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PIERCING THE CORPORATE VEIL IN WORKERS' COMPENSATION CASES

Before workers' compensation legislation was enacted, only common law tort remedies were available to employees injured on the job.[1] Frequently, however, injured employees were left without remedies because their employers were not liable for injuries caused by unavoidable industrial accidents.[2] Even when employers were liable, the uncertainties and delays of litigation placed injured workers at a substantial disadvantage.[3]

With workers' compensation acts, legislatures attempted to address the inequities of common law remedies for injured employees by balancing the competing interests of employers and employees.[4] Under the legislative compromise each party surrenders certain advantages of the tort law system to gain other benefits for themselves and ultimately for society.[5] Employees surrender their right to collect damages in tort from their employers[6] for more certain albeit more modest remedies.[7] Employers, on the other hand, relinquish their

1. *See generally* A. MILLUS & W. GENTILE, WORKERS' COMPENSATION LAW AND INSURANCE 6-12 (1st ed. 1976). Prior to workers' compensation acts, a basic common law tenet prevailed: employers were liable to employees only for injuries caused by the employer's negligence. Employers could also be liable for the acts of third parties that caused workers' injuries under the respondeat superior doctrine. *Id.*

2. *See, e.g.*, State v. Industrial Comm'n, 92 Ohio St. 434, 450, 111 N.E. 299, 303, (1915) (attributing most industrial accidents to the inherent risk of employment because often no party is at fault).

3. W. MALONE, M. PLANT & J. LITTLE, WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS 38 (2d ed. 1980) [hereinafter cited as WORKERS' COMPENSATION]. In most cases both the facts surrounding the injury and the applicable law were uncertain. The witnesses, usually co-employees, were torn between loyalty to injured co-workers and fear of reprisal by employers. The expenses and delays of litigation often pressured injured workers into settling for less than the true value of their claims. *Id.* Additionally, an employer's position was inherently stronger than that of employees' because of the common law defenses of assumption of risk and contributory negligence. *See* Priestley v. Fowler, 3 M & W. 1, 150 Eng. Rep. 1030 (1837) (when workers voluntarily undertake the dangerous conditions of work, they cannot complain about injuries resulting from those conditions); Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809) (recognizing the defense of contributory negligence).

4. *See, e.g.*, United States Casualty Co. v. Hercules Powder Co., 4 N.J. 157, 162-63, 72 A.2d 190, 193 (1950) (act intended to accomplish economic reform in the legal rights and responsibilities of employees and employers).

5. *See* WORKERS' COMPENSATION, *supra* note 3, at 40.

6. A. LARSON, 2A THE LAW OF WORKMEN'S COMPENSATION § 65 (11th ed. 1982). The compensation remedy is the exclusive remedy for the employee against the employer if the injury falls within the act's coverage. *Id. See also* Campbell v. Waggoner, 235 Ark. 374, 375-76, 360 S.W.2d 124, 125 (1962) (exclusive remedy provisions of compensation act bar a common law suit for same injury); Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 639, 105 Cal. Rptr. 890, 899 (1973) (employee recovery under the act forecloses any other recovery against the employer). *But see* 2A A. LARSON, *supra* § 67.10. New Jersey, South Carolina, and Texas permit employees covered by their acts to choose between statutory and common law remedies. Thus under these statutes, an employee is not required to surrender his common law right to sue for full damages. *Id.*

7. *See, e.g.*, FLA. STAT. § 440.15 (1981) (limiting recovery for particular injuries). *See also* WORKER'S COMPENSATION, *supra* note 3, at 40.

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freedom from liability in cases in which they are not at fault[8] for limited but more certain liability.[9]

Workers' compensation statutes generally limit an employer's liability for employment-related injuries to the act's specific remedies.[10] Notwithstanding these statutory limitations on employer liability, injured workers can pursue common law remedies against third party tortfeasors.[11] Consequently, determining whether a party is an "employer" or a "third party" under the applicable act defines the limits of potential liability to injured workers.[12] Because most compensation statutes fail to define these terms,[13] courts applying them have reached inconsistent results.[14] Recently, courts have considered whether a parent corporation is a third party liable for injuries to its subsidiary's employees or whether it is an employer of the subsidiary's employees and thus immune from tort liability.[15]

For example, assume a wholly-owned subsidiary of a parent corporation employs the injured worker. The parent directly controls and monitors the work performed at the subsidiary's plant. In fact, the corporations are so economically integrated that in reality they function as a single economic enterprise, yet they remain legally distinct for tax benefits. If the worker's injuries arose in the course of his employment, workers' compensation benefits are clearly available from the subsidiary. Nevertheless, courts faced with similar facts disagree about the parent corporation's liability. Some courts have found the parent subject to tort liability as a third party tortfeasor while others have held it immune to tort liability as the worker's employer.[16] Those courts holding the parent liable as a third party recognize only the subsidiary as the injured worker's employer and adhere to strict corporate boundaries between affiliated companies in interpreting compensation acts.[17] This result, however,

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8. *See supra* note 1.

9. *See, e.g.,* FLA. STAT. § 440.11 (1981). Typically workers' compensation statutes provide that the statutory liability of an employer within the act is exclusive and replaces any other liability of the employer to third party tortfeasors or injured employees. *See id.*

10. *Id.*

11. *See, e.g.,* ARIZ. REV. STAT. ANN. § 23-1023 (1971 & Supp. 1971-1982); FLA. STAT. § 440.39(1) (1981); N.Y. WORKMEN'S COMPENSATION LAW § 29 (McKinney 1982). *See also* Davis, *Workmen's Compensation — Using an Enterprise Theory of Employment to Determine Who Is a Third Party Tort-Feasor,* 32 U. PITT. L. REV. 289, 289 (1971).

12. *See supra* notes 9-11 and accompanying text.

13. Davis, *supra* note 11, at 289. When statutes do provide definitions, they are too vague to be of practical value. *See, e.g.,* FLA. STAT. § 440.02(4) (1981). The statute defines an employer as "the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person." *Id.*

14. *See* Davis, *supra* note 11, at 289.

15. *E.g.,* Gulfstream Land & Dev. Corp. v. Wilkerson, 420 So. 2d 587, 588 (Fla. 1982).

16. *Compare* Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 314, 327 (C.D. Cal. 1980) (holding parent company and other subsidiary corporations of the worker's immediate employer were separate entities and entitled to immunity under Texas compensation law) *with* Harvey v. Fine Prod. Co., 156 Ga. App. 649, 650, 275 S.E.2d 732, 733 (1980) (holding the parent corporation to be the alter ego of its subsidiary and therefore immune to a suit by an injured employee of the subsidiary).

17. *See, e.g.,* McDaniel v. Johns-Manville Sales Corp., 487 F. Supp. 714, 716 (N.D. Ill.

may be inconsistent with the purpose of workers' compensation in today's industrial economy.

This note examines whether the tort immunity provided under workers' compensation for corporations whose employees suffer work-related injury should be extended to affiliated corporations. The note initially reviews various workers' compensation law tests and corporate law concepts used by courts to determine whether an employment relationship exists. Following a survey of the current judicial trend, the note analyzes the shortcomings and potential consequences of this trend. Finally, a proposal is offered for more appropriately balancing the overlapping policies of compensation and corporate law.

THE WORKERS' COMPENSATION THEORY

Workers' compensation statutes reflect a societal determination that consumers who enjoy the benefits of a product should ultimately bear the cost of injuries resulting from its production.[18] The ability to obtain insurance to cover the cost of work-related injuries allows businesses to treat compensation benefits as a fixed production cost.[19] Businesses include this fixed cost in the price of their products, forcing consumers ultimately to bear the cost of workers' injuries.[20]

Although workers' compensation permits employers to pass the cost of industrial accidents to consumers,[21] its primary purpose is to compensate workers in a speedy, certain and efficient manner.[22] The drafters of compensation legislation made proof of fault unnecessary to recovery for all employment-related injuries.[23] Whether an injured worker recovers under workers' compensation depends on the relationship of an accident to the worker's employment rather than an assigning fault.[24] Thus, if the employee can demonstrate that his injury arose out of his employment, compensation acts provide benefits.

1978) (rejecting arguments that the court should pierce the corporate veil and find that the parent corporation was plaintiff's employer); Gulfstream Land & Dev. Corp. v. Wilkerson, 420 So. 2d 587, 589 (when benefits of dividing a business accrue to an owner, fairness requires recognition of separate identities when an injured worker sues).

18. *See* WORKERS' COMPENSATION, *supra* note 3, at 39-40. *See also* Employer Mut. Liab. Ins. Co. v. Konvicka, 197 F.2d 691, 693 (5th Cir. 1952) (purpose of workers' compensation is to transfer economic loss caused by industrial accidents from worker to consuming public); Chambers v. District Court of Hennepin County, 139 Minn. 205, 209, 166 N.W. 185, 187 (1918) (basic principle underlying workers' compensation is that industry should pay for accidental injuries as a part of the cost of production).

19. *See* WORKER'S COMPENSATION, *supra* note 3, at 39.

20. *Id.*

21. *Id.* at 39-40. Since each competing enterprise in a given industry is uniformly affected, no producer gains any substantial competitive advantage or suffers any appreciable disadvantage because of compensation legislation. *Id.*

22. *E.g.*, DuPont de Nemours & Co. v. Frechette, 161 F.2d 318, 321 (8th Cir. 1947) (the purpose of workers' compensation is "to provide certain, effective, speedy, and inexpensive relief for injured workmen").

23. *See* WORKER'S COMPENSATION, *supra* note 3, at 39-40. Compensation acts guarantee immediate cash for injured employees. This benefit of workers' compensation is particularly important when the injured employee provides the family's sole income. *Id. See also* 1 A. LARSON, *supra* note 6 at § 2.10.

24. *See, e.g.*, Hamilton v. Shell Oil Co., 215 So. 2d 21, 22 (Fla. 4th D.C.A. 1968) (re-

Courts have developed several tests to determine whether an employment relationship exists.[25] Since most compensation acts only vaguely define the term "employee,"[26] early courts adopted the common law definition of employee used for vicarious tort liability purposes.[27] Under this common law test, control over the employee's work is the primary indication of an employment relationship.[28]

Subsequent courts, however, began to recognize that the purpose for which workers are defined as employees in compensation law is entirely different from the purpose for which workers are deemed servants under the vicarious liability doctrine.[29] The common law "servant" concept was developed to expand an employer's tort liability to third parties for injuries resulting from the workers' employment activities.[30] Conversely, compensation law is not concerned with providing recovery for third parties.[31] Rather, its purpose is to compensate employees for work-related injuries whether the employer, the employer's independent contractor or the employee himself causes the injury.[32] The right to control an employee's work is not a crucial element to employer liability under worker's compensation that it is under vicarious tort liability.[33] Consequently, many courts currently focus on the relationship between the nature of the claimant's work and the regular business of the employer to determine whether a worker is an "employee" under compensation statutes.[34]

In defining employment relationships courts look to the intent and purpose of workers' compensation.[35] The courts' task has become increasingly difficult because compensation legislation was enacted before the modern business con-

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lationship of employer-employee is essential to liability for compensation benefits) (citing Maige v. Cannon, 98 So. 2d 399, 401 (Fla. 1st D.C.A. 1957)).

25. *See, e.g.*, Askew v. Macomber, 398 Mich. 212, 225, 247 N.W.2d 288, 290 (1976) (applying the "economic reality" test to determine employment status); Caicco v. Toto Bros., Inc., 62 N.J. 305, 310, 301 A.2d 143, 145 (1973) (the "relative nature of the work" test determines employment status); Harris v. Seiavitch, 336 Pa. 294, 297, 9 A.2d 375, 376 (1939) (master and servant relationship establishes employment relationship under the act).

26. 1C A. LARSON, *supra* note 6, § 43.00. Typical of these broad, relatively useless definitions is the following: "[E]very person in the service of another under any contract for hire, express or implied." *Id. See, e.g.*, 5 IOWA CODE ANN. § 85.61(2) (West Supp. 1982-1983); 13 MINN. STAT. ANN. § 176.011(9) (West Supp. 1982-1983).

27. *See, e.g.*, Western Indem. Co. v. Pillsbury, 172 Cal. 807, 810, 159 P. 721, 723 (1916) (the word "servant" is generally synonymous with the word "employee"); Sun Cab Co. v. Powell, 196 Md. 572, 577, 77 A.2d 783, 785 (1951) (rules for determining "employer" and "employee" relationship under the act are the same used at common law for determining master and servant relationship).

28. *E.g.*, Weeks v. Dickert Lumber Co., 270 Ala. 713, 121 So. 2d 894 (1960).

29. *See* 1C A. LARSON, *supra* note 6, at § 43.42.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at § 43.50. The test examines the following elements: character of the claimant's work or business, relationship of claimant's work to employer's business, and continuity of claimant's work for the particular employer. *Id.* at § 43.52.

35. *See supra* notes 9-13 and accompanying text.

glomerate prevailed in the American economy.[36] Thus, courts must consider the overlapping doctrines of workers' compensation and corporate law in determining whether tort immunity should extend to a parent corporation for injuries to its subsidiary's employees.

THE CORPORATE ENTITY THEORY

A basic tenet of corporate law is that a corporation exists as a legal entity completely separate from its shareholders and affiliated corporations.[37] Neither shareholders nor affiliated corporations ordinarily bear legal responsibility for the corporation's liabilities and obligations.[38] Because the limited liability of corporate shareholders is regarded as one of the primary advantages of incorporation,[39] courts are hesitant to disregard the corporate entity.[40]

Courts will disregard the theoretical distinction between shareholders and corporate entities when the corporate structure has been used "to defeat public convenience, justify wrong, protect fraud or defend crime."[41] Although no uniform test exists for determining when courts will "pierce the corporate veil,"[42] the most widely used test has two prongs.[43] The first prong requires proving a unity of interests and ownership such that the separate identities of the corporation and the shareholders no longer exist in reality.[44] To satisfy the second prong, courts must find that observance of strict legal identities will lead to an inequitable result.[45]

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36. Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658 (6th Cir.), *cert. denied*, 444 U.S. 836 (1979).

37. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, 20 (1925). *See also* Kentucky Elec. Power Co. v. Norton Coal Mining Co., 93 F.2d 923, 926 (6th Cir. 1938); Exchange Nat'l Bank of Spokane v. Meikle, 61 F.2d 176, 179 (9th Cir. 1932); Wilson v. Crooks, 52 F.2d 692, 694 (W.D. Mo. 1931).

38. *See* Douglas & Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929).

39. *Id.*

40. *See* Douglas & Shanks, *supra* note 38, at 193-95.

41. *See, e.g.*, Henry v. Dolley, 99 F.2d 94, 97 (10th Cir. 1938) (citing Dunnett v. Arn, 71 F.2d 912, 918 (10th Cir. 1934)); Watson v. Bonfils, 116 F. 157, 165 (8th Cir. 1902); United States v. Milwaukee Refrig. Transit Co., 142 F. 247, 255 (E.D. Wis. 1905).

42. In certain circumstances, courts may disregard the distinction between a corporation and its shareholders or between affiliated corporations. Though courts have not recognized a single definitive test, some general guidelines have emerged. *See, e.g.*, United States v. Reading Co., 253 U.S. 26 (1919) (if the court finds the corporate entity is merely the instrumentality of an individual or another corporation, the corporate distinction will be disregarded); McCaskill Co. v. United States, 216 U.S. 504 (1910) (court will pierce corporate veil when corporate form has been used to work a wrong); Northern Sec. Co. v. United States, 193 U.S. 197 (1904) (corporate veil will be pierced when corporate form is used to evade a statute).

43. FMC Fin. Corp. v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980). Some courts require proof of a third prong—that the fiction of the corporate structure worked an inequity on the party trying to disregard that structure. *E.g.*, Saphir v. Neustadt, 177 Conn. 191, 210, 413 A.2d 843, 853 (1979).

44. *E.g.*, Automotriz Del Golfo de Cal. S.A. De C.V. v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957); Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673, 676 (1922).

45. Robert's Fish Farm v. Spenser, 153 So. 2d 718 (Fla. 1963); Computer Center, Inc. v. Vedapco, Inc., 320 So. 2d 404, 406 (4th D.C.A. 1975), *cert. denied*, 333 So. 2d 465 (Fla. 1976).

In the context of a parent-subsidiary relationship, a showing of the parent's control and domination of the subsidiary will satisfy the first prong.[46] To determine the extent of control and domination, courts examine a number of factors.[47] No combination of factors, however, has ever been established as controlling.[48] The lack of definitive guidelines is attributable to the case-by-case analysis courts use to determine the underlying relationship between affiliated corporations.[49] Under the second prong analysis, courts have traditionally focused on the effects on third parties[50] to determine whether inequity will result from upholding the corporate structure.[51] If the court determined that allowing affiliated corporations to maintain their separate legal identities would work an unjustice on a third party, the corporate veil would be pierced.[52]

In special circumstances courts will allow a corporation to pierce its own veil.[53] In determining whether a parent corporation should be permitted to pierce its own veil and avoid tort liability to its subsidiary's injured worker, courts must examine the interface between the piercing doctrine and compen-

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46. *See, e.g.*, Owl Fumigating Corp. v. California Cyanide Co., 24 F.2d 718 (D.C. Del. 1928), *aff'd*, 30 F.2d 812 (3d Cir. 1929). The parent must be shown to have actually exercised control over the subsidiary company. Proof of an opportunity to exercise control is inadequate. Atwater & Co. v. Fall River Pocahontas Collieries Co., 119 W. Va. 549, 560, 195 S.E. 99, 104 (1938). The basic inquiry is whether the controlling corporation treated the subsidiary corporation as a separate entity. Mere identity of stockholders, directors and other officers does not of itself indicate sufficient control to allow a court to collapse the corporate structure. Additionally, inadequate financing of a subsidiary corporation by a parent corporation is not by itself sufficient to permit a court to pierce the veil. *Id.* at 560, 195 S.E. at 104.

47. *See, e.g.*, Berkey v. Third Ave. Ry., 244 N.Y. 84, 88-89, 155 N.E. 58, 59 (1926). The court looked to intercompany loans and unpaid advances, identity of officers, and the adequacy of capitalization to determine the extent of the parent's control. Courts also examine stock ownership and identity of management and directors between corporations as evidence of control. Courts may place emphasis on the formalities used by the corporations. For example, separate bank accounts, payment of employees out of the appropriate accounts and non-interference by the parent's officers in the business of the subsidiary are formalities examined by courts.

48. *See supra* notes 42-45 and accompanying text.

49. *See* Ballantine, *supra* note 37, at 14-16.

50. *See, e.g.*, Feucht v. Real Silk Hosiery Mills, Inc., 105 Ind. App. 405, 411, 12 N.E.2d 1019, 1021 (1938) (when one corporation is organized and controlled by another corporation such that it is merely an instrument of that corporation, the corporate entity will be disregarded to prevent injustice and fraud on third parties).

51. *Id.* at 19. Whether the corporate veil should be pierced is determined by the good faith and honesty in the use of the corporate fiction for legitimate ends. *Id.*

52. *Id.*

53. *See* California Zinc Co. v. United States, 72 F. Supp. 591 (Ct. Cl. 1947). In *Zinc*, the federal government pursuant to the eminent domain doctrine claimed certain lands for building a dam. The plaintiffs, California Zinc Co. and its wholly-owned railway subsidiary, alleged that the operation of the mining company and the railroad company was a single integrated enterprise. The plaintiffs argued they were entitled to recover not only the value of the part of each company taken but also the consequential damage to the remaining part of the mining operation not taken by the government. The court allowed the corporations to pierce their own veils in determining the compensation due in the eminent domain proceedings. *Id.*

sation legislation.[54] If compensation acts reveal no policy against disregarding corporate identities, courts must inquire whether a corporate law policy prohibits a corporation from piercing its veil.

THE INTERPLAY OF WORKERS' COMPENSATION THEORY AND CORPORATE ENTITY THEORY

Generally when a plaintiff injured by the subsidiary's actions sues both the parent corporation and subsidiary, the parent asserts its separate legal status.[55] It does so to avoid being held legally responsible for its subsidiary's actions and having its assets made available to satisfy the subsidiary's obligations.[56] Conversely, the injured plaintiff seeks to collapse the corporate structures into a single entity and hold the parent corporation fully accountable for its subsidiary's operations.[57] These positions are reversed in workers' compensation cases when the subsidiary's injured employee brings a civil suit against the parent corporation. The parent corporation seeks to disavow its separate legal status and share the subsidiary's tort immunity as the statutory "employer" of the worker.[58] The plaintiff-employee seeks to have the separate legal identities upheld so that he can sue the parent as third party tortfeasor and avoid having his recovery limited to workers' compensation remedies.[59]

The likely success of an injured employee's tort suit against his immediate employer's parent corporation depends on the legal basis of the action. If the injured worker sues the parent corporation for its negligent act independent of the subsidiary's actions, the plaintiff faces the usual problems of proving negligence. If the injured employee, however, attempts to hold the parent corporation legally responsible for its subsidiary's action under agency theory, the employee faces a dilemma. The employee's suit is premised on the theory that the parent corporation so dominated the subsidiary that it should be held liable for the subsidiary's actions.[60] Yet, the more thoroughly the employee proves the parent's domination of the subsidiary, the more he shows that, in

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54. *See, e.g.*, Mingin v. Continental Can Co., 171 N.J. Super. 148, 150, 408 A.2d 146, 147 (1979) (issue is whether the separate operations must be treated as one amalgamated unit and no recovery beyond workers' compensation benefits may be obtained); Phillips v. Stowe Mills, Inc., 5 N.C. App. 150, 153, 167 S.E.2d 817, 820 (1969) (compensation statute did not extend tort immunity to parent corporation from injuries to subsidiary's employees).

55. *See, e.g.*, Zaist v. Olson, 154 Conn. 563, 227 A.2d 552 (1967) (stockholder and two affiliated corporations asserted legal distinctness); Bartle v. Home Owners Coop., Inc., 309 N.Y. 103, 127 N.E.2d 832 (1955) (parent corporation asserted legal separateness from subsidiary).

56. *See supra* notes 37-38 and accompanying text.

57. *See, e.g.*, Walkovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966) (plaintiff sought to collapse affiliated corporations into a single entity and hold that entity liable for the alleged damages).

58. *See supra* notes 6-11 and accompanying text. *See also* O'Brien v. Grumman Corp., 475 F. Supp. 284 (S.D.N.Y. 1979).

59. *See supra* notes 6-11 and accompanying text.

60. *See, e.g.*, Berkey v. Third Ave. Ry., 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926) (the parent corporation will be deemed the subsidiary's principal if it exercises enough domination and control over the subsidiary to satisfy the law of agency). *See* RESTATEMENT (SECOND) OF AGENCY § 217 (1958) [hereinafter cited as RESTATEMENT (SECOND)].

effect, the subsidiary has no separate identity.[61] Thus the parent corporation would share the subsidiary's immunity from suit under the compensation act.

The parent corporation likewise faces a dilemma irrespective of the employee's theory of recovery. The parent corporation deliberately chose to legally separate the operating units of its enterprise. Even if no separate economic entities exist in reality, the parent corporation has reaped the benefits of this organizational structure.[62] In contesting the worker's suit, however, the parent company that has enjoyed the benefits of separate corporations now requests the court to recognize a single entity for workers' compensation purposes.[63] If successful, the parent company will be able to prove an employment relationship sufficient to confer tort immunity.[64]

The Judicial Response

To resolve the conflicting claims of injured employees and parent corporations, courts must decide how the statutory term "employer" should be defined because compensation acts provide inadequate definitions.[65] Employment relationships in the parent/subsidiary context could be defined in two ways. Under the first approach, courts could focus on the economic relationship between the two corporations. If a high degree of economic integration exists between the corporations, the businesses could be treated as the single employer of all the workers in the economic enterprise. Alternatively, courts could adopt a joint employment test and focus on the workers' employment relationship with each corporation. Both approaches examine employment relationships, but the economic integration test differs from the joint employment test because the former focuses on employers while the latter focuses on employees.

Until recently, most courts have dealt with the problematic definition of "employer" in the parent/subsidiary context using the joint employment test.[66] Joint employment occurs when a common employee performs work for both corporations under the simultaneous control of both.[67] For a court to find

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61. *See, e.g.,* Coco v. Winston Indus. 330 So. 2d 649, 654 (La. App. 1976), *rev'd on other grounds,* 341 So. 2d 332 (1977) (control over the subsidiary's operations is sufficient to find an employment relationship between the parent company and its subsidiary's employees).

62. Separate corporations may be formed for a variety of reasons. The parent may have created them to enter a new market, introduce a new product or establish a new location. Additionally, the parent may have created subsidiaries to realize tax benefits. *See* I.R.C. § 11(b) (West Supp. 1983) (marginal corporate tax rates).

63. *E.g.,* Gulfstream Land & Dev. v. Wilkerson, 420 So. 2d 587, 590 (Fla. 1982).

64. Harvey v. Fine Prod. Co., 156 Ga. App. 649, 275 S.E.2d 732 (1980). The parent corporation was held the "alter ego" of the wholly-owned subsidiary company and immune to the tort suit of the subsidiary's employee. *Id.* at 650, 275 S.E.2d at 733.

65. *See supra* note 13 and accompanying text.

66. *See, e.g.,* Babineaux v. Southeastern Drilling Corp., 170 So. 2d 518 (La. Ct. App.) (claimant was hired by one affiliate but was subject to the control of two others; therefore joint employment existed), *appeal dismissed,* 382 U.S. 16 (1965); Del Peso v. H.A. Bar & Restaurant Co., 75 N.J. Super. 108, 182 A.2d 373, 380 (1962) (concluding that joint employment existed).

67. *See* 1C A. LARSON, *supra* note 6, § 48.40. Additionally, joint employment occurs when

joint employment no actual employment agreement need exist.[68] The worker must only perform duties for the common benefit of both companies.[69]

In *Gauss v. Hartwell Co.*,[70] the Massachusetts Supreme Court applied the joint employment test to determine if the parent as well as the subsidiary was a worker's employer. In *Gauss*, a subsidiary's employee was killed during a coal delivery to a customer of the parent corporation.[71] The employee's widow brought a tort action against the parent company for negligence.[72] Noting that the parent frequently used its subsidiary's employees for coal deliveries to its customers,[73] the majority held the worker to be jointly employed by both corporations and thus limited the widow's recovery to compensation benefits.[74] The court reached this conclusion without analyzing the economic relationship of the corporations.[75] The *Gauss* court's rationale demonstrates that the joint employment test focuses entirely on the work relationship between the employee and each corporation separately.[76]

No court addressed the issue of whether the economic integration of affiliated corporations could serve as a basis for defining employment status until *Boggs v. Blue Diamond Coal Co.*[77] The *Boggs* plaintiffs were widows of miners who worked for a wholly-owned subsidiary of the defendant parent corporation and were killed in a mining accident.[78] After receiving compensation benefits from the subsidiary, the widows sued the parent company for negligent operation of the subsidiary's coal mines.[79]

The parent company claimed tort immunity under the compensation act

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an employee performs work for two affiliated corporations, and the service for each employer is closely related to the work for the other corporation. *Id.*

68. *Id.* Moreover, there is no need to find the parent and subsidiary to be a single entity. In fact, the joint employment test implicity acknowledges the separate legal identities of the parent and its subsidiary. *Id.*

69. *See, e.g.*, Wabash Smelting, Inc. v. Murphy, 134 Ind. App. 198, 186 N.E.2d 586 (1962).

70. 338 Mass. 353, 155 N.E.2d 415 (1959).

71. *Id.* at 354, 155 N.E.2d at 415. The subsidiary was a coal retailer, and the parent corporation was a coal wholesaler. *Id.*

72. *Id.*, 155 N.E.2d at 415.

73. *Id.*, 155 N.E.2d at 416. The court noted that the parent company owned no trucks to deliver coal to its customers. The parent therefore contracted with transportation companies and its own subsidiary to make coal deliveries. *Id.*

74. *Id.*, 155 N.E.2d at 415. The court analogized the parent/subsidiary relationship to that of a principal contractor/subcontractor relationship. The court found the subsidiary's work to be the regular work of the parent's business and thus the parent company was immune. *Id.*, 155 N.E.2d at 416.

75. *Id.* at 355, 155 N.E.2d at 416. The court merely stated that the subsidiary's status as the corporate creation of the parent reinforced its conclusion. *Id.*, 155 N.E.2d at 416.

76. *See supra* notes 67-68 and accompanying text.

77. 590 F.2d 655 (6th Cir.), *cert. denied*, 444 U.S. 836 (1979).

78. *Id.* at 657.

79. *Id.* at 655. The parent corporation provided safety and engineering services to the subsidiary company, including advice and assistance in mine ventilation. The parent company negligently delayed the construction of improvements needed to minimize the accumulation of dangerous methane gas. It also authorized removal of existing ventilation and safety devices in order to open a new mine tunnel but concealed its action from federal mine inspectors. These negligent actions caused the explosion of methane gas that killed the miners. *Id.* at 658.

asserting that the two corporations produced coal as an integrated business and were in reality a single employer.[80] The parent corporation provided accounting, financial, and management services to the subsidiary and retained primary responsibility for safety within the mines.[81] Mining the coal was the subsidiary's sole function in the overall economic enterprise.[82] This integration of mining operations strongly indicated that the separate corporations were a single economic enterprise,[83] but the court refused to characterize the parent company as the deceased miners' "employer" under the act.[84]

Rather than analyzing the corporations' economic interrelationship, the majority held the parent corporation to its chosen form of operations.[85] The court noted that corporate law allows the parent company to divide its operations as it sees fit.[86] The majority added, however, that when operational benefits[87] accrue to the parent company, reciprocity requires upholding the corporations' separate legal identities in suits brought by a subsidiary's injured employee.[88] Further, the tort system should not deny recovery to injured employees simply because the alleged tortfeasor controls the workers' immediate employer.[89]

The *Boggs* majority emphasized that the parent corporation was not being held liable for the negligence of its subsidiary under the doctrine of respondeat superior.[90] Rather, the parent's failure to operate the mines safely was an independent act of negligence, and neither agency nor compensation law could insulate the parent against liability for its actions.[91] The *Boggs* decision to hold corporations to their separate legal forms for compensation purposes has become the current trend in both state and federal courts.[92] The *Boggs* holding, however, has been narrowed to apply only to cases in which a parent

80. *Id.* at 658.

81. *Id.* at 657-58.

82. *Id.*

83. Control over the subsidiary's operations and finances are very strong indications that the corporations constituted a single economic enterprise. *See also* NLRB v. Deena Artware, Inc., 361 U.S. 398, 403-04 (1960) (suggesting that corporations' affairs may be so intertwined that there are no distinct corporate lines).

84. 590 F.2d at 663. The court noted, however, several factors that supported the parent corporation's single economic enterprise position. First, the parent entered into sales contracts based upon coal to be produced at its subsidiaries' mines. Second, all coal produced by the deceased miners' subsidiary was sold and shipped at the direction of the parent. Third, all sales were invoiced to the parent company and deposited in its account. Fourth, all of the subsidiaries' expenses were paid by the parent company. *Id.* at 657.

85. *Id.* at 662-63. The court briefly analyzed existing corporate law and concluded the parent corporation should not be allowed to pierce its own veil. *Id.*

86. *Id.* at 662.

87. *See supra* note 62.

88. 590 F.2d at 662.

89. *Id.*

90. *Id.* at 663.

91. *Id.*

92. *See, e.g.,* Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 314 (C.D. Cal. 1980) (great weight of authority holds a subsidiary's employee may sue the parent corporation as third party); O'Brien v. Grumann Corp., 475 F. Supp. 284 (S.D.N.Y. 1979) (suit against parent corporation by subsidiary's employee not barred by Georgia's Workmen's Compensation statute); *see also* 2A A. LARSON, *supra* note 6, § 72.40.

company's independent acts of negligence cause injury to its subsidiary's employees.[93]

In *Love v. Flour Mills of America, Inc.*[94] the court set forth the rationale for narrowing the *Boggs* holding. In that case plaintiffs were injured when their immediate employer's grain elevator exploded.[95] After recovering compensation benefits, the injured workers brought negligence suits against the parent corporation. The plaintiffs alleged that the parent failed to provide a safe work place and failed to warn them of the dangers within the subsidiary's mill.[96] Citing *Boggs*, the court declared that a parent corporation which assumes separate and independent corporate status would not be permitted to share its subsidiary's tort immunity under the act.[97] The court added, however, that finding the parent to be a third party subject to tort liability only completed the threshold inquiry.[98] For the parent to be liable, its independent act of negligence unconnected to the management of its subsidiary must cause the injury to the subsidiary's workers.[99] The plaintiffs merely alleged that the parent corporation, in its capacity as a shareholder, should have recognized the hazardous conditions at the facility and instructed its subsidiary to correct them.[100] The court held the parent's actions as a shareholder were not independent acts of negligence and dismissed the case.[101] The *Love* court reasoned that holding the parent liable would have the effect of placing upon shareholders the employer's nondelegable duty to provide employees a safe work environment.[102] Moreover, such a holding would have the anomalous effect of treating corporate shareholders as employers and then refusing to grant them employer immunity under the compensation act.[103]

Relying on *Boggs*, the *Love* court failed to consider the economic integration between the corporations as a means of determining employment relationships under the compensation statute.[104] The *Boggs* analysis starts with the premise that corporate identities will be upheld for compensation purposes.[105] This approach has not been uniformly adopted by all states.[106] Some courts will pierce the corporate veil whether the injured employee is suing the parent in

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93. *See* Samaras v. Gatx Leasing Corp., 75 A.D.2d 890, 428 N.Y.S.2d 48 (1980).

94. 647 F.2d 1058 (10th Cir. 1981).

95. *Id.* at 1059.

96. *Id.*

97. *Id.* at 1062.

98. *Id.*

99. *Id.*

100. *Id.* at 1063. The plaintiffs asserted that since the parent owned other grain elevators and companies operating similar mills, it should have been aware of the dangerous conditions at the plaintiffs' mills. *Id.*

101. *Id.*

102. *Id.* Thus, in *Love* the lack of duty to the subsidiary's employees, not immunity conferred by a compensation act, spared the parent company from liability.

103. *Id.*

104. *Id.* at 1062. The court cited *Boggs* and summarily held the companies to their separate corporate structures. *Id.*

105. *See, e.g.*, Choate v. Landis Tool Co., 486 F. Supp. 774 (E.D. Mich. 1980); Buchner v. Pines Hotel, Inc., 87 A.D.2d 691, 448 N.Y.S.2d 870 (1982).

106. *See* 2A A. LARSON, *supra* note 6, § 72.40.

negligence for its own actions or under respondeat superior for its subsidiary's actions.[107]

In *Beck v. Flint Construction Co.*[108] the court refused to hold affiliated corporations to their strict legal forms.[109] The *Beck* plaintiff suffered a serious injury on land jointly used by the parent and subsidiary corporations.[110] The parent corporation owned the land and was plaintiff's immediate employer.[111] After successfully claiming workers' compensation, the employee brought a negligence suit against the subsidiary.[112] The suit alleged that the subsidiary, as a joint occupant, exercised control over the premises and breached a duty to treat the plaintiff, worker-invitee, with reasonable care.[113]

The employee thus found himself in the classic dilemma.[114] If he did not allege the subsidiary corporation to be the alter ego of the parent company, then no evidence existed that the subsidiary exercised control over the premises or had any duty to keep the premises safe for the parent's employees.[115] Alternatively, if plaintiff relied on the alter ego theory, the subsidiary would share the parent's immunity under the compensation statute.[116] The court therefore upheld summary judgment for the subsidiary corporation.[117]

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107. Beck v. Flint Constr. Co., 154 Ga. App. 490, 268 S.E.2d 739 (1980).

108. *Id.*

109. *Id.* at 492, 268 S.E.2d at 741.

110. *Id.* at 490, 268 S.E.2d at 740. The subsidiary occupied four offices as a tenant in the parent's building. *Id.*

111. *Id.* at 491, 268 S.E.2d at 740.

112. *Id.*

113. *Id.*

114. *Id.* at 492, 268 S.E.2d at 741.

115. *Id.*

116. *Id.* at 492-93, 268 S.E.2d at 741. *See also* GA. CODE ANN. § 114.103 (1974).

117. 154 Ga. App. at 493, 268 S.E.2d at 741. The *Beck* holding, however, does not apply to cases in which the parent clearly has an independent duty to the injured worker. For example, consider the case of a parent corporation that manufactures machines for its own use and for sale to other non-affiliated corporations. If the parent corporation installs one of its machines in a wholly-owned subsidiary, the parent corporation has an independent duty to each employee of the subsidiary for their machines.

The products liability doctrine adds some policy considerations that are not present in the normal workers' compensation case. First, courts have found that consumers of products need special protection against defects in those products. Second, courts generally agree that consumers of a product should bear the cost of compensating consumers injured by that product through increased prices. Courts therefore impose strict liability on companies that manufacture defective products which cause injury. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 127 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *see generally* W. PROSSER, LAW OF TORTS, 657-58 (4th ed. 1971). This stricter standard of liability might well be applied to the parent machine manufacturer that installs a defective machine in its subsidiary's plant, resulting in worker injury.

When the user of the product is the employee of the manufacturer, a special situation arises. If the employee is injured using his employer's product while not on the job, he will recover on the same theory as any other consumer would. If, however, the employee is injured on the job using a machine manufactured by his employer, courts disagree about limiting his recovery to workers' compensation benefits. Some courts allow a products liability suit notwithstanding compensation benefits. These courts reason that the worker's employer occupies a dual capacity, as the statutory employer and the manufacturer of machines. They allow workers to sue the employer under this second capacity. These courts would clearly

Although the *Beck* court indicated that it would allow parent and subsidiary to disregard their separate corporate identities, that court, like the *Boggs* and *Love* courts, failed to examine carefully the economic integration of the corporations. *Coco v. Winston Industries, Inc.*[118] illustrates that a minority of courts will analyze the economic integration of affiliated corporations even in suits involving an independent act of negligence by the parent corporation. The plaintiff, in *Coco*, was employed by Sherwood Homes, Inc., the wholly-owned subsidiary of Winston Industries, Inc.[119] After sustaining injuries, the worker brought a tort action against Winston alleging that it had negligently designed and installed a hazardous saw in its subsidiary's place of business.[120] To resolve Winston's claim of tort immunity as the statutory "employer" of the plaintiff, the court applied a "nature of the work" test.[121] Under this test, if the claimant is pursuing the trade, business or occupation of the parent corporation at the time of injury then the immunity provision bars the tort suit.[122] Noting the degree of economic integration between Winston and Sherwood Homes, the court concluded these corporations were mere alter egos of one another.[123] Thus, when the worker was performing work for the subsidiary corporation, he was also performing the parent's business.[124] The court therefore ruled Winston was plaintiff's statutory employer and dismissed the case.[125]

The above cases present a variety of factual situations, but the basic issue dividing the courts is whether corporations should be permitted to disregard their own legal identities and assume a single identity as a statutory employer under the acts. Courts permitting corporations to pierce their veils realize that the corporate entity theory and the piercing doctrine do not necessarily remain viable in workers' compensation cases. In contrast, courts following *Boggs* strictly apply these concepts in compensation cases. The latter approach, however, has serious flaws.

Inadequacies of the Boggs *Holding*

The intent of the *Boggs* holding is to preserve employees' common law rights to sue those responsible for negligent acts.[126] No strong compensation

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allow a subsidiary's employee to sue the parent corporation as the manufacturer of the machine. A complete discussion of employers' dual capacity is beyond the scope of this note and it is assumed that dual capacity of an employer is not at issue. For a discussion of the dual persona doctrine see 2A A. LARSON, *supra* note 6, § 72.83.

118. 330 So. 2d 649 (La. Ct. App.), *rev'd on other grounds*, 341 So. 2d 332 (1976).

119. 330 So. 2d at 652.

120. *Id.*

121. *Id.* at 653-55.

122. *Id.*

123. *Id.* at 654.

124. *Id.*

125. *Id.* at 667.

126. *Boggs*, 590 F.2d at 655 (1979). The court noted that the workers' compensation legislation is not intended to abrogate existing common law tort remedies for workers. Rather, its purpose is to provide social insurance to compensate victims of industrial accidents because the common law rights of injured workers are inadequate. Because workers' com-

policy exists which mandates destroying either statutory or common law rights against third party tortfeasors.[127] Nevertheless, the benefits and limitations under compensation statutes are predicated on the employment relationship.[128] Thus, identifying the employment relationship is the initial step in determining employer immunity from tort liability under workers' compensation.

The *Boggs* analysis, however, prevents a parent corporation from proving an employment relationship exists with the injured employee of its subsidiary.[129] Under *Boggs*, courts hold affiliated corporations to their separate legal forms without examining the degree of economic integration between them.[130] Yet the more economically integrated the corporations, the more likely it is that an employment relationship exists between the injured worker and the parent corporation.[131] Moreover, when the parent company actually controls the subsidiary, it directly controls the employment of the worker.[132] Control over the worker is a traditional factor courts have weighed in determining the employment relationship.[133] *Boggs* summarily restricts such an inquiry[134] by refusing to pierce the corporate veil in compensation cases.

The strict application of *Boggs* not only fails to provide an adequate test for determining employment relationships, it also leads to poorly reasoned cases. Consider the following example. An employee of a small wholesale manufacturer is injured by an assembly-line machine at the manufacturer's place of business. Prior to the injury, a competing corporation purchases all of the wholesale manufacturer's stock, making it a wholly-owned subsidiary. Subsequently, the parent corporation effectively controls the operations of its subsidiary by providing all of the subsidiary's financial, accounting and engineering services. The parent also supervises the maintenance of its subsidiary's machines, although the maintenance is actually performed by the subsidiary's employees. The subsidiary's liability to the worker remains un-

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pensation benefits have remained low, courts have liberally construed the coverage provision of the acts while narrowly construing the immunity provisions. *Id.* at 660-61.

127. *See* 2A A. LARSON, *supra* note 6, § 72 (1976).

128. *See id.* § 2.10.

129. *See supra* notes 86-90 & 106-107 and accompanying text. The parent corporation would still be able to prove that it had a separate employment relationship independent of the subsidiary. *See supra* notes 70-76 and accompanying text. If the court applies a strict control test, however, a parent corporation will probably be unable to demonstrate control over the subsidiary's employee when the corporate structure is well-developed and the worker has a low position within that structure. For a summary of the control test used by many courts, see RESTATEMENT (SECOND), *supra* note 60, § 217.

130. *See, e.g.*, Gigax v. Ralston Purina Co., 136 Cal. App. 3d 591, 186 Cal. Rptr. 395 (1982). The court specifically noted that compensation statutes do not address the problem of whether a parent corporation is immune from tort action by its subsidiary's injured employees. The preeminent factor to be considered, however, is the right of control. Thus, the issue of extended immunity requires a factual determination. *Id.* at 598-600, 186 Cal. Rptr. at 399-400.

131. *See, e.g.*, Nichols v. Uniroyal, Inc., 399 So. 2d 751 (La. Ct. App. 1981). The more integration between corporations, the more likely the operations of both are controlled by a centralized management.

132. *Id.*

133. *See supra* note 26-28 and accompanying text.

134. *See supra* notes 105-107 and accompanying text.

changed notwithstanding the merger. Yet, under *Boggs*, the worker could bring a tort action against the parent for its negligence in not protecting its subsidiary's employees from machine defects.

Increasing the parent's liability simply because of a merger seems inappropriate for two reasons. First, the nature and risk of the employee's work have not changed. Second, by overseeing the safety of the subsidiary's operations the parent corporation is performing the duties of an employer. Given the objectives of compensation legislation,[135] permitting employees to sue an affiliated corporation that negligently performs employer functions seems anomalous since the worker could not sue his immediate employer for similar negligence.[136] Some legislatures have reconciled this anomaly by extending immunity to entities that perform an employer's function.[137] The *Boggs* holding rejects this approach. The parent cannot assume the identity of the subsidiary regardless of the benefits provided to the subsidiary's employees.[138] Under *Boggs*, corporate form rather than economic substance becomes all important.

Consequences of the Current Trend

The current trend will provide less incentive for affiliated corporate employers to settle promptly workers' compensation claims.[139] For example, a parent corporation that could be liable to the subsidiary's injured employee as a third party tortfeasor, may well decide to contest the workers' compensation claim and litigate the employment issue. If the parent is found to be a statutory employer, then it shares the subsidiary's immunity from a subsequent tort action.[140] Litigating the employer issue in a compensation proceeding

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135. *See* THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION, THE REPORT OF THE NATIONAL COMMISSION ON STATES' WORKMEN'S COMPENSATION LAWS 35 (1972). The four basic objectives of a modern compensation program are as follows: (1) broad coverage of work-related injuries and diseases; (2) substantial protection against interruption of income; (3) providing sufficient medical care and rehabilitation services; and (4) encouraging safety. *Id.*

136. *Id.* at 52.

137. *See, e.g.*, FLA. STAT. § 440.11(2) (1981) which provides:

> "An employer's workers' compensation carrier, service agent, or safety consultant shall not be liable as a third-party tortfeasor for assisting the employer in carrying out the employer's rights and responsibilities under this chapter by furnishing any safety inspection, safety consultative service, or other safety service incidential to the workers' compensation...."

Id.

138. *See Boggs*, 590 F.2d at 655.

139. *See* 3 A. LABSON, *supra* note 6, at § 82.00. The vast majority of compensation claims are disposed of by agreement, without any contest at the administrative or at the judicial level.

140. The parent corporation could pressure a worker into waiving his tort rights by litigating the course of employment issue, thus threatening the worker with no recovery at all. A problem, however, with this approach is that the doctrines of collateral estoppel or res judicata could be applied at the tort trial if the parent loses at the administrative level. If the conventional elements of res judicata are present, a prior decision or finding on any relevant issue in a compensation proceeding is res judicata as to the same issue in a subsequent suit at law to recover for the same injury or death. This rule applies whether the effect is to defeat the civil suit or to defeat a a defense to the civil suit. This rule has been

undercuts the workers' compensation objective to produce prompt and adequate indemnification to the injured employee.[141] Additionally, this litigation burdens the workers' compensation administrative system and increases the cost of administering benefits.[142]

The *Boggs* holding also provides an incentive for the parent corporation to merge and operate subsidiaries as divisions rather than as separate corporations.[143] The strength of the incentive to merge depends on whether the industry is labor[144] or capital[145] intensive and whether other benefits will arise from operating separately.[146] Corporations that were not previously economically integrated would become one employer under the statutes. Thus, an employee who had a cause of action against the parent before the merger would no longer have one after the merger.[147]

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applied when the issue was the existence of the employment relations. *See, e.g.*, Lovette v. Braun, 293 F. Supp. 41 (D.N.D. 1968) (plaintiff who successfully claims compensation is barred from raising employment status in subsequent civil suit against employer); Smith v. General Motors Corp., 63 F. Supp. 101, 103 (E.D. Mo. 1945) (federal court concluded it could reexamine a determination made by the Missouri Compensation Commission that decedent was defendant's employee). The advantage of litigating the employment issue before an administrative board is that the ruling body should be familiar with issues in the case and should not be bound by common law concepts that are inconsistent with compensation legislation.

141. *See, e.g.*, Blount v. State Road Dep't, 87 So. 2d 507, 512 (Fla. 1956) ("[t]he act is designed to afford a speedy and summary disposition of claims"); Barber Asphalt Corp. v. Industrial Comm'n, 193 Utah 371, ——, 135 P.2d 266, 270 (1943) (workers' compensation intended to secure means of speedy recovery of benefits).

142. All but a small fraction of compensation claims are disposed without contest. *See* 3 A. LARSON, *supra* note 6, at § 82.10.

143. *See* Hughey v. Hoffman Rosner Corp., 109 Ill. App. 3d 633, 440 N.E.2d 1049 (1982). The plaintiff was barred from bringing a common law suit against parent corporation because both corporations merged before the injury, changing the status of the workers' immediate employer from a subsidiary to a division. *Id.* at ——, 440 N.E.2d at 1051. Since the *Boggs* court put such emphasis on corporate structure, a parent could gain tort immunity by merging with its subsidiaries.

144. G. AMMER & D. AMMER, DICTIONARY OF BUSINESS AND ECONOMICS 227 (1977). "Labor intensive" describes an industry that requires a large portion of labor input relative to capital investment. For example, many agricultural enterprises are labor intensive simply because the maintenance and harvesting of many crops require work that machinery cannot perform. *Id.* The more labor intensive an industry is, the higher the cost of workers' compensation will be.

145. *Id.* at 59. "Capital intensive" describes an industry that requires a large capital input relative to the amount of labor or land necessary to conduct the enterprise. *Id.*

146. *See supra* note 62.

147. Courts could circumvent this result by finding that the cause of action arose before the merger. *See* Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980). In this case the employee was killed by a machine while at work. The widow brought a wrongful death action against the decedent's employer and the machine's manufacturers with which the decedent's employer had merged. The court noted that the manufacturers and the decedent's employer had merged before the worker's death. *Id.* at 156-58, 412 N.E.2d at 937-38, 432 N.Y.S.2d at 881-82. Nonetheless, the court allowed the wrongful death action. The court reasoned that the parent had inherited through the corporate merger the obligations and liabilities of the third party tortfeasor manufacturer. *Id.* at 161, 412 N.E.2d at 940, 432 N.Y.S.2d at 884. *But cf.* cases cited *supra* note 140.

A PROPOSAL

To avoid the shortcomings of the *Boggs* rationale courts should adopt an alternative approach for determining employment relationships in compensation cases. Courts should examine the economic integration of affiliated corporations and permit such corporations to disregard their separate legal identities if in reality they are one entity. Focusing on economic realities to determine employment relationships would not disrupt the balance of employer and employee interests under compensation law. Moreover, compensation law's tort immunity provisions would be interpreted in line with modern corporate realities. A brief analysis demonstrates the advantages of this approach.

Under this approach courts could conduct a factual inquiry into employment relationships without being bound by the legal fictions of the corporate entity.[148] The corporate entity is a misplaced concept in workers' compensation, and courts should disregard it.[149] This "economic reality" approach was used by the court in *Wells v. Firestone Tire & Rubber Co.*[150] In that case, the injured worker brought a products liability suit against the parent corporation of his immediate employer.[151] The parent moved for summary judgment, claiming that the exclusive remedy of workers' compensation barred plaintiff's tort suit.[152]

Under the economic reality approach, the *Wells* court examined several factors to determine whether the parent company was the injured worker's statutory employer.[153] Some factors, such as employee benefit programs, union membership, and payroll procedures, pertained to the relationship between the subsidiary's workers and the parent corporation.[154] Other factors, such as control over the subsidiary's operations, accounting, and hiring and firing, related to the economic association of the parent and subsidiary corporations.[155] After examining these factors, the court found the parent corporation to be the worker's "employer" and granted summary judgment for the parent.[156]

Examining economic realities and allowing corporations to pierce their own veils would maintain the balance of interests under compensation law.[157]

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148. *See, e.g.*, White v. Searls & White Tree Serv., 60 Mich. App. 714, 231 N.W.2d 522 (1975); Bell v. Hartman, 44 Or. App. 21, 604 P.2d 1273 (1980).

149. *See* 2A A. LARSON, *supra* note 6, § 72-81. Legal fictions have no place in the interpretation of detailed modern compensation acts. It is one thing to resort to fictions to create new law out of thin air. It is quite another to take a compensation statute consisting of pages of fine print and judicially announce that pre-existing legal fictions define the key terms of the act. *Id.*

150. 97 Mich. App. 790, 296 N.W.2d 174 (1980).

151. *Id.* at 792, 296 N.W.2d at 175. The plaintiff was injured when a truck rim manufactured by Firestone blew apart as he was changing a tire. His immediate employer was a wholly-owned subsidiary of Firestone. *Id.*

152. *Id.* at 792-93, 296 N.W.2d at 175.

153. *Id.* at 798, 296 N.W.2d at 176.

154. *Id.* at 794-96, 296 N.W.2d at 176-77.

155. *Id.* at 796, 296 N.W.2d at 177.

156. *Id.*

157. *See supra* notes 4-9 and accompanying text. The basis of workers' compensation is a compromise between employers and employees. In exchange for guaranteeing benefits for

Courts should apply similar standards in determining both tort immunity and employer's liability for compensation benefits under the acts.[158] If a court would hold a parent company liable for compensation benefits to its subsidiary's employees, then the parent should be immune to tort liability in actions by the subsidiary's employees.[159] Strictly holding corporations to their legal identities as in *Boggs* does not result in such uniform analysis.

Some courts admit to liberally construing coverage provisions while narrowly construing immunity provisions.[160] These courts support their bias by adverting to the inadequacies of current compensation benefits.[161] Although broadly construing coverage provisions may increase the number of employees that receive benefits, it will not increase the amount workers receive.[162] If benefits are inadequate it is up to the legislatures, not the courts, to increase the benefits.[163]

Some courts may be reluctant to adopt the suggested approach because of their perception that it would adversely affect employee recoveries against third parties.[164] These courts must realize that employment relationships should be determined according to compensation law.[165] In addition, they must

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all work related injuries, employers were granted immunity from tort suits by their employees. If courts apply two different standards, one for compensation liability and another for tort immunity, then the courts are distorting the compromise. *Id.*

158. *See, e.g., Boggs*, 590 F.2d at 662; State v. Florida Indus. Comm'n., 151 So. 2d 636, 640 (Fla. 1963) (act should be given liberal construction in favor of claimant but administered and interpreted in fairness to both sides).

159. *See, e.g.*, Florida Forest & Park Serv. v. Strickland, 154 Fla. 472, 477-78, 18 So. 2d 251, 254 (1944) (provisions of the act are to be interpreted as constituting a contract between the parties embracing all the provisions of the statute). *See also Boggs*, 590 F.2d at 662 (arguing that in the long run the majority's decision may lead to less benefits for employees).

160. *See, e.g.*, Choate v. Landis Tool Co., 486 F. Supp. 774, 776 (E.D. Mich. 1980).

161. *Cf.* FLA. STAT. § 440.14 (1981). If a worker is covered by workers' compensation then the amount of his recovery is defined by statute. Due to the exclusive remedy provisions of the statutes, the worker can recover only a fixed amount from the employer and no more.

162. *See, e.g., Boggs*, 590 F.2d at 655.

163. Workers' compensation is a creation of the legislature. Accordingly, the courts should not distort the meaning of the statutes simply because the benefits have become outdated. *See* Thompson v. Florida Indus. Comm'n, 224 So. 2d 286, 287 (Fla. 1969) (remedy for any inadequacy in the act lies with the legislature and not with the court).

164. *See, e.g.*, Mingin v. Continental Can Co., 171 N.J. Super. 148, 149, 408 A.2d 146, 148 (1979). The claimant was injured operating a machine for his employer, and he received workers' compensation benefits from his employer's insurance carrier. He later brought a products liability suit against the manufacturer of the machine and its parent company. The claimant's employer, however, was a wholly-owned subsidiary of the same parent corporation. The defendant corporations moved for summary judgment asserting that the claimant's exclusive remedy was workers' compensation. Citing *Boggs*, the court denied the motion and thus the claimant was not barred from maintaining a tort action against the parent. The *Mingin* court noted the inadequacy of the workers' compensation statute in addressing the issues involved in the parent-subsidiary relationship. The court, however, held the defendants to their chosen form. The majority appeared to be intimidated by the potential results of allowing the corporation to disregard its own legal identity. The result of the corporation's proposition, the court reasoned, would be to deny products liability suits to a significant percentage of the population. Given the growth of modern business conglomerates, such a drastic result should only be mandated by the legislature. *Id.*

165. *See supra* notes 21-24 and accompanying text.

realize that the proposed approach will not necessarily allow large diversified conglomerates to avoid tort liability. These companies will not be integrated enough to demonstrate that they are in reality a single economic enterprise.

CONCLUSION

The workers' compensation system has performed reasonably well over the years in providing benefits to injured workers. As inflation has increased, however, the absolute value of these benefits have decreased.[166] Some courts have attempted to remedy this situation by narrowly construing immunity provisions while broadly construing coverage provisions.[167] Although this judicial response increases the potential of workers' recoveries, it also denies tort immunity to some employers deserving the statutes' protection.[168] Courts holding parent/subsidiary corporations to strict legal identities often improperly deny tort immunity. Rather than rigidly adhering to legal fictions, courts should permit affiliated corporations to assume a single identity if the facts of the case demonstrate that such an economic association exists in reality. This approach would maintain the integrity of compensation provisions and properly place the issue of inadequate benefits for injured workers with the legislatures.

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166. *See Boggs*, 590 F.2d at 659.
167. *Id.*
168. *See supra* notes 80-85 and accompanying text.