?

I. INTRODUCTION

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] which gave broad cleanup powers to the Environmental Protection Agency (EPA), and provided the mechanism to pay for that cleanup. One question that remains unanswered is whether a parent corporation should be held liable for the cleanup cost emanating from its subsidiary's unsafe disposal of hazardous waste. In *Joslyn Manufacturing Co. v. T.L. James & Co.*,[2] the Fifth Circuit held that as long as a parent corporation keeps its affairs strictly separate from those of its subsidiary, it cannot be held liable for cleanup costs under CERCLA.[3] The court found no significant indication of congressional intent to override the judicially created concept of limited liability for shareholders of corporations.[4] It further held that the facts of *Joslyn* did not justify piercing the corporate veil.[5]

This casenote initially will examine the background of CERCLA and the doctrine of limited liability against which the Fifth Circuit decided *Joslyn*. It will then discuss the *Joslyn* case and analyze the court's reasoning suggesting that the Fifth Circuit applied an unduly narrow test for determining whether a parent corporation is liable as an owner or operator of a facility. This note proposes a broader test that would hold a parent corporation liable under CERCLA any time the parent's control over its subsidiary is such that the parent could have monitored the hazardous waste disposal activities of the subsidiary.

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1. 42 U.S.C. §§ 9601-9675 (1988).
2. 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct 1017 (1991).
3. *Id.*
4. *Id.* at 82.
5. *Id.* at 83.

II. BACKGROUND

A. *CERCLA*

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act[6] (CERCLA). Congress designed CERCLA to "protect and preserve public health and the environment" by facilitating the cleanup of hazardous waste sites.[7] The act establishes the "Superfund," a monetary reserve that enables the EPA to "respond" to severe environmental situations.[8] The response can take the form of either "short-term 'removal' actions or long-term 'remedial' actions or both . . . ."[9] To prevent depletion of the Superfund, CERCLA allows the EPA to recover its response costs from responsible parties.[10] The term "responsible party" encompasses "[a]ny 'person' who is the 'owner' or 'operator' of a facility at the time of the disposal of a hazardous substance."[11]

CERCLA imposes joint and several liability on responsible parties.[12] The standard is strict liability.[13] These rules of liability manifest Congress's intent to impose broad liability upon all responsible parties for the cost of cleaning up unsafe hazardous waste disposal sites. Several courts, determined to implement this congressional objective, have imposed liability on corporate parents of subsidiary corporations responsible for improper hazardous waste disposal.[14] Each of those decisions

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6. 42 U.S.C. §§ 9601-9675.

7. United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

8. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 731 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987); *see also* 42 U.S.C. §§ 9604, 9641.

9. *Northeastern Pharmaceutical*, 810 F.2d at 731; *see also* 42 U.S.C. § 9604.

10. *Northeastern Pharmaceutical*, 810 F.2d at 731; *see also* 42 U.S.C. § 9607.

11. *Kayser-Roth*, 910 F.2d at 26 (footnote omitted); *see also* 42 U.S.C. § 9607(a)(2).

12. *Kayser-Roth*, 910 F.2d at 26; *Northeastern Pharmaceutical*, 810 F.2d at 731.

13. *Kayser-Roth*, 910 F.2d at 26; *Northeastern Pharmaceutical*, 810 F.2d at 731. Despite the judicial characterization of CERCLA liability as "strict," the act does provide for a few very limited defenses to liability, none of which is relevant to this discussion. 42 U.S.C. § 9607(b).

14. *See* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988); Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988); Colorado v. Idarado Mining Co., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578 (D. Colo. Apr. 29 1987); Idaho v Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986).

has required an exception to the rule of limited liability by which shareholders of corporations are usually protected.[15]

B. Limited Liability

1. Justifications for the rule of limited liability

Among the basic principles of corporate law is that the liability of corporate shareholders is limited to their investment in the corporation.[16] Courts and scholars view this rule as socially desirable for a number of reasons.

First, limited liability encourages investors to take risks that they would not otherwise accept.[17] Limited liability affects investors' decisions in two basic ways. It encourages the separation of ownership from control, thus promoting more efficient diversification of capital. Limited liability also promotes investment in "risky" but socially desirable enterprises.[18]

A corporation is a form of ownership that allows many investors to pool their capital resources in a common enterprise. Limited liability facilitates this accumulation of capital

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15. *Shore Realty Corp.*, 759 F.2d at 1052; *Mottolo*, 695 F. Supp. at 624; *Staco, Inc.*, 684 F. Supp. at 832; *Idarado Mining Co.*, 18 Envtl. L. Rep. at 20,578; *Bunker Hill Co.*, 635 F. Supp. at 672.

16. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985).

17. Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L REV. 986 (1986); Easterbrook & Fischel, *supra* note 16, at 97.

18. Easterbrook and Fischel further analyze the incentive to engage in risky but socially desirable activities. First they note that limited liability decreases shareholders' need to monitor the activities of the corporation and companion shareholders. Because each shareholder has less at risk (only the amount of her investment as opposed to her entire wealth under a rule of unlimited liability), and because no shareholder's individual liability is tied to the wealth of the other shareholders (as it would be if each shareholder were liable to the extent of her personal wealth), each shareholder has less incentive to monitor. Limited liability also provides an incentive for management to act efficiently, because limited liability makes free transfer of shares feasible. This, in turn, makes possible a "takeover," whereby a large investor attempts to gain control of a corporation whose poor economic performance the acquiror believes results from inefficient management. The acquiror then ousts existing management, replacing them with its own "efficient" managers. Thus, existing management has an incentive to perform efficiently to prevent such a takeover. Easterbrook and Fischel also note that limited liability facilitates the diversification of capital by shareholders and allows corporations to behave in ways that are not "risk averse." Easterbrook & Fischel, *supra* note 16 at 94-97.

by encouraging capital owners to relinquish control of their assets. Without a rule limiting liability, owners of capital would be unwilling to part with control of their assets.[19] An owner would not want to risk losing all of her assets in a venture in which she is not able to exercise a substantial degree of control. Limited liability allows an investor the benefits of diversifying[20] her holdings without the risks that would otherwise be associated with relinquishing control. Diversification allows firms to raise capital less expensively because they do not need to compensate investors for the risk associated with nondiversified holdings.[21]

Limited liability also helps overcome aversion to enterprise-specific risks. Because most investors are risk averse,[22] they will avoid socially desirable but risky investments. Liability limited to the amount invested in the enterprise encourages such investment by allowing an investor to minimize her risks by diversifying her investments.[23]

A second justification for limited liability is that it fosters efficient risk spreading among corporations and their creditors.[24] Limited liability shifts some of the risks of enterprise failure away from the owners (i.e., shareholders) and onto creditors. Such a shift of liability is desirable when the creditors are in a better position to monitor the corporation than are the shareholders.[25]

A third justification for the rule of limited liability is that it decreases the costs of dispute resolution.[26] The premise of this argument is that without a rule limiting liability, creditors

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19. Easterbrook & Fischel, *supra* note 16, at 90 (citing Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967)).

20. Diversification is beneficial because the failure of one enterprise does not destroy the entire wealth of the investor.

21. Easterbrook & Fischel, *supra* note 16, at 96.

22. A person is risk averse if she prefers a venture offering an assured return to a more risky venture offering an expected return (probability of return multiplied by its value) which is greater than the assured return. Note, *supra* note 17, at 988.

23. Easterbrook & Fischel, *supra* note 16, at 97.

24. Note, *supra* note 17, at 992.

25. Easterbrook & Fischel, *supra* note 16, at 94-95. While this can be an efficient allocation of risks when only voluntary creditors are involved, the same rationale does not apply to involuntary creditors, such as tort victims. Involuntary creditors can neither bargain for nor assess the risks of business failure. Note, *supra* note 17, at 992-96.

26. Note, *supra* note 17, at 997.

of a corporation would spend inefficiently large amounts of time and money trying to collect their receivables from individual shareholders. The individual shareholders would, in turn, sue other shareholders for their proportionate share of the liability. The result would be a complex and expensive apportionment of liability.[27] Limited liability reduces litigation costs by establishing a single, definite liable party.[28]

2. *Exceptions to the rule of limited liability*

Although shareholders' liability is generally limited in America, courts will, under exceptional circumstances, "pierce the corporate veil" to reach shareholders' assets.[29] Courts have articulated many different standards for determining when the corporate form will be disregarded and liability extended to shareholders.[30] In the sphere of parent/subsidiary veil piercing, courts base unlimited liability on theories termed the "'alter ego' theory, or the 'instrumentality rule,' or the 'mere agent' or 'adjunct' theory."[31] Of the factors considered for disregarding the corporate entity the most oft cited are: (1) inadequate capitalization of the corporation, (2) failure to observe corporate formalities, (3) failure to keep individual (shareholder) and corporate interests separate, (4) commingling of personal and corporate funds or diversion of corporate property, or (5) unjust or fraudulent use of the corporate form.[32]

At the heart of the grounds for piercing the corporate veil is the idea that the "corporation is something less than a bona

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27. *Id.*

28. *Id.*

29. *E.g.*, United States v. Jon-T Chem., Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied* 475 U.S. 1014 (1986).

30. David H. Barber has enumerated nineteen factors for consideration in piercing the veil. David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 374-75 (1981).

31. *Id.* at 397 (citations omitted). Mr. Justice Cardozo warned, "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) *quoted in* Anne F. Team, Glen v. Wagner: *Instrumentality Rule versus the Balancing Test in Piercing the Corporate Veil*, 64 N.C. L. REV. 1265, 1270, n.58 (1986).

32. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

fide independent entity."[33] Most of the grounds focus on the blending of corporate and shareholder operations. Not surprisingly the cases that have extended CERCLA liability to a corporate parent have done so on the theory that, because of some failure to adhere to corporate principles, the parents were *de facto* "operators" of the offending facility within the meaning of CERCLA.[34] A court should be no less willing to pierce the veil if, despite strict adherence to corporate formalities and a clean separation of operations, a limitation of liability based merely on the form of ownership would spawn injustice. *Joslyn Manufacturing* presented such a case.

III. *Joslyn Manufacturing Company v. T. L. James & Company*

A. Facts

In 1935, T.L. James & Company ("James Co."), C.A. Tooke and J.R. Hayes incorporated Lincoln Creosoting Company ("Lincoln"). Lincoln operated a creosoting recovery system in Bossier Parrish, Lousiana. Raw creosoting chemical leaked from treating cylinders to a sump pit beneath the system. Although Lincoln recovered some of the chemicals, the remainder leaked into an open ditch, from which they eventually made their way into the surrounding land areas and waterways.[35]

James Co. provided the initial capital for which it received 60% of Lincoln's common stock and all the preferred stock. Tooke and Hayes received 40% of the common stock, which they endorsed over as security for their unpaid capital subscription.[36] Since Lincoln never paid any dividends, James Co. controlled 100% of Lincoln's stock.[37] Lincoln's board of directors was initially composed of seven members: Mr. Tooke, Mr. Hayes and five persons associated with James Co. At the initial board of directors' meeting the board elected T.L. James president and made Mr. Tooke vice-president. In the mid-1940s G.W. James, who had succeeded his father as president of

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33. *Id.* (citing Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978)).
34. *See supra* note 14, and cases cited therein.
35. Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 81 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).
36. *Id.*
37. Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 228 (W.D. La. 1988), *aff'd* 893 F.2d (5th Cir. 1990).

Lincoln, bought out Hayes and replaced him on the board of directors with a former James Co. employee. Although the size and composition of the board of directors varied thereafter, never were fewer than 50% of the directors associated with James Co.

Throughout its existence, Lincoln held regular shareholders' and directors' meetings. Lincoln owned property separate from James Co. and "maintained its own employees, payrolls, insurance, pension system, and workman's compensation program. Lincoln filed its own tax returns."[38] In 1950 Joslyn Manufacturing Co. ("Joslyn") purchased Lincoln. Joslyn operated the plant for 19 years after which Kopers Company, Inc. purchased it. The property, after passing through five more owners, was subdivided.[39]

After the Lousiana Department of Environmental Quality ordered Joslyn to investigate and clean up the contaminated site, Joslyn filed a CERCLA action in the district court under section 113(b) of CERCLA.[40] Joslyn claimed that James Co. was liable as an "owner or operator" under title 42, section 9607 (CERCLA § 107(a)(2)). James Co. moved for summary judgment, arguing that Congress, in enacting CERCLA, did not intend to create an exception to the rule of limited liability. The district court granted James Co.'s motion.[41] Joslyn appealed.

B. The Fifth Circuit's Decision

The Fifth Circuit refused to make an exception to the rule of limited shareholder liability that would permit a court to hold a parent corporation responsible for the CERCLA liabilities of a subsidiary.[42] The court first noted that nothing in CERCLA indicated congressional intent to alter the court created rule of limited liability.[43] Judge Gee, writing for the court, went on to argue that the facts of the case did not justify "piercing the corporate veil."[44]

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38. 893 F.2d at 82.
39. *Id.*
40. 696 F. Supp. at 224.
41. *Id.* at 232.
42. The Fifth Circuit stated that it declined to follow the lead of several federal courts by reading CERCLA's definition of "owner or operator" broadly enough to reach parent corporations. 893 F.2d at 82.
43. *Id.*
44. *Id.* at 83.

The court wrote that "[t]he 'normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.'"[45] The court found the legislative history presented by Joslyn unpersuasive. Furthermore, Joslyn's contention that Congress intended to "hold those who profited from hazardous waste sites responsible for the cost of cleanup and a desire to effectuate a timely cleanup of these sites"[46] failed to persuade the court. Instead, the court held that "[w]ithout an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis."[47] Judge Gee noted that Congress had adopted a "control" test that was applicable under specific circumstances.[48] If Congress had intended a general change in the way courts determine liability, he argued, it knew how to express that intent.[49]

Having decided that common-law limited liability would be afforded under CERCLA, the court went on to determine whether, applying traditional concepts, the corporate veil should be pierced in this case. The court applied the test for veil-piercing which it developed in *United States v. Jon-T Chemicals, Inc.*[50] Under that test, "[v]eil piercing should be limited to situations in which the corporate entity is used as a sham to perpetrate a fraud or avoid personal liability."[51] The court went on to note that under this test, the degree of control required to pierce the corporate veil amounts to "total domination" of the subsidiary corporation.[52] Because Lincoln observed

45. *Id.* at 82-83, (citing Midlantic Nat'l Bank v. New Jersey, 474 U.S. 494, 501 (1986)).
46. *Id.* at 83.
47. *Id.*
48. *Id.* In the case of a facility which has passed into the hands of a state or local government because of foreclosure or similar action, CERCLA § 101(20)(A)(iii) defines an "owner or operator" as "any person who owned, operated, *or otherwise controlled* activities at such facility" immediately beforehand. 42 U.S.C. § 9601(20)(A)(iii) (emphasis added).
49. 893 F.2d at 83.
50. 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).
51. 893 F.2d at 83.
52. *Id.* at 84.

the requisite corporate formalities,[53] the court held that piercing the corporate veil was not warranted.[54]

In summary, the Fifth Circuit held that the common law rule of limited liability protected T.L. James Co. in this case. In the absence of express congressional direction, the Fifth Circuit refused to read the definition of "owner or operator" as sufficiently broad to encompass parent corporations. Moreover, the court held that this was not a proper case in which to pierce the corporate veil.

IV. ANALYSIS

The *Joslyn* court's narrow reading of the scope of CERCLA liability is contrary to the emerging trend in CERCLA cases. "Though the results have been mixed and some of the reasoning muddled, the trend in judicial decisions on this issues is . . . to give great deference to the statute's objectives and to impose liability on parent corporations and shareholders where appropriate to advance those objectives."[55] In this part, this note will critique the *Joslyn* court's departure from this trend. It will then suggest a theoretical basis for the imposition of liability on parent corporations for the improper disposal of hazardous wastes by their subsidiaries.

The *Joslyn* court refused to distinguish the imposition of liability on parent corporations under CERCLA from a similar imposition of liability when it arises out of an ordinary tort or contract dispute. In the context of hazardous waste disposal, limited liability affords parent corporations a degree of protection that is inappropriate to accomplish the aims of limited liability generally. Furthermore, Congress's intention that CERCLA impose liability broadly, to make those who profited from unlawful disposal of hazardous waste liable for its clean-up, provides a strong policy reason for limiting the application of the common-law doctrine of limited liability. Finally, the

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53. The court noted specifically that Lincoln kept its own books, held frequent shareholders' and directors' meetings, and kept daily operations separate; that those in most direct control of the operations of Lincoln—Tooke and Hayes—were not employed by James Co.; that Lincoln owned its own property, which was not used by James Co.; and that Lincoln filed a separate tax return, paid its own bills, and arranged its own employee benefits. 893 F.2d at 83.

54. *Id.* at 84.

55. Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 429 (1990).

Fifth Circuit's own characterization, in an earlier case, of the unique abilities of an owner-operator to bear the burdens imposed by environmental litigation[56] compels a reading of the terms owner and operator broadly enough to encompass all who have, by virtue of their status as owners, such unique ability.

A. Limited Liability is Inappropriate

The reasons outlined above[57] which justify limited liability are much less convincing in the context of a parent corporation, which controls a wholly owned subsidiary. When the shareholder upon whom liability is sought to be imposed is either a corporation or a shareholder in a closely-held corporation, many of the justifications for limited liability do not apply.[58] When the shareholder is a corporation that owns 100% of an offending subsidiary, the argument for piercing the corporate veil is even more compelling.

1. Accumulation of capital and risk taking

Limited liability is a means of encouraging investors to pool their capital. It lowers the risk of relinquishing control over capital by enabling an investor to invest in many different enterprises without risking her entire fortune on each enterprise over which she has no control.[59] The goal of accumulating capital is not served by single-owner corporations. Since one party owns and controls all the corporation's capital, there is no accumulation of capital such as justifies limited liability in the publicly held corporation.

Additionally, when the shareholder is a corporation itself, limited liability is not needed to overcome risk aversion. Assuming that the doctrine of limited liability will protect the individual shareholders of the parent, the parent corporation will not exhibit risk aversion when investing. Rather, to maximize shareholder wealth, it will invest in projects with positive net present value.[60] Indeed corporations will have an incentive to undertake *excessively* risky projects.

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56. *See infra* notes 86-94 and accompanying text.
57. *See supra* notes 16-28 and accompanying text.
58. Easterbrook & Fischel, *supra* note 16, at 109-111.
59. *See supra* notes 17-21.
60. Note, *supra* note 17, at 989.

> If limited liability is absolute, a parent can form a subsidiary with minimal capitalization for the purpose of engaging in risky activities. If things go well, the parent captures the benefits. If things go poorly, the subsidiary declares bankruptcy, and the parent creates another with the same managers to engage in the same activities. This asymmetry between benefits and costs, if limited liability were absolute, would create incentives to engage in a socially excessive amount of risky activities.[61]

2. *Risk spreading*

The argument against limited liability intensifies when the creditor is an involuntary creditor.[62] The rule of limited liability spreads risk efficiently only if the creditor is in a better position to bear the risk and is compensated for the higher level of risk he assumes. A corporation compensates its contract creditors for the risk they bear. For example, lenders charge an interest rate based on the risk that the principal may not be repaid. Risk is one factor that employees can consider when negotiating their salaries. Conversely, tort creditors have no opportunity to negotiate for compensation *ex ante*.

Moreover, allocating the risks of unsafe hazardous waste disposal to involuntary creditors, as compared to the corporate parent of an offending subsidiary, is inefficient. Efficient allocation of risks dictates that the party best able to 1) avoid the risk and 2) bear the risk should sustain that burden.[63] In the context of the large, publicly held corporation, logic suggests imposing some of the burden of risk on voluntary creditors. Such creditors are better positioned than individual shareholders to monitor and thus discourage corporate misfeasance, including unsafe discharge of hazardous waste; after all, each shareholder's investment is but a minute fraction of the corporation's total capital.[64] Because they are able to bargain

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61. Easterbrook & Fischel, *supra* note 16, at 111.

62. Involuntary creditors are tort creditors, as opposed to voluntary contract creditors. Contract creditors include lenders, vendors (who sell on a contract), and employees. *Id.* at 112.

63. Note, *supra* note 17, at 992.

64. Easterbrook & Fischel, *supra* note 16, at 105. As noted above, the ability of contract creditors to assess the risk and demand compensation for it increases the

for the risk of loss, contract creditors bear the risk as well as individual shareholders.[65]

Likewise, a parent corporation avoids and bears the risk of loss more efficiently than involuntary creditors. A parent corporation, especially one that has actual control over the board of directors of the subsidiary, is able to monitor the subsidiary very cheaply. Involuntary creditors, which in the context of hazardous waste disposal ultimately include the United States government via Superfund, must depend on "costly and sometimes inefficient regulation, licensing, and enforcement"[66] to monitor the activities of corporations.

A parent corporation efficiently bears the risk of loss due to improper hazardous waste disposal by purchasing insurance and allocating the cost of such insurance to its customers.[67] The immediate victims of unsafe hazardous waste disposal—those who use the resources spoiled by the waste—are not in a good position to bear the risks of loss. They are individuals with extremely high monitoring costs, which makes insurance difficult and expensive to obtain.[68] Although the government is arguably capable of bearing the risk and spreading the cost through increased taxation, the parent corporation is equally capable and can better pass on the costs to the customers who actually reap the benefits of the risk.[69]

3. *Costs of dispute resolution*

A clear rule holding a parent corporation liable for the cleanup of hazardous waste unsafely discharged by its subsidiary would not significantly increase the costs of dispute resolution.[70] Although attempting to sue each shareholder of a publicly held company would greatly increase the costs of dispute

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incentive of the corporation to avoid excessively risky behavior. *Id.* at 106.

Easterbrook and Fischel go on to argue "that the limited liability will never result in a socially excessive amount of risk taking in situations involving creditors." *Id.*

65. Voluntary creditors are able to bargain for a risk premium at a lower transaction cost than the shareholders. *Id.* at 95-96.

66. Note, *supra* note 17, at 993.

67. *Id.*

68. *Id.* at 996.

69. *Id.*

70. *Id.* at 997.

resolution,[71] when the only shareholder is a parent corporation, the cost of suing the parent may actually be less than the cost of suing the subsidiary.[72]

A bright-line rule of liability or non-liability would most effectively decrease the costs of dispute resolution.[73] However, if the parent corporation did not exercise some degree of actual control over the subsidiary, such a bright-line rule would less effectively serve the policy of placing liability on those in the best position to avoid the damage.[74]

B. Congressional Intent Indicates a Strong Preference for Corporate Liability

Although the rule of limited liability is generally applicable to federal statutes, "the Court looks closely ' "at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine . . . ." '"[75]

The courts of appeals have consistently given the language of CERCLA broad interpretation to ensure that the Congressional purposes of the act are met. In *United States v. Kayser-Roth Corp.*,[76] the First Circuit broadly construed CERCLA to hold that a parent corporation actively involved in the operations of its subsidiary could be held liable under CERCLA as an operator of the subsidiary's facility.[77] The First Circuit also construed CERCLA broadly in *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*[78] In that case the court "join[ed] the Second Circuit in proclaiming that '[they] will not

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71. *See id.*

72. *Id.*

73. *Id.*; *see also*, Gary Allen, *Refining the Scope of CERCLA's Corporate Veil-Piercing Remedy*, 6 STAN. ENVTL. L.J. 43 (1987) (arguing for a bright line rule of liability for all parent corporations any time their subsidiary would be liable under CERCLA).

74. *See infra* notes 86-95 and accompanying text.

75. United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988) (quoting Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986) (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981))).

76. 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

77. The court specifically declined to decide whether the parent would be liable as an owner because it could rest its decision on a determination that the parent was an operator. *Id.* at 28, n.11.

78. 805 F.2d 1074 (1st Cir. 1986).

interpret section 9607(a) in a way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise.' "[79] The Second Circuit made that statement in *New York v. Shore Realty Corp.*,[80] where it held that despite the absence of express statutory language, courts should apply CERCLA to current owners of Superfund sites, even though those owners did not own the property at the time of the hazardous waste disposal.[81] In holding that CERCLA applies retroactively, the Eighth Circuit stated, "Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect."[82] Courts have similarly established other vital principles of CERCLA law. For example, courts have held that liability under CERCLA is both strict and joint and several.[83] As the New Hampshire District Court held in *United States v. Mottolo*,

> [O]ne of CERCLA's expressed goals is to ensure 'that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.' This goal would be frustrated if the mere act of incorporation were allowed to impede the recovery of response costs, for a nonincorporated violator could avoid liability simply by changing company structure. Furthermore, the absence of explicit statutory language addressing the effect of incorporation, the Act's strict liability scheme, and the broad and encompassing categories of potentially responsible parties ineluctably lead the Court to the conclusion that CERCLA places no importance on the corporate form.[84]

The *Joslyn* court is alone in placing the corporate form above congressional intent. *Joslyn* would require Congress, in its quest to reach all responsible parties, to explicitly state that

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79. *Id.* at 1081 (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985)).

80. 759 F.2d 1032 (2d Cir. 1985).

81. *Id.* at 1045.

82. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-33 (8th Cir. 1986) *cert. denied*, 484 U.S. 848 (1987).

83. *See supra* notes 12-13 and accompanying text.

84. United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988) (citation omitted) (citing Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting United States v. Reilly Tar & Chem. Corp. 546 F. Supp. 1100, 1112 (D. Minn. 1982))).

in CERCLA cases corporate parents would not be afforded limited liability.[85] The purposes of limited liability do not require such loyalty to form over substance, and the purposes of CERCLA do not allow it.

C. *The Fifth Circuit's "Person in Charge" Test*

In *United States v. Mobil Oil Corp.*,[86] the Fifth Circuit Court of Appeals equated the owner-operator of a facility with the person in charge.[87] In that case, Mobil Oil Corporation sought an immunity that the Federal Water Pollution Control Act affords to the "person in charge" of a facility who reports an unlawful discharge of oil into the waters.[88] The court held that as the owner of the facility, Mobil had "power to direct the activities of persons who control the mechanisms causing the pollution," and "the capacity to prevent and abate damage." Accordingly Mobil Oil "must be regarded as [the] person in charge."[89]

Since the *Mobil Oil* decision, other courts have adopted the Fifth Circuit's language to determine whether an entity is an owner-operator under CERCLA. In *United States v. Northeastern Pharmaceutical & Chemical Co.*,[90] the court adopted the following language from *Mobil Oil* as the definition of owner-operator:

> The owner-operator of a vessel or a [f]acility has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the WPCA, such as the Mobil facility here, must be regarded as a "person in charge" of the facility for purposes of § 1161. A more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large

85. Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

86. 464 F.2d 1124 (5th Cir. 1972).

87. *Id.* at 1127.

88. *Id.* at 1126.

89. *Id.* at 1127.

90. 579 F. Supp. 823, 848 (W.D. Mo. 1984) *aff'd in part, reversed in part on other grounds*, 810 F.2d 726 (8th Cir. 1985), *cert. denied*, 484 U.S. 848 (1987).

> class of persons who are uniquely qualified to assume the burden imposed by it.[91]

Although the Fifth Circuit used this language to define a "person in charge," the court in *Northeastern Pharmaceutical* and other courts that have followed the Fifth Circuit's reasoning[92] have recognized that the characteristics that qualify a party for consideration as a "person in charge" make that party uniquely answerable to the demands of CERCLA. The objective of CERCLA is to protect the environment and to make those responsible for spoiling it pay for its repair.[93] The Fifth Circuit's *Mobil Oil* "person in charge" test furthers that objective without seriously impairing the policy behind limited liability. A "person in charge" rule for piercing the corporate veil in CERCLA cases would expose to liability only those parent corporations that are "uniquely qualified to assume the burden imposed by it."[94]

In order to impose liability on a parent corporation for the hazardous waste disposal of its subsidiary under a "person in charge" test, the court would have to find three conditions present: (1) that the parent held a position of control over the subsidiary that would provide the parent an enhanced capacity to discover the subsidiary's hazardous waste disposal; (2) that the parent had the power to direct the activities of persons who control the mechanisms causing the pollution; and (3) that the parent had the capacity to prevent and abate damage. Although this test is admittedly more rigorous than traditional veil-piercing theories,[95] it fully comports with the policy behind the doctrine of limited liability when the incentives created thereby are unnecessary. Moreover this test better responds to the congressional policy behind CERCLA than traditional veil-piercing theories.

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91. *Id.* (quoting *Mobil Oil*, 464 F.2d at 1127).

92. Colorado v. Idarado Mining Co., 18 ENVTL. L. REP. (Envtl. L. Inst.) 20,578 (D. Colo. Apr. 28 1987); Idaho v. Bunker Hill Co. 635 F. Supp. 665 (D. Idaho 1986). The court in *Bunker Hill* recognized that the test was designed to define a person in charge under the Water Pollution Control Act but stated, "[t]he court believes that the test outlined above may properly be employed to determine when a parent corporation becomes an owner or operator with respect to a subsidiary's facilities." *Id.* at 672.

93. *See supra* text accompanying notes 6-10.

94. *Mobil Oil*, 464 F.2d at 1127.

95. *See supra* text accompanying notes 29-34.

D. *Application to* Joslyn

Had the Fifth Circuit analyzed the facts of *Joslyn* under the "person in charge" test, it would have held James Co. liable under CERCLA.

At all times during James Co.'s ownership of Lincoln, the board of directors consisted of at least two persons who were associated with James Co. The board did not consist merely of persons elected by James Co., but of persons associated with James Co. in capacities other than their positions as directors of Lincoln.[96] The presence of these persons on the Lincoln board of directors would have been sufficient to give James Co. an enhanced capacity to discover Lincoln's hazardous waste disposal practices. James Co's 100% ownership of Lincoln would have given it the power to direct all of Lincoln's activities, including its hazardous waste disposal. Finally, complete control of the corporation would have made James Co. the only entity with any capacity to prevent and abate the damage caused by Lincoln's creosoting process.

As application of the "person in charge" test to James Co. illustrates, most parent corporations would be liable under that test. Any corporation that completely owns another will be exceptionally well positioned to control its subsidiary's activities, and to prevent and abate damage caused thereby. To argue that the parent is not liable because it kept its operations separate from the subsidiary and failed to make itself aware of its subsidiary's hazardous waste disposal activities when it had the capacity to do so is irrational. It is, in essence, an argument that the parent intentionally or negligently permitted the subsidiary to engage in environmentally destructive behavior merely because the parent wishes to be insulated from liability. When a parent corporation reaps the benefits of its subsidiary's actions, and has the capacity to control those actions, the parent corporation must accept the responsibility to either monitor and direct its subsidiary's hazardous waste disposal practices or accept liability for the damage caused thereby.

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96. Joslyn Mfg. Co. v. T. L. James & Co., 893 F.2d 80, 81 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

V. CONCLUSION

Piercing the corporate veil requires a balancing of the costs and benefits of limited corporate liability. In all cases in which the corporate veil has been pierced, the courts have found that the costs of extending the protections of limited liability outweighed the benefits.[97] Where a corporation is able to control and closely monitor the hazardous waste disposal activities of its subsidiary, the benefits of limited liability are minimal. The costs, however, include frustration of the purposes that CERCLA was enacted to accomplish. In *Joslyn*, the Fifth Circuit should have followed its decision in *Mobil Oil* and held that an owner, such as James Co., who is uniquely capable of preventing and controlling unsafe hazardous waste disposal by its subsidiary does not merit the protection of limited liability.

Grant M. Sumsion

97. Easterbrook & Fischel, *supra* note 16, at 109.