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PROFESSIONAL CORPORATION
(303) 629-2600

Piercing the Corporate Veil: Focusing the Inquiry

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**Piercing The Corporate Veil:
Focusing The Inquiry**

By Cathy S. Krendl** and James R. Krendl*

I. The Role Of The Corporate Veil Doctrine

A fundamental tenet of Anglo-American law is the concept that a corporation will ordinarily be treated as a legal entity separate from its shareholders.[1] The shareholders can thus confidently commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debts.[2] This tenet is based on the theory that the corporation is an artificial entity, separate from the shareholders.[3] Further, it is based on the economic policy that shareholders should be encouraged to commit limited amounts of capital to an endeavor which might be too risky for direct individual involvement.[4] Corporate limited liability is fundamental to the law of every jurisdiction in the United States.[5]

There is no suggestion in the case law which will be discussed later in this article of any basic change in this strong legal policy. There are, however, numerous cases in which the corporate structure is used so improperly that the continued viability of the corporation is unfair. In such circumstances, the courts will exercise their equitable powers[6] to disregard the corporate entity, to "pierce the corporate veil," and thereby hold the proper parties liable for the corporation's actions.[7]

Obviously, there are other legal remedies[8] which would achieve many of the same ends attained by piercing the corporate veil: Agency,[9] fraud,[10] estoppel,[11] contract or quasi-contract theories such as unjust enrichment,[12] and breach of fiduciary duty[13] are among such alternative bases for relief. Indeed, it is common in corporate veil cases for a complaint to state a claim based on one or more of these theories as well as the piercing-the-corporate-veil theory.[14] The corporate veil theory, although similar to certain other causes of action in some respects, is not congruent with any of them.

One can imagine, for example, a hypothetical situation which would represent a composite of a number of recent corporate veil cases.[15] Assume that a corporation sets up a subsidiary to engage in some high risk activity related to the parent's business. The corporate formalities between the companies are casually observed: They operate out of the same office with the same officers and directors, they participate in the same projects with confused lines of authority between them, and they transfer money and other assets between them without proper accounting or consideration. Third parties dealing with the parent and subsidiary are not fully aware of the distinction between the two companies, and, either through deliberately misleading statements or through a failure to correct the impression given to such third parties, the related corporations encourage or permit such confusion. As a result of initial undercapitalization or because the subsidiary is operated in an unprofitable manner, the parent ends up with all of the fruits of their combined business activities and the subsidiary is left insolvent.

Then, a creditor or tort victim of the subsidiary corporation finds that the subsidiary is judgment proof while the parent which has grown prosperous on the subsidiary's activities has no contractual or other obligation to the plaintiff. Seeking redress against the parent, the plaintiff may allege fraud (on the theory that the parent represented itself as being liable for the subsidiary's debts), fraudulent transfers of property (on the theory that money or assets were improperly transferred from the subsidiary to the parent), agency (on the theory that the subsidiary acted at the direction of the parent), breach of fiduciary duty (on the basis that the directors and officers of the subsidiary wasted its assets in order to benefit the parent), or any number of other causes of action. In such a situation, the corporate veil doctrine may provide a more realistic measure of the essence of the claim, that is, that the parent, not the subsidiary, is the real party in interest. More important, it may be easier for the plaintiff to carry his burden of proof under the corporate veil theory than under other legal theories.

A plea to pierce the corporate veil may occur in a wide variety of circumstances: against the sole individual shareholder of a close corporation[16] or against a substantial parent corporation with one or more subsidiaries;[17] it may arise against an affiliated group of corporations with a common shareholder or shareholders;[18] the party sought to be held liable may not even be a shareholder, but rather a creditor or optionee.[19] The plaintiff may be a party to a contract with the subsidiary who claims that he relied on representations that the parent would back the subsidiary,[20] or he may be a tort victim who had no knowledge of the defendant prior to the incident giving rise to his claim.[21] Obviously somewhat different policy considerations are involved in such cases,[22] but a common set of rules and equitable principles are usually applied to all of them.[23]

The corporate veil concept therefore serves a useful if ambiguous role in the law. Because the remedy is essentially equitable[24] and because disregarding the corporate entity requires contradicting the strong public policy of limited liability, the courts reluctantly, inconsistently, and sometimes unclearly determine how and when to pierce the veil.[25] This article will discuss the historical development of the principal applicable rules, consider in some detail what we will refer to as the "Powell" rule, analyze a number of recent cases within the structure of what we believe are the ultimate issues which courts consider in determining when to pierce the veil, and, finally, suggest some considerations and procedures which may help corporations weave more impenetrable veils and assist plaintiffs in piercing the veil.[26]

A. *Approaches to Piercing the Corporate Veil*

The corporate veil area of law seems peculiarly susceptible to unhelpful rhetorical devices. Some of the terms which have been used to discuss or describe a corporation whose veil should be pierced include "mere adjunct, agent, alias, alter ego, alter, idem, arm, blind, branch, buffer, cloak, coat, corporate double, cover, creature, curious reminiscence, delusion, department, dry shell, dummy, fiction, form, formality, fraud on the law, instrumentality, mouth piece, name, nominal identity, phrase, puppet, screen, sham, simulacrum, snare, stooge, subterfuge, and tool."[27]

1. Early Case Law

A fair starting point for analyzing this rhetoric is to examine the early case law. Perhaps the earliest important case is *United States v. Reading Co*.[28] In that case the United States brought suit under an antitrust statute which provided that it was unlawful for any railroad company to transport in interstate commerce "any article or commodity that . . . [is] mined or produced by it, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." The Reading Railroad had established an elaborate corporate structure whereby a coal company originally organized by Reading became the wholly-owned subsidiary of a holding company which also owned Reading. The Court looked through this subterfuge to find a violation of the statute.

The *Reading* case involved both a strong public policy, as embodied in a statute, and a cause of action which might have rested solely on a liberal construction of the statute in question. However, the Court chose to adopt a broader line of attack by piercing the corporate veil of the elaborate structure to treat the coal company, the railroad company, and the holding company as a single entity.

The most widely cited of the early cases is *Berkey v. Third Avenue Railroad Co*.[29] In that case Judge Cardozo refused to pierce the corporate veil of a street car subsidiary corporation to find its parent liable for a personal injury to the plaintiff. The accident in question occurred on a street car belonging to the 42nd Street, Manhattenville and St. Nicolaus Railroad Company which was a subsidiary of the Third Avenue Railroad. Facts which indicated that the 42nd Street Company was not a genuine separate corporation were that the subsidiary's cars were marked with the parent's name, the annual report of the parent referred to the subsidiary as part of the system, the employees of the companies regarded them as identical, many functions such as printing and purchasing were handled on centralized basis, the parent directly paid for certain expenses of the subsidiary, and the parent had made substantial loans to the subsidiary.[30] On the other hand, Cardozo emphasized that the subsidiary maintained its own bank account, paid the wages of its lower level employees out of such account, had not been organized by the parent, had substantial assets, negotiated loans from the parent in an arm's length manner, and separated its operations to some degree from affiliated lines, for example, by not allowing its motormen and conductors to travel beyond its lines.[31]

Although *Berkey* was a civil action for injuries, piercing the veil of the subsidiary—or treating the parent and subsidiary as one entity—might have suggested that the corporations had violated a criminal statute which made it illegal for a franchise to be assigned (in this case from the subsidiary to the parent) without the approval of the proper regulatory commission. In refusing to pierce the veil, Cardozo placed considerable emphasis on the seriousness of inferring a violation of the criminal statute.[32]

The most interesting and significant part of this case was not its holding, but this famous, oft-quoted language in which Cardozo struggles to impose some kind of rational order on the metaphors to which the courts had resorted in attempts to propound rules for disregarding the corporate entity:

> The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mist of metaphor. Metaphors in law are to be narrowly watched, for starting as the devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an "alias" or a "dummy." All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term is to be defined in the act of operation. Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the test of honesty and justice. Ballantine, Parent and Subsidiary Corporations, 14 Cal. Law. Rev. 12, 18, 19, 20. The logical consistency of a juridical conception will indeed be sacrificed at times, when the sacrifice is essential to the end that some accepted public policy may be defended or upheld. This is so, for illustration, though agency in any proper sense is lacking, where the attempted separation between parent and subsidiary will work a fraud upon the law. (Citation omitted) At such times, unity is ascribed to parts which, at least for many purposes, retain an independent life, for the reason that only thus can we overcome a perversion of the privilege to do business in a corporate form. We find in the case at hand neither agency on the one hand, nor, on the other, abuse to be corrected by the implication of a merger. On the contrary, merger might beget more abuses than it stifled.[33]

2.The Powell Synthesis

In 1931 Frederick J. Powell published a monumental study, *Parent and Subsidiary Corporations*,[34] which attempted to synthesize those cases which had disregarded the corporate entity. Powell described an "instrumentality" test which he perceived to be the test for determining whether a subsidiary is in fact so dominated by its parent that its veil should be pierced to find the parent liable. Although Powell's test was derived from a study of the parent-subsidiary relationship and may have been meant to apply exclusively to that relationship, it has been applied with equal force to pierce the veil of closely held corporations to hold the individual shareholders liable.[35]

a. Lowendahl: ***An early application of the Powell synthesis***

One of the early cases which used the Powell synthesis, although in a slightly modified form, was *Lowendahl v. Baltimore & Ohio R.R.*[36] In *Lowendahl* two insolvent individuals had, prior to the entry of the judgment against them in favor of Lowendahl, transferred substantially all of their assets to a newly-created corporation in exchange for forty-nine percent of its stock. The defendant B&O Railroad was the majority shareholder of such corporation and, when Lowendahl failed to recover against either the individual debtors or against the insolvent transferee corporation, he sued B&O on the theory that the corporate veil of the transferee corporation should be pierced to hold B&O liable.

In refusing to pierce the corporate veil, the court emphasized that the individual judgment debtors had formed their scheme to evade creditors long before they approached the defendant and, therefore, that the B&O Railroad had played no direct role in the injury to the plaintiff.[37] The court also found that the B&O Railroad did not in fact control the subject corporation at the time of the fraudulent transfer, that it paid fair value for its stock and received no assets from the defunct corporation, and that it was not shown even to have had any knowledge or warning of the improper activities of the insolvent individual shareholders.[38] Citing Powell generally, the *Lowendahl* court stated that three elements must be proved to pierce the corporate veil:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.[39]

b. *The impact of the Powell synthesis*

It is interesting that the *Lowendahl* court chose a rule strongly supportive of the corporative limited liability when Lowendahl had such a weak case for relief on the facts. One explanation might be that the court felt the need to preserve the rules of limited liability in the depression era. Otherwise, widespread corporate failures might have encouraged a multiplicity of lawsuits where hopeful plaintiffs would seek to pierce corporate veils to find shareholders personally liable.

Derived from Powell's examination of the earlier case, the *Lowendahl* case is one of the most frequently cited cases in this area,[40] and is frequently followed either expressly or implicitly by other courts. Although the Powell rule is itself solidly grounded on case law, it represents a composite of factors considered by the courts. In other words, some courts rely only on one or two of the Powell factors and do not require all three. Therefore, the Powell rule is of interest, not only because it is perhaps the most frequently applied and most clearly articulated of the rules in the corporate veil area, but also because its parts include most of the other rules in this area.[41]

The Powell rule was derived to a large extent from a study of early New York cases, and the influence of those cases continues today. As a commercial center, New York generated many of the most important corporate veil cases. Early opinions by distinguished jurists, including Cardozo[42] and Learned Hand,[43] have carried great persuasive weight, and Powell himself was a New York attorney. Moreover, the difficulty of the issues raised by corporate veil cases, the inability of most courts to develop a comprehensive independent approach to the problem,[44] and the force of the New York opinions frequently have caused other jurisdictions to follow New York case law. As a result, the tendency of New York courts to take a somewhat restrictive view[45] toward disregarding the corporate entity may be discerned in other jurisdictions.

c. *Other attempts to systemize the law*

There have been any number of other attempts to systematize the law in the corporate veil area.[46] The California courts have sometimes emphasized undercapitalization to the exclusion of other factors in finding grounds for piercing the veil.[47] Many courts have analyzed the problem through an "alter ego" or "identity" test, although such an analysis seems to be essentially the same as Powell's instrumentality rule.[48] Some states have refused to pierce the veil absent a showing of fraud, the second leg of the Powell rule,[49] while others, almost eliminating the necessity for a showing of any kind of wrongdoing, hold a defendant liable where it is shown that the defendant dominated another corporation and some loss was suffered by the plaintiff.[50] A few courts have utilized the "economic entity" concept, first propounded by Professor Berle.[51]

Under the Berle view, related corporations may be viewed as a single economic entity so that, in effect, the veil of each corporation is pierced to obtain the benefit of the total assets of all the corporations.

B. ***Analysis of the Powell Rule***

The Powell rule, followed in whole or in part by most courts, consists of three legs: instrumentality, improper purpose, and proximate causation. In a strict application of the Powell test, each of these elements must be proven in order to pierce the veil. We will therefore consider the three legs of the rule separately, but it must be borne in mind that the demarcation between the facts showing one element and the facts showing another is by no means always clear.

1. Instrumentality

This is the leg of the Powell rule on which the greatest amount of verbiage has been expended, and it is probably the most difficult of the three legs to define. The concept is that a plaintiff must prove that the subsidiary or other subservient corporation was operated not in a legitimate fashion to serve the valid goals and purposes of that corporation but that it functioned under the domination and control and for the purposes of some dominant party.[52] Such domination must be something substantially more than the control which would be exercised by any majority shareholder or every corporation would be automatically subject to having its veil pierced.[53] Further, the domination, according to the letter of the Powell rule, must be domination with respect to the particular transaction attacked as opposed to domination in general.[54]

a. ***The Powell circumstances***

Although no single fact or set of facts is determinative, Powell identified eleven circumstances which in a variety of combinations may indicate that the subsidiary is a mere instrumentality. These are as follows:

1. The parent corporation owns all or most of the capital stock of the subsidiary.

2. The parent and subsidiary corporations have common directors or officers.

3. The parent corporation finances the subsidiary.

4. The parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation.

5. The subsidiary has grossly inadequate capital.

6. The parent corporation pays the salaries and other expenses or losses of the subsidiary.

7. The subsidiary has substantially no business except with the parent corporation, or no assets except the ones conveyed to it by the parent corporation.

8. In the papers of the parent corporation or in the statements of the officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

9. The parent corporation uses the property of the subsidiary as its own.

10. The directors or executives of the subsidiary do not act independently in the interest of the subsidiary, but take their orders from the parent corporation in the latter's interest.

11. The formal legal requirements of the subsidiary are not observed.[55]

b. *The significance of the Powell circumstances*

Fact 10—that the officers and directors of the subsidiary do not act independently—would appear to be the most significant fact, but it is also more a conclusion than an evidentiary fact. Many of the other facts simply tend to establish the existence or nonexistence of number 10. We would prefer to think of the Powell circumstances as "indicia." In some cases, the presence of all or most of such "indicia" tends to establish that the subsidiary corporation is not really a separate and independent entity and is therefore a mere instrumentality of the parent. In other cases, the presence of most or even all of such "indicia," with the possible exception of number 10, may not necessarily prove that the subsidiary is an instrumentality. Moreover, in still other cases, a subsidiary is found to be an instrumentality of the parent where many of these indicia are not present.[56] The factors identified by Powell are therefore by no means a fully satisfactory test for determining whether one corporation is an instrumentality of another. They do, however, provide a useful and specific beginning to an analysis of the instrumentality metaphor.

The instrumentality analysis is used by most courts in some form or another because it provides a basis for determining that the defendant is a real party in interest. If the defendant dominates the subsidiary to such an extent that the subsidiary has no will of its own, the parent, in effect, has itself acted to commit the wrong to the plaintiff. Since the parent was the wrongdoer, it can not defend itself with a corporate sham. Another way of stating the justification for this leg of the rule is that the shareholder who treats the corporate entity as if it were another aspect of his personal business can hardly complain if the court treats the entity as he does.[57]

2. Improper Purpose

If it is found that the subsidiary has been a mere instrumentality with respect to a particular transaction, the next question under the Powell rule is whether the parent's domination or control has been used for fraud or other improper purpose. The underlying rationale of this requirement is that the corporate veil should not be lightly pierced.[58] The use of a corporation as a mere instrumentality should not give third parties a license to pursue the defendant unless some actual fraud or other injurious act can be proven. This policy is defensible, especially in view of the obvious indefiniteness of the instrumentality rule. While it may well be argued that the instrumentality test makes piercing a corporate veil too difficult for a plaintiff, it is also clear that the ambiguity of the instrumentality test makes it possible to establish that a corporation was a mere instrumentality in a situation where there was no improper intent on the part of the shareholder nor any injurious result. Therefore, in fairness to the parent and to support the policy of limited liability, improper purpose must be established before the parent or other dominant party can be found liable.

a. ***The Powell approach to improper purpose***

The Powell rule, as adopted by *Lowendahl*, refers to "fraud or wrong, to perpetrate the violation of a statutory or other positive duty, or a dishonest or unjust act . . . ."[59] Other courts have used the phrase "improper purpose," which we prefer as the general term to describe this leg of the Powell rule.[60]

This aspect of the rule may best be appreciated by consideration of a case in which the subsidiary was clearly an instrumentality of the parent, yet no improper purpose was found. In *Pauley Petroleum, Inc. v. Continental Oil Co.,*[61] Pauley sought a preliminary injunction which would have required Continental Oil to cause its wholly-owned subsidiary to cease prosecution of an action against Pauley's wholly-owned subsidiary in Mexico. Pauley's theory was that the action in Mexico should be terminated because of the likelihood that the Mexican courts would make a wrong choice-of-law decision by applying Mexican law rather than Delaware law to the contract at issue. The court found that Continental's subsidiary was in fact a mere instrumentality of Continental and that it had similarly been an instrumentality of Pauley prior to its acquisition by Continental Oil.[62] Stating that piercing the veil was appropriate only when required "in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or . . . equitable consideration among members of the corporation require it,"[63] the court found that there was a legitimate reason for the existence of Continental's subsidiary and that the subsidiary was not being used by Continental for any improper purpose. Specifically, the court found that it did not know whether Mexican courts would make an improper choice of law, nor did it know that an application of Mexican law would lead to the wrong decision. Accordingly, since the instrumentality was not being used for any improper purpose, the court refused to pierce the veil.

b. ***Alternative approaches to improper purposes***

On the other hand, some cases have found an improper purpose rather easily once the initial question of instrumentality has been resolved. Thus, in *Consolidated Sun Ray, Inc. v. Oppenstein*[64] the court found that an improper purpose was established by the undercapitalization or removal of assets from the subsidiary corporation by the parent—facts which the court also considered in deciding that the subsidiary was an instrumentality. Citing *May Department Stores Co. v. Union Electric Light & Power Co.,*[65] the court, in *Consolidated Sun Ray,* stated:

> It does seem, however, that the determination of whether there is a case for equitable relief could and should be decided by the test of whether or not the arrangement involved is being used for a proper purpose. Should not all these other suggested tests be used only as aids for determining the true purpose of the arrangement? Making a corporation a supplemental part of an economic unit and operating it without sufficient funds to meet obligations to those who must deal with it would be circumstantial evidence tending to show either an improper purpose or reckless disregard of the rights of others.[66]

Thus, an improper purpose of some sort must be shown, but such improper purpose may be as general or as vague as improperly capitalizing the subsidiary corporation at its outset.[67] The use of the subsidiary for the purpose of evading a statute,[68] creating unjustified procedural roadblocks to legal relief for the plaintiff,[69] or misrepresenting the state of affairs to a potential plaintiff[70] are other examples of improper purposes. Therefore, the Powell rule, through its improper purpose requirement, ordinarily requires that something more than a mere instrumentality be proven,[71] but the plaintiff need not prove the equivalent of common law fraud.[72] Some equitable wrong will usually be sufficient to show improper purpose.

3. Proximate Cause

The final leg of the Powell rule is that not only must the plaintiff show instrumentality and an improper purpose, but he must also show that both the control by the parent and the improper act of the subsidiary have caused him some direct damage.[73] Again, consistent with the general policy to support corporate limited liability, it is not the intent of the corporate veil doctrine to grant a hunting license to plaintiffs to redress a general wrong effected by domination of a corporation. The particular plaintiff must be able to show that he suffered damages as a result of this domination.

Thus, in *Schlecht v. Equitable Builders, Inc.,*[74] the trustee of employee-benefit funds sued the parent of the employer to collect amounts due to the funds. There was considerable evidence to show that the assets of the subsidiary had been improperly used for the benefit of the parent. For example, loans to the parent were guaranteed by the subsidiary and secured by the assets of the subsidiary. Nonetheless, the court refused to pierce the veil because there was no evidence that the control exercised by the parent or the improper activities of the subsidiary caused an injury to the plaintiff. In fact, the court pointed out that the improper actions had resulted in a Small Business Administration loan to the parent and that some of the proceeds of such loan had been paid to the plaintiff.[75] Therefore, the action at issue, even though performed by an instrumentality of the parent and perhaps being improper in some respects, was not injurious to the plaintiff.

Thus, the third leg of the Powell rule serves to support the policy of limited liability by permitting the piercing of the corporate veil only where equity strictly requires that a particular defendant by reason of that defendant's wrongful acts has caused injury to the plaintiff. Absent proof of all three legs of the rule, the plaintiff will not ordinarily be allowed to recover in a jurisdiction following the Powell rule.

II. The Ultimate Issues

A. ***Categorization of the Ultimate Issues***

We believe that the courts, whether applying the Powell rule or some variation or alternative, are essentially concerned with certain ultimate issues which can be identified in the cases. We know, however, of no successful effort to integrate all of these issues into a single simple rule which incorporates the proper considerations with sufficient specificity to insure uniformity and predictability of application.[76] In this equitable area involving as wide a variety of situations as foolishness or deviousness can contrive, there appears to be no single determinative factor. The relative importance and usefulness of various factors will vary from case to case, but at least the relevant factors or ultimate issues can be identified to some extent.

To some degree, courts pay lip service to the Powell rule and the circumstances evidencing instrumentality, or to some alternative rule or analysis, while actually basing their decisions on one or more of the ultimate underlying issues.[77] In other cases, the courts attempt to apply in an inflexible mechanical way the Powell rule or some other rule and thereby arrive at what may not be a sound decision.[78]

We believe that it is useful to attempt to identify and analyze some of the ultimate issues which underlie the better-reasoned decisions. Such ultimate issues may be considered in three categories.

1. Necessary Preconditions

There appear to be three necessary preconditions for a corporate veil case. These preconditions also exist in many cases where piercing the veil would not be appropriate. Therefore, such conditions usually provide only a basis for moving forward to the second level of inquiry. They are not determinative in and of themselves. Such factors are: dominance of what we call a "subservient corporation" by some party to whom we refer as the "dominant party;" a beneficial interest by the dominant party in the subservient corporation; and an injury to the plaintiff reasonably related to the defendant’s dominance of the subservient corporation.

2. Improper Purposes

In order to justify piercing the veil there should be some showing of improper purpose in addition to establishment of the preconditions. These improper acts may be categorized as violations of public policy, misrepresentation, lack of economic substance, participation, and what we have labeled as "joint improper acts."[79]

3. Policy Considerations

Finally, it would appear that there are policy considerations which are utilized by the courts in a close case. We assume, of course, that the traditional equitable considerations and the strong policy in favor of preserving corporate limited liability will always be involved. However, the particular additional policy considerations which the courts appear to use in the corporate veil area are the questions of who should bear the risk of loss and what degree of legitimacy exists for claiming the limited liability protection of a corporation.

It should be admitted that any attempt to categorize the factors is somewhat arbitrary and artificial. At all times it should be borne in mind that these factors are closely related and that they tend to merge imperceptibly into one another. Nonetheless, we believe that there is some usefulness in trying to untangle them for a brief examination. We will, therefore, discuss the proposed headings separately below.

B. *Preconditions*

1. Beneficial Interest

The Powell analysis was directed only at parent-subsidiary relationships, presumably because there was perceived no need to establish the liability of a nonshareholder. Stock ownership, however, is not an absolute requirement for piercing the veil. A more precise requirement is that the dominant party must have some beneficial interest in the subservient corporation. Thus, for example, in *Soderberg Advertising Inc. v. Kent-Moore Corp.,*[80] the defendant had an option to acquire the subservient corporation but no actual stock ownership. However, pursuant to contractual agreements, the optionee had effective control over the subservient corporation and a beneficial interest because of its right to purchase the company. In connection with other factors, it was found that the dominant party was in fact liable for certain actions taken through the instrumentality of the subservient corporation. Similarly, in *Krivo Industrial Supply Co. v. National Distillers & Chemical Corp.,*[81] a creditor was sued on a piercing-the-corporate-veil theory. There, the court held for the defendant on other grounds, but acknowledged that the defendant could be liable by reason of its position as a creditor and its exercise of certain control rights over the debtor corporation.

Thus, the test is whether or not the defendant has some beneficial interest in the subservient corporation, as a shareholder, creditor, potential shareholder, or conceivably, in other respects. The better view in support of corporate limited liability and judicial economy would, however, seem to require some such beneficial interest. Otherwise there would be a potential for suits against parties with only remote relationships with the corporate wrongdoer.

2. Domination

The next precondition is effective domination over the subservient corporation by the dominant party. This is basically the same question as is addressed by the first leg of the Powell test.[82] Many cases appear to be decided almost exclusively on whether or not the requisite degree of domination exists.[83] However, this merely demonstrates that instrumentality is the most difficult aspect of most corporate veil cases, not that it is the only issue. If domination can not be proven, there is no basis for going forward to other issues. If domination is proven, the very facts which establish it often demonstrate the other attributes necessary to pierce the veil.

Consider, for example, a fairly typical opinion with an extended discussion of the domination which established that a subsidiary was a mere instrumentality. In *Consolidated Sun Ray, Inc. v. Oppenstein,*[84] there was an action by a landlord to recover damages for breach of a lease against both the subsidiary which had entered into the lease and the parent corporation, Consolidated Sun Ray. In determining that the subsidiary was so dominated by the parent as to be a mere instrumentality, the court found that Consolidated had exclusive control over the subsidiary's bank account, that it pledged the subsidiary's accounts receivable for its own loans, that the subsidiary had no independent discretion with respect to buying and merchandising, that the parent in its own name made arrangements for insurance and advertising on behalf of the subsidiary without any indication of consultation with the subsidiary, and that the two companies had common officers and directors.[85] The court then determined that the parent was liable for the subsidiary's lease obligations without such an elaborate discussion of the other requirements for piercing the veil. But note that the facts showing domination also show misrepresentation and undercapitalization,[86] thereby eliminating the need for detailed analysis on those issues.

The degree of domination which must be shown varies and, for example, may depend on the force of the other equitable arguments in favor of piercing the veil. Thus, in *Fisser v. International Bank,*[87] the court refused to find that a subsidiary corporation was so dominated as to be a mere instrumentality where the parent-defendant had negotiated for a ship charter on behalf of the subsidiary, had formed and capitalized the subsidiary, and had chosen all of the subsidiary's officers and directors. The facts seemed clearly to indicate the presence of virtually all of the Powell "circumstances," including the fact that the subsidiary existed exclusively for the benefit of the parent.[88] But the court also found that the plaintiffs knew that they were dealing with a controlled, undercapitalized subsidiary and that they therefore could not hold the parent liable for the subsidiary's inability to perform the contract.[89]

On the other hand, in *Caple v. Raynel Campers, Inc.,*[90] the court found only very general evidence that the shareholder was the "investing and directing force of both corporations."[91] However, in that case, the corporation had engaged in an outrageous line of conduct with respect to the plaintiff, repossessing his truck without justification, converting certain of his tools and personal property, charging him a repossession fee based on its promise to return the truck, and then still refusing to return it. In view of the conduct of the corporation, the court determined with relatively little analysis that the individual shareholder should be found liable for the corporation's activities.[92]

The issue of effective domination is one that will often involve a subjective determination by the courts. It is possible that such determination will turn to a substantial degree on the court's reaction to the other facts of the case. As a general rule, domination should be addressed as a threshold question; if it is found to exist, one can then move on to the issue of whether the domination was used for an improper purpose. But one should be aware that the degree of domination which the plaintiff must prove will frequently be dependent on the equity of his overall position.

3. Relationship to Injury

The final precondition is that there be some reasonable relationship between the injury suffered by the plaintiff and the actions of the defendant. In the *Lowendahl* adoption of the Powell rule this is put in terms of "wrongful acts resulting from the parent's domination being the proximate cause of plaintiff's loss."[93] We submit that this is too restrictive a rule. For example, in those cases discussed below, under Joint Improper Acts, it appears that it is sufficient to show some knowing or cooperative effort between the related parties which results in unjust injury to the plaintiff,[94] even though it may not be possible to prove that the defendant's control directly caused plaintiff's injury.

Although there may be doubt as to the exact scope of this causation or relationship requirement, the principle of some reasonable connection between plaintiff's injury and the action of the defendant seems both morally and logically sound. Thus, in the *Schlecht* case,[95] the mere fact that the defendant improperly dominated its subsidiary and caused it to perform improper acts was insufficient to allow the particular plaintiffs to pierce the veil absent a showing that such plaintiffs were injured by such acts.[96] This rule—that no plaintiff may avoid corporate limited liability unless he can prove injury resulting from misuse of the corporation—supports the strong policy of limited liability and offers some assurance that the plaintiff has standing to complain, thereby tending to discourage frivolous claims.

C. *Improper Purposes*

The heart of most corporate veil cases, explicitly or implicitly, is that a corporation has been used for such an improper purpose that equity will permit its corporate form to be disregarded.[97] The types of situations in which such improper activities arise can be classified under five headings:[98] Violations of public policy including evasion of statutes; misrepresentation, which should be understood to encompass a wider range of actions than common law fraud; lack of economic substance which subsumes a variety of misconduct; participation, including intervention and direction of the corporation's wrongful acts; and joint improper acts, an admittedly elusive concept which we will endeavor to clarify.[99]

These categories are discussed separately below.

1. Violations of Public Policy

The origin of the corporate veil doctrine and some of the continued strong bases of the theory arise as a result of violations or evasions of some statute or other strong public policy through the instrumentality of a subservient corporation.[100] *United States v. Reading Co.*[101] is an early example of such misuse of the corporate form.

In *Zale Corp. & Corrigan-Republic, Inc. v. FTC,*[102] the court upheld an FTC cease-and-desist order relating to violation of Regulation 2. Such order affected Zale Corporation and a net work of 1056 wholly-owned subsidiaries. In piercing the corporate veil to hold Zale responsible for the actions of all of the subsidiaries, the court found that the violations of Regulation 2 were for the use of a form prepared by Zale and distributed to the subsidiary for its use, that advertising for the stores was done in the name of the total enterprise, and that the nature of the parent-subsidiary organization denied recognition of the separate corporate structure of the subsidiaries. Thus, for the court to recognize the legitimacy of the separate corporations would frustrate the statutory policy underlying Regulation 2.

In an interesting Texas case,[103] a local statute prevented businesses from being open on consecutive weekends. Sundaco, Inc., an apparently resourceful organization, formed a wholly-owned subsidiary to which it leased its premises on alternate weekends on the theory that two separate corporations had the right to do business on consecutive weekends. Viewing this as a transparent attempt to evade public policy the court pierced the veil.

In *United States v. Ira S. Bushen & Sons, Inc.*[104] the court pierced the veil of approximately 40 subsidiaries, each of which owned a separate vessel, to enjoin the parent from failing to comply with regulations designed to prevent oil spills. The court emphasized the control of the subsidiaries by the parent, the fact that the parent profited from their activities and the strong public interest in avoiding oil spills. The court also stressed its concern that the parent might attempt to evade regulations by creating additional subsidiaries if the corporate forms were not pierced. In the case of *United States v. Wood,*[105] reversed on appeal, the Customs Court held that the corporate veil could be pierced when it determined that a Canadian corporation had established an American subsidiary for the purpose of reselling its goods to such subsidiary in the United States at a low price in order to reduce import duties.[106]

There are also a vast number of intriguing cases in which there have been attempts to avoid not a particular statute but a general public policy. Thus, in a number of cases which can be referred to as distributorship cases, large companies have set up a two-tier corporate structure whereby a wholly-owned subsidiary manufactures products which are sold by the parent or the parent manufactures the products and distributes them through a subsidiary.[107] The purpose of such arrangements appears to be to complicate the task of a plaintiff in a products liability suit who may have jurisdiction over the distributor but a claim against only the manufacturer. The courts have almost uniformly pierced the veil in such situations. There have also been a number of instances in which the courts have disregarded the corporate form where it appeared that a separate corporation was being used for an inequitable procedural purpose, for example, to allow a statute of limitations to run.[108]

On the other hand, there is clearly a limit to how far the courts will go simply because there is a technical evasion of some statute or rule of public policy which has no clear moral purpose and where the corporate structure may be justified on other grounds. For example, in *Westcott Construction Corp. v. Cumberland Construction Co.,*[109] there appeared to be an inadvertent evasion of a technical local statute. Westcott sought a declaratory judgment to determine that its bid on a public project was acceptable where such bid had not included, as required by statute, a sub-bid by a corporation controlled by Westcott.

Westcott had not included the sub-bid because it had chosen to subcontract the work on this particular project to a lower bidder. The court held that there was no basis for piercing the veil simply to enforce a rule that was not intended to apply to such circumstances and where there was no evidence that Westcott was attempting to evade any legitimate concern of public policy. Thus, although there is a strong tendency to look through the corporate form to enforce public policy rules of a substantial nature, such tendency is usually limited to willful attempts to evade *malum in rem* rules. Corporate veil misrepresentation must be understood to constitute something quite distinct from common law misrepresentation.[110]

2. Misrepresentation

The misrepresentation issue sometimes is confusing because of the tendency of courts to use fraud language in ruling on corporate veil matters. Clearly, if the plaintiff in such cases had a good fraud claim he would plead it, but in most cases this is not done. Fraud cases are difficult to prove, and the quantum of evidence available in most corporate veil cases is considerably smaller than would be required to carry the burden on a fraud claim.[111]

Thus, in *Paumier v. Barge B.T. 1073,*[112] Zapetis, the sole shareholder of the corporation, was held personally liable for expenses incurred in connection with a salvage operation of a tug leased by his corporation. The court found that Zapetis had advised the creditor in question that the barge pledged as security for the expenses incurred in the salvage operation was owned by OSC, a corporation controlled by Zapetis, when in fact OSC did not own the barge. At the time he made this statement Zapetis knew that the corporation did not own the barge and had no other substantial assets.[113] However, he made the representation in good faith based on his belief that he could arrange for a security interest with the owner of the barge, a defense which would presumably have been valid in a fraud case. However, the court held that such a defense was inadequate in a corporate veil case:

> Counsel urges that since Zapetis acted in good faith we should not hold him liable. The good faith argued for is that when Zapetis pledged the Barge he fully expected that GMC would stand behind him. We feel that Zapetis' good faith is immaterial. Although quite different on the facts, in a case involving going behind the corporate entity, the Supreme Court stated that good faith was irrelevant as long as the parties intended to do what they did. . . . The principle is applicable in the case before us. If good faith were to become a defense in actions of this type, every defendant would claim good faith of some sort even though he did exactly what he intended to do in misrepresenting certain facts to an innocent party. This is not an action for common law misrepresentation in which scienter must be proven. That distinction must be made. The corporate identity can be pierced to prevent not only fraud, but any injustice.[114]

Other interesting cases go even farther, suggesting that confusion, absent a positive misrepresentation, is a basis for piercing the corporate veil. For example, in *My Bread Baking Co. v. Cumberland Farms, Inc.,*[115] the plaintiff had sold products to various subsidiaries owned by the principal defendant. In seeking to recover from the parent for the refusal of the subsidiaries to return certain property to it, the plaintiff proved, among other things, that the affiliated corporations used a common name, operated out of the same office, and otherwise caused confusion to the parties dealing with them as to the identity of the responsible corporation. The court accordingly held the parent liable for the claims against all of the subsidiaries.[116]

In *Zaist v. Olson*[117] there was a somewhat similar situation with the added factor that the subservient corporation was, in the view of the court's majority,[118] undercapitalized. Mr. Olson operated through several corporations, including the debtor East Haven. Olson used the services and supplies of the plaintiff on a number of substantial real estate projects, including some housing developments and a shopping center. Although statements for such work were originally sent to Olson individually, he directed, and the plaintiff agreed, to send the bills to East Haven. When Olson ran into financial difficulties, it was found that all of the real property and most of the other assets of his real estate empire were owned by him or other related corporations and that East Haven was a virtual shell. In view of the fact that the activities of the corporations were hopelessly mixed up, that they all operated out of the same offices, and that Olson never clearly indicated to the plaintiff what the differences among the various entities were, the plaintiff was permitted to recover against Olson individually.[119]

Misrepresentation requires some of the most difficult balancing decisions which arise in this area of the law. On the one hand is the strong policy of preserving corporate limited liability. On the other is the unsophisticated general creditor such as Zaist who thinks he has good reason to believe that he is dealing with a debtor with substantial assets. Note that the plaintiff in such cases is rarely a sophisticated lender who would insist on personal guarantees and collateral; he is usually a small businessman who should not, as a matter of policy, be required to investigate his debtors or incur the legal expenses of securing his trade receivables.[120]

The relevant balancing procedures should, therefore, include not only the usual consideration of the ultimate issues but also questions of the relative sophistication of the parties and the legitimate business expectations and practices of the parties. Where other factors are favorable to the plaintiff, it is equitable to pierce the veil based on a much lesser degree of misrepresentation than would be required for common law fraud, provided that there is at least some action by the defendant which encourages plaintiff's misapprehension.[121] Compare *Fisser v. International Bank,*[122] where gross undercapitalization and possible participation in a breach of contract by the parent did not cause the veil to be pierced because the parent had advised third parties of its relationship with the subsidiary and the nature of the subsidiary's assets and purposes.

3. Lack of Economic Substance

Many cases have used undercapitalization as the primary basis for piercing the corporate veil. At least in some of the California cases, it appears that gross undercapitalization by itself will be sufficient to pierce the veil.[123] On the other hand, most jurisdictions follow the rule that while undercapitalization raises very serious questions, there must be some additional factor in order to justify disregarding the corporate entity.[124]

As a starting point, lack of economic substance should be understood to cover a variety of evils[125] in addition to undercapitalization. First, it includes traditional undercapitalization, setting up a new corporation with capital that is clearly inadequate for the needs of the business.[126] Secondly, it includes cases, closely akin to fraudulent transfers, where a shareholder milks all of the assets out of the corporation.[127] Finally, lack of economic substance includes operating a corporation unprofitably or having the corporation do business exclusively with the dominant party, such that all of the profits of the transaction are reaped by the dominant party.[128]

The first category should be fairly clear although there are obvious difficulties in determining what constitutes adequate capital in a particular case. An example of the second category is *Bernandin, Inc. v. Midland Oil Corp.,*[129] where a creditor of a wholly-owned subsidiary of Midland pierced the subsidiary's veil to recover against Midland. In that case, the subsidiary's plant had burned down and the parent received the insurance proceeds. An officer of the parent served as liquidator for the business, and all liquidation proceeds were paid directly to the parent. The plaintiff was therefore allowed to recover from Midland.

a. ***Unprofitable operation***

The more interesting and perhaps challenging cases arise where the subsidiary is operated on a basis which does not permit it to make an adequate profit. Thus, in *United States v. Reserve Mining Co.,*[130] the Government brought an action against Reserve Mining Co., Armco, and Republic Steel Corporation based on violations of environmental laws by Reserve. The specific action arose out of government efforts to terminate the discharge of taconite tailings into the air and into the water of Lake Superior. The court determined that Armco and Republic owned all of the stock of Reserve on a fifty-fifty basis and effectively dominated its board of directors and policymaking procedures. The court then emphasized that Reserve dealt exclusively with Armco and Republic, that its debts were guaranteed by the parent companies, and that Armco and Republic never bought Reserve's products at market price. Instead, they simply reimbursed Reserve for its production costs so that all of the "profits" of the enterprise were enjoyed by the parent corporations. In view of the large potential liability involved in the case and the belief of the court that Reserve was being used to shield the parents from the consequences of their polluting activities, the veil of the subsidiary was pierced.

The *Reserve* case exemplifies the interrelationship of the various factors. Lack of economic substance—in this case the conduct of the business in an unprofitable manner—was not the sole basis for the decision. However, when combined with strong evidence that Reserve was totally dominated by the parents and the fact that Reserve was engaged in activities contrary to public policy, the court reached the conclusion that the veil should be pierced.

b. ***Undercapitalization as the sole criterion***

A great deal of attention has been devoted to lack of economic substance, usually in the form of undercapitalization, including suggestions that this should be the sole criterion in some cases.[131] It has also been proposed that courts should determine what would constitute adequate capitalization and then hold the shareholders liable for an amount up to but not to exceed such adequate capitalization.[132] Finally, the suggestion has been made that plaintiffs in tort cases should be permitted to pierce the corporate veil if the corporation has inadequate capital and inadequate insurance.[133]

We object to most of these proposals and submit that, with the possible exception of California, they have found little acceptance in the courts.[134] Cases which seem to use undercapitalization as an exclusive test often involve fact situations where there is at least an implied misrepresentation or other reasons for piercing the veil.[135] Absent such factors, there is no reason why parties should not knowingly deal with a corporation, understanding that ultimate payment may be contingent on the corporation's success, and, because of that knowledge, be precluded from piercing the veil should the corporation be unsuccessful.[137]

We would further submit that the courts are not totally competent to determine what adequate capitalization should be for a particular business.[138] To give them not only the task of deciding that a company is undercapitalized but the further assignment of determining what the amount of equity should have been at some time in the past seems to us unreasonable. Moreover, if the purpose of such a policy is to encourage investors to capitalize corporations adequately, such purpose is hardly served by a penalty which limits shareholder exposure to an amount not to exceed what they should have invested in the first place.[139]

Finally, we submit that a policy of piercing the veil in every tort action where the corporation is inadequately insured and capitalized elevates the rights of tort victims above the public interest in limited liability.[140] How much insurance cost would a corporation have to incur to assure its shareholders that they would never be liable for some unforeseen but expensive tort?[141] We would contend that if investors are to continue to provide equity for high risk activities, the general policy of corporate limited liability must be preserved. Of course, undercapitalization with respect to the predictable needs of the business, combined with some slight degree of other inequitable conduct, should continue to provide a basis for piercing the veil.

4. Participation

The concept of participation or direction, treating the subservient corporation in an agencylike way, is a common feature in corporate veil cases. Thus, in the *My Bread*[142] case it was shown that the controlling shareholder of the Cumberland Bread Company had effectively dominated the affairs of both the primary and the affiliated corporations and that in fact he had ordered certain of the subsidiary corporations not to return display cases to the plaintiff. The basis for piercing the corporate veil in that case was therefore that the controlling shareholder was directly participating in or directing the subsidiaries' wrongful conversion of plaintiff's property.

In such direct-intervention cases, the basis of liability may often be agency and there may be a direct claim against the dominant party. As in other cases, however, the corporate veil doctrine presents a better evidentiary case for the plaintiff because of the difficulty of proving express agency.

Consider, for example, *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*[143] There, Koscot sued Glenn W. Turner as controlling shareholder of American Line because of a breach of contract by American Line. The court found that Turner was directly involved, without going through any corporate formalities, in hiring and firing employees and making other corporate decisions. Indeed, Turner apparently directed the particular breach of contract in question and was arguably acting as a principal or a participant in the breach. Therefore, he was found personally liable for the corporation's activities. Note that Turner's hiring and firing of corporate employees did not necessarily make the employees or the corporation agents of Turner. Such actions did, however, form part of the basis for piercing the veil.

The comparison between agency and corporate veil participation is similar to the comparison between common law fraud and corporate veil misrepresentation in that the facts establishing the respective types of claims are similar but the plaintiff's burden of proof is somewhat less onerous in the corporate veil theory.[144]

5. Joint Improper Acts

a. *Some illustrative cases*

A final and particularly interesting category of improper acts exists when two parties, the dominant party and the subservient corporation, cooperate to perform some series of actions which, if all such actions were performed by either of them alone, would create liability. In *Professional Beauty, Inc. v. Gay,*[145] a salesman entered into a contract whereby he was given the exclusive right to commissions on the employer's products in a specific geographic area. The employer thereafter created a subsidiary corporation to sell products in the same are. The court determined that the sales by the subsidiary constituted a breach of the contract of the parent with the employee.

Similarly, in *McDonald Co. v. Kemper,*[146] the principal asset of the parent corporation was a piece of real estate. The corporation entered into an agreement with Kemper giving him exclusive brokerage rights to the property. Kemper then found a purchaser who, at the suggestion of the corporation's shareholder, ultimately purchased the stock of the corporation rather than the real estate thereby attempting to evade the brokerage fee. Kemper sued for his commission and the court found in his favor. Note that in such a case as this there is no suggestion that the dominant party directed the corporation to do anything; yet there is clearly inequitable conduct.

By contrast, in *Tiernan v. Sheldon,*[147] an individual lessee, pursuant to a ninety-nine year lease, had the right to assign his lease to any party without the approval of the lessor. The lessee formed a wholly owned corporation without any significant capital, assigned the lease to it and thereby relieved himself of any lease obligation. The court rejected an effort by the lessor to pierce the veil and hold the individual liable on the lease. One can only conclude that the court decided that a lessor who signed a lease permitting an assignment to anyone at the lessee's discretion, and without further liability of the lessee, must have had fair warning that the lease could be assigned to an insolvent party.[148]

b. Berger v. Columbia Broadcasting System, Inc.

A variation in structure is demonstrated in *Berger v. Columbia Broadcasting System, Inc.*[149] CBS Films, a wholly-owned subsidiary of CBS, developed pilot films and other projects for sale to CBS or other outlets. The directors of Films were employees of CBS as were many of the officers of Films. The testimony showed that lines of executive authority flowed from Films to or through executives at CBS and that CBS employees regarded Films as a "division" of CBS. The opinion indicates that CBS effectively controlled, or at least had the ability to control, Films, and therefore had access to projects developed by the subsidiary without any general responsibility for its actions.

In 1965, the plaintiff contacted Films to discuss his idea for an annual fashion show. A Mr. Levitan, a CBS executive, accompanied a Films' representative to Las Vegas, viewed Berger's show and expressed interest in using his idea for an annual television production. Thereafter, Films entered into a contract with Berger obtaining a right of first refusal for television rights to the fashion show. Subsequently, a Mr. Cowley from a New York model agency approached Mr. Levitan and sold CBS a substantially similar idea. Berger then sued CBS on the theory that its transaction with Cowley breached the implied covenant of good faith and fair dealing of the contract between Berger and Films. The trial court entered judgment for Berger based on its determination that Films was a mere instrumentality of CBS; the appellate court reversed, holding that the instrumentality test of *Lowendahl* had not been satisfied.

It appears that Films acquired the right of first refusal because Levitan, on behalf of CBS, liked the fashion show idea. It may fairly be inferred that CBS rarely entered into contracts for pilot shows directly and that CBS had established Films in part for the purpose of developing new shows. It further appears that because of CBS's effective control of Films, the contract between Films and Berger for all practical purposes gave CBS a right of first refusal on the Berger production. In refusing to pierce the corporate veil, however, the appellate court focused on the absence of adequate proof that CBS completely controlled and directed Films with respect to the transaction attacked.[150]

The appellate court's analysis is consistent with the *Lowendahl* rule.[151] Yet the court seems not to come to grips with the equitable issue of the case. The real transaction attacked was the contract with Cowley, a transaction entered into by the parent, not by the subsidiary. The only relevance of the subsidiary was that it had previously entered into an agreement with Berger which was allegedly breached by the CBS-Cowley contract.

c. *Critique of Berger*

We suggest that the inflexible application of *Lowendahl* was inappropriate in the *Berger* case. There was no doubt that CBS had the potential to control Films, although there was a lack of proof of complete domination with respect to the Berger contract. It appears inequitable that CBS should have such control of its subsidiary that it had all the practical advantages of a direct contract with Berger yet none of the responsibilities. Neither Films nor CBS alone could have contracted first with Berger and then with Cowley with impunity. Where there was a cooperative transaction with Berger involving both CBS and Films, where CBS had the ability to dominate Films and to take advantage of the Berger idea, and where CBS had a beneficial interest both in Films generally and in the Berger transaction particularly, we think the veil should have been pierced.

It therefore appears that the better reasoned cases in the mutually improper act cases go beyond a mere rote application of the Powell rule, a rule that was designed to apply to a parent which *used* its subsidiary to carry out an unjust act. In the mutually improper act sphere, the dominant party and the subsidiary corporation jointly perform some unfair action. It hardly matters which party performs the act. What does matter is that both parties have a common interest and knowledge, that one is generally responsible, because of its dominance, for the acts of both, and that they deal inequitably with a third party. In such cases, piercing the veil appears appropriate.

We would submit that the foregoing five categories cover the various instances in which the corporate veil will be pierced. One starts with the assumption that all of the three preconditions will be present in any valid case and then proceeds to determine whether one or more of the five categories—violation of public policy, misrepresentation, lack of economic substance, participation, or mutually improper acts—is also present. If so, there is a basis for piercing the corporate veil. The determination of how to treat these factors, what importance to give them, and how they relate to each other must be made in the context of the degree of impropriety involved and must further be based on certain overriding policy considerations as hereafter discussed.

>D. *Policy Considerations*

If all of the necessary preconditions are found to be present and if one or more improper purposes exist to a sufficient degree, then the corporate veil will ordinarily be pierced. The question of whether there is a sufficient degree of improper purpose is, however, difficult, and the courts are often left to struggle with this issue for which no rule offers much useful guidance. In such situations, general policy considerations are often helpful.

As indicated below, there are applicable general policy considerations, including the importance of preserving corporate limited liability[152] and the customary considerations that govern any equitable case. No additional discussion of these factors seems useful here. There are, however, two particular policy considerations that deserve some separate discussion: legitimacy of corporate purpose and the risk of loss.

1. Legitimacy of Corporate Purpose

In determining the propriety of piercing the corporate veil, courts seem to consider whether there is a legitimate purpose for the existence of the corporation.[153] Although courts frequently state that the same general rule applies to all situations,[154] it would appear that a parent-subsidiary relationship will be more closely scrutinized and may be more readily subject to having the view pierce than would a close corporation with individual shareholders.

For example, in *Zubik v. Zubik*,[155] the court found that an individual shareholder had set up a closely held corporation, had undercapitalized the corporation, and had dealt with it in a highly informal way, including a failure to memorialize his lease arrangements in writing or to maintain written minutes of meetings. The court also found that the shareholder had casually intermingled his personal and corporate assets, including payment of personal expenses out of corporate accounts. However, in holding that the individual shareholder was not liable for damage done by his corporation's barges, the court pointed out that the shareholder was old, in ill health, and illiterate and that he had legitimate reasons for incorporating the business to provide limited liability protection for himself in a business over which he had little active control. It seems doubtful that a similar conclusion would have been reached in a situation where a corporation set up a subsidiary to insulate itself from similar liability.

It would appear that there are at least two considerations at work here. First, the degree of sophistication of the shareholders is to be taken into account, and, consequently, an illiterate old man should not be held to the same standard of conduct that would apply to a sophisticated corporate defendant. Secondly, it may be recognized that there is less justification for providing multiple limited-liability insulation to a corporation which wishes to segregate high risk activities than there would be for an individual shareholder or a group of individuals who wished to take advantage of the corporate limited-liability feature. The fact the law permits corporate limited liability may not be a license for creating an infinite series of corporations, each with the same degree of limited liability that would be granted to individuals who form an initial corporation. While it may be necessary as a matter of good public policy to provide limited liability to encourage the infusion of capital into new corporations, it is less clear that limited liability through subsidiaries is necessary to encourage existing corporations to enter into new and perhaps riskier businesses.

An example of the courts' consideration of the legitimacy of the subsidiary corporation's purpose is found in the distributorship cases.[156] In these cases there appears to be no reason for multiple corporations except to try to provide insulation from products liability suits. Note that these cases do not generally involve a lack of economic substance. Both the distributing company and the manufacturing company ordinarily have adequate assets and insurance to bear whatever financial risk is involved. Instead, the goal appears to be to create procedural roadblocks to force a plaintiff to sue the manufacturer who may be subject to process only in a foreign jurisdiction.

Thus, the courts apparently feel that the right to corporate limited liability is by no means an absolute right and that cynical misuse for something more than merely limiting liability in a traditional sense will be scrutinized closely.

2. Bearing the Risk

Riskbearing is an economic concept generally applicable to tort cases. The distinction between tort and contract cases in the corporate veil area is one that is frequently made.[157] In a contract case there is likely to be a much higher degree of reliance by the plaintiff, for example, with respect to misrepresentations as to the relationship of the dominant party and subservient corporation, than is true in the tort area. There is also a greater degree of volition in the contract case, when the plaintiff voluntarily, albeit often unwisely,[158] elects to do business with the subservient corporation. In a tort case, on the other hand, there is both a moral and an economic concern that the risk of injury or loss not be apportioned in an unreasonable way.[159] This is an area in which the courts have had great difficulty, as illustrated by the two following cases.

In *Black & White, Inc. v. Love*,[160] the plaintiff had called the Black & White Cab Company and ordered two taxis. Two cabs were sent, one a Black & White cab and the other a Checkers cab. The plaintiff's wife was injured in an accident while riding in the Checker cab. The evidence showed that Black & White shared a radio dispatcher, used the same switch board operator, and that both operator and dispatcher were on the payroll of Black & White. While there is some confusion in the opinion as to whether or not the decision was based on a joint venture theory or on a piercing-the-corporate-veil theory, the result was that the plaintiff was allowed to recover against Black & White.

By contrast, consider *Steven v. Roscoe Turner Aeronautical Corp.*[161] There, Roscoe turner Aeronautical Corporation (RTAC) had a substantial business with several airplanes engaged in the air carrier business. The sole shareholder of RTAC also owned Turner Aviation Corporation (TAC) which had a single airplane as its principal asset. When the plaintiff requested transportation to Chicago, an airplane from RTAC and other airplane from TAC were made available. The plane from TAC crashed, killing the passengers, and the decedent's estate brought an action against RTAC on a piercing-the-veil theory. The court held that the corporate veil of RTAC could not be pierced despite the fact that the corporations had the same shareholder and substantial identity of officers and directors and that the second airplane was provided to customers who had contracted originally with RTAC.

There seems little doubt that there is a discernable tendency for businessmen who are engaged in high risk activities to divide their operations into separate corporations.[162] This tendency seems objectionable on several bases. First, there is a moral objection to a policy that prohibits one injured in an accident involving a substantial economic organization from having recourse against the total organization. This seems to be a perversion of the traditional notion that investors can limit their personal exposure by creating a corporation. Secondly, any sound economic analysis would suggest that the most effective way of distributing the risk should be to assign liability to the total organization and that the law should encourage such organization to insure fully and adequately. Finally, it seems absurd to have a legal policy which encourages the proliferation of corporations, with all of the consequential legal and administrative expense, for the sole purpose of protecting against tort liability. It therefore appears that the *Black & White* case presents the better view—the total organization should not be allowed to be artificially subdivided for the sole purpose of limiting liability. This is not to endorse any general policy of piercing the veil simply to place the risk of loss on an economically identifiable party. But where there are other factors indicating the propriety of piercing the veil, consideration may properly be given to risk of loss factors.[163]

E. *Relationship of Ultimate Issues*

It cannot be emphasized too strongly that all of the ultimate issues discussed above are closely interrelated. For convenience there is some value in discussing them individually and attempting to analyze separately the considerations applicable to each. In a particular case one consideration may control while in another the overall analysis and the relative weight and importance of each of the other ultimate issues will have to be decided within the context of the specific facts. For example, grossly inadequate undercapitalization may be a sufficient basis by itself, or in conjunction with other minor factors, to cause the corporate veil to be pierced. Similarly, a very substantial breach of some important public policy through the subservient corporation may similarly cause the veil to be pierced almost without regard to other factors. On the other hand, lack of economic substance combined with some misrepresentation and indications that the dominant party is using the corporate structure for an illegitimate purpose, may cause the veil to be pierced where no single factor by itself appears to be overpowering. The courts can provide us with no formula for the application of these factors, but the ultimate issues may at least provide a starting point for focusing the inquiry.

III. Weaving an Impenetrable Veil

A. *Practical Applications v. Theory*

It is no doubt appropriate that an article written by a law professor and a practicing corporate attorney should take a somewhat bifurcated approach to analyzing the problems of piercing the corporate veil. On the one side, we must be concerned with the underlying rationale of the courts, the true importance and relationship of the ultimate issues which they should or do consider, and the policies that may influence the decisions. On the other side, we must recognize that the concern with the ultimate issues which we perceive in the opinions has little obvious relevance to many decisions. In practice, there is a somewhat confused approach and what often seems to be a superficial application of the Powell circumstances or some similar checklist. The courts often state a vague general rule, list various factors, and announce a decision, often without articulating how the decision relates to either the rule or to the factors. From the corporate client's point of view, the reality of what he can or cannot do must be of considerably more importance than the theoretical soundness of the approaches which the courts are taking. However, it is helpful and often crucial for the practitioner to understand the issues that are of real concern to the better reasoned cases, as well as the rules and factors courts recite to justify conclusions reached by their application of the ultimate issues. Thus far, this article has identified and analyzed the ultimate issues; the remainder of the article will suggest a list of factors noted by courts in recent decisions.

Some of the practicalities of how to structure a corporation and its business operations in such a way as to minimize the likelihood of the veil being pierced are demonstrated by the following cases.

B. *A Successful Attempt*

The case of *American Trading & Production Corp. v. Fischbach & Moore, Inc.*[164] illustrates how to establish and operate a subsidiary so as to avoid having a court pierce the veil. Moreover, the case shows how to defeat a claim at the summary judgment stage. The parent corporation, Fischbach & Moore Electrical Contracting, Inc., installed electrical wiring in a large Chicago exhibition hall, giving rise to the subject litigation. The building was subsequently destroyed by fire, allegedly because of improper wiring. In an action for losses arising out of the fire, the court determined that the subsidiary was not a mere instrumentality of the plaintiff under a variation of the Powell rule.[165] The following facts were considered by the court in reaching its decision to grant a summary judgment in favor of the parent. At the time of the tort, all four of the subsidiary directors were also directors of the parent and four of its eight officers were officers of the parent. However, the corporations maintained separate offices and conducted separate directors' meetings, the subsidiary maintained its own financial books and records, and the subsidiary had a separate bank account and negotiated its own loans from third parties, even though the loans were reviewed and guaranteed by the parent. The subsidiary had borrowed money from the parent, but only under very formal circumstances, that is, the loans were evidenced by notes and called for interest at the prime rate. The subsidiary and parent filed separate tax returns even though their financial statements were consolidated. Their payrolls were separate although the salary levels which were determined by the subsidiary were subject to review by the parent. The two corporations had never purchased goods or services from each other. Labor relations were independently handled by each corporation.[166]

Although the subsidiary notified the parent of bids made on contracting jobs and of contracts awarded, neither bids nor contracts were reviewed by the parent. The manner of performance and the materials to be used on the projects were not subject to review by the parent but the profit mark-up contracts exceeding $5 million was to be determined only after consulting with the parent. The subsidiary also forwarded schedules to the parent regarding new jobs acquired and contracts on hand for each three-month period and submitted reports on material purchases, estimates, salary changes, and financial data on a more frequent basis, but there was no evidence that the parent acted as a result of any of these reports.[167] Other evidence tending to show more-than-typical-shareholder interest or control by the parent included the following: On one occasion, the subsidiary sought review by the parent of a lease it had negotiated for additional yard space for its equipment; the parent had determined on other occasions which of its subsidiaries should bid on a particular project; and the parent's management considered the subsidiary to be part on its family, as evidenced by its annual reports and advertising in *Fortune* magazine, where the parent had claimed credit in its own name for projects, including the Chicago exhibition hall project at issue in the instant case.[168] There was, however, no showing that any of the plaintiffs had been misled as to the identity or financial resources of the subsidiary.

The court also examined financial data relevant to the subsidiary. The subsidiary's net worth was $511,503 in 1966 and $684,574 in 1967. The subsidiary had paid dividends of $100,000 in 1966 and $369,000 in 1967, which had amounted to substantially all of its after-tax earnings. These figures represented approximately 4.42% and 8.07%, respectively, of the consolidated gross income of the parent and all its subsidiaries. The parent's gross income, apart from the income from subsidiaries, approximated $77 million in each of the two years. The court concluded that the subsidiary had a very adequate capitalization and that the parent had not isolated a great deal of its income through the creation of subsidiaries. More importantly, the claims at issue were covered by $15 million of insurance, which exceeded aggregate claims.[169]

The court observed that the facts showed, at most, that the parent exercised supervision and guidance of the general performance of the subsidiary. The court noted that "such participation in a subsidiary's affairs does not amount to the domination of day-to-day business decisions and disregard of the corporate entity necessary to impose liability on a parent."[170] Finally, it was apparent that formalities in this case had been followed to the "nth degree" and the court concluded that "separate corporate identities had been scrupulously maintained."[171]

C. *An Unsuccessful Attempt*

A case which illustrates the circumstances in which the corporate veil is likely to be pierced is *Ampex Corp. v. Office Electronics, Inc.*[172] There, the plaintiff-creditor was allowed by the court to pierce the veil of a subsidiary to find Office Electronics, Inc., the parent corporation, liable. The court, using an instrumentality-alter ego theory,[173] first determined the extent to which the parent had intervened in the operation of the subsidiary. The following factors were enumerated by the court: (1) Two of the three directors of the subsidiary were officers of the parent; (2) the parent owned fifty-one percent of the subsidiary; (3) when the plaintiff had refused to grant corporate credit to the subsidiary, the parent agreed to inventory $20,000 worth of tapes for the benefit of the subsidiary; (4) the parent advanced monies to the subsidiary for its commission sales accounts; (5) the parent received merchandise for the subsidiary from the plaintiff, along with monthly statements and invoices; and (6) the parent did all the shipping and billing to the customers of the subsidiary. In addition, the parent had continued to pay for verbal orders made by the subsidiary, even after the parent had given written instructions to the plaintiff not to conduct business on this basis. These factors established not only direct intervention by the parent, but they also showed that the plaintiff-creditor was misled by the parent since the creditor really dealt with the parent as the person in charge as opposed to the subsidiary. That is, the plaintiff sent the statements and inventories to the parent, met with the parent and the subsidiary when discussing the subsidiary's credit arrangements, and received payment from the parent for the merchandise sold to the subsidiary. Finally, the subsidiary may have been inadequately capitalized. It had, initially, capital of $16,000 with no other assets, although, from the outset, it planned to inventory $20,000 worth of magnetic tapes as well as incur other expenses.

A comparison of *Fischbach* and *Ampex* demonstrates the desirability not only of being right, but of being right by a wide margin. It does the defendant relatively little good to prevail ultimately on the facts after an expensive and time-consuming trial. Instead, the object should be to prevail on a motion on the pleadings or by a summary judgment motion, which is in fact the stage at which an unusually larger number of corporate veil cases seem to be decided.[174]

D. *The Practitioner's Checklist*

Recent court decisions have identified a number of factors which should be taken into consideration when attempting to keep the corporate veil intact. One should attempt to comply with as many of these factors as possible. To the extent that not all of the factors can be complied with, it should at least be one's object to stay on the right side of those which are clearly substantive matters going to ultimate issues, as opposed to those which are likely to be found in any parent-subsidiary relationship. The factors tending to support separate corporate entities in recent cases include the following.[175]

1. The shareholder is not a party to the contractual or other obligations of the corporation.[176]

2. The subsidiary is not undercapitalized.[177]

3. The subsidiary does not operate at a deficit while the parent is showing a profit.[178]

4. The creditors of the companies are not misled as to which company they are dealing with.[179]

5. Creditors are not misled as to the financial strength of the subsidiary.[180]

6. The employees of the parent and subsidiary are separate and the parent does not hire and fire employees of the subsidiary.[181]

7. The payroll of the subsidiary is paid by the subsidiary and the salary levels are set by the subsidiary.[182]

8. The labor relations of the two companies are handled separately and independently.[183]

9. The parent and subsidiary maintain separate offices and telephone numbers.[184]

10. Separate directors' meetings are conducted.[185]

11. The subsidiary maintains financial books and records which contain entries related only to its own operations.[186]

12. The subsidiary has its own bank account.[187]

13. The earnings of the subsidiary are not reflected on the financial reports of

the parent in determining the parent's income.[188]

14. The companies do not file joint tax returns.[189]

15. The subsidiary negotiates its own loans or other financing.[190]

16. The subsidiary does not borrow money from the parent.[191]

17. Loans and other financial transactions between the parent and subsidiary are properly documented and conducted on an arm's-length basis.[192]

18. The parent does not guarantee the loans of the subsidiary or secure any loan with assets of the parent.[193]

19. The subsidiary's income represents a small percentage of the total income of the parent.[194]

20. The insurance of the two companies is maintained separately and each pays its own premiums.[195]

21. The purchasing activities of the two corporations are handled separately.[196]

22. The two companies avoid advertising as a joint activity or other public relations which indicate that they are the same organization.[197]

23. The parent and subsidiary avoid referring to each other as one family, organization, or as divisions of one another.[198]

24. The equipment and other goods of the parent and subsidiary are separate.[199]

25. The two companies do not exchange assets or liabilities.[200]

26. There are no contracts between the parent and subsidiary with respect to purchasing goods and services from each other.[201]

27. The subsidiary and the parent do not deal exclusively with each other.[202]

28. The parent does not review the subsidiary's contracts, bids, or other financial activities in greater detail than would be normal for a shareholder who is merely interested in the profitability of the business.[203]

29. The parent does not supervise the manner in which the subsidiary's jobs are carried out.[204]

30. The parent does not have a substantial veto power over important business decisions of the subsidiary[205] and does not itself make such crucial decisions.

31. The parent and subsidiary are engaged in different lines of business.[206]

E. ***Using the Checklist***

The above factors are not necessarily presented as a logical or preferable measure for determining when to pierce the corporate veil.[207] They are, however, factors which have been listed by one or more courts as relevant considerations to be taken into account in making such a determination. Therefore, anyone attempting to set up a subsidiary which will be fully viable should try to comply with as many of them as possible. In many cases it will be noted that compliance is, after all, a fairly easy matter and the slight additional effort and expense should be incurred to insure corporate indestructibility.

We do not mean to suggest that mere mechanical compliance with the foregoing factors will insure an impenetrable veil.[208] The ultimate issues discussed in the foregoing sections are of direct and major importance. In structuring any corporate relationship, careful thought should be given to such ultimate issues and to the effect that they have on each other. For example, the most stringent efforts to satisfy some mechanical check list will not protect a corporation where it is being used to violate an important public policy.

In establishing any corporation which is intended to withstand efforts to pierce the veil, overkill is justified. That is, not only should one attempt to meet the minimum standards for preserving the corporate entity, but one should greatly exceed those minimum standards if at all possible. The reasons for this are at least two-fold.

1. Summary Disposition

First, an unusually large number of cases in this area are resolved at an early state in the pleadings by a motion to dismiss or by a summary judgment.[209] Obviously, it is of great value to the client to prevail in a law suit at such a stage, without incurring the substantial legal expenses involved in preparing a case for trial with the attendant interruption of business activities. Moreover, the defendant in a corporate veil case usually has available most of the evidence that would support piercing the veil and, if success can be achieved at some early stage of the proceedings, there is little opportunity for the plaintiff to develop such discovery.

2. Preparing for the Unforeseen

Second, no matter how carefully structured the transaction may be, it is always possible that some developments will occur which will make a decision in favor of the plaintiff seem equitable. For example, it is entirely possible in the *Reserve Mining* case[210] that the organizers of the corporation never anticipated that enormous potential damages for violations of environmental laws might accrue. Once such damages were alleged, it became more likely that the subsidiary corporation would be found to be lacking in economic substance and violative of a strong public policy. Thus, no matter how strong the case for an impenetrable veil may seem at the time a corporation is established, there is always the possibility that future developments may greatly weaken its position.[211]

The conclusion, therefore, should be that one attempting to weave an impenetrable veil should comply with as many of the mechanical factors listed by the courts as possible. Such a party should also keep in mind the importance of complying with basic policy considerations and, specifically, of staying on the right side of the various ultimate issues discussed previously.

This section would not be complete without a brief discussion of the problems of the plaintiff in a corporate veil case. Several suggestions may be useful to such a plaintiff. First, like the potential defendant, the plaintiff should bear in mind both the factors, the mechanical tests, which are listed above, and the ultimate issues which should control the decisions of most courts and the relationship, if any, of the factors to the issues. Second, the plaintiff should be aware that in applying traditional variations of the Powell rule, courts tend to focus heavily on proof of actual instrumentality with respect to the particular improper act at issue. Accordingly, evidence must be mustered, not simply to show general domination of, or potential to control, the subservient corporation, but actual control and direction with respect to the particular transaction. Far too many plaintiffs fail to provide the necessary minimum of evidence of instrumentality because they focus on questions of general rather than specific control. Third, the plaintiff must be aware that most of the evidence he needs is in the hands of the defendant.[212] Moreover, much of his evidence is intangible, for example, the motivations of a key executive at the time he took some crucial action. It is important to conduct an immediate and aggressive discovery campaign, to examine such documentary evidence as may be available and, in particular, to take extensive depositions before the defendants have an opportunity to rationalize their own behavior in terms that will avoid penetration of the veil.

From a practical point of view, it is quite difficult to structure a case either for or against piercing the veil with complete certainty. The rules are equitable and their relative importance varies from one case to another. However, the foregoing guidelines and careful consideration of the effect of the ultimate issues may be helpful in focusing legal efforts.

Conclusion

The case law and the commentators are by no means totally successful in attempting to formalize and simplify the rules applicable to piercing the corporate veil. This, we would submit, is not the fault of the judges or the commentators but is an inherent problem in this area of law. We believe that "piercing the corporate veil" is only a general term under which are subsumed a multitude of fact situations. No useful general statement can be made about such situations, except that, despite the strong public policy in favor of preserving corporations, there are situations in which equity will require that the corporate form be disregarded. We have categorized some types of cases and fact situations in connection with our discussion of the ultimate issues. We have no doubt that other situations have arisen or will arise in which equity will demand that the corporate form be disregarded. No doubt it is useful to attempt the classifications and rules, but, as Judge Cardozo pointed out, we must not become lost in the mists of metaphor.[213]

We are reminded of the analogy drawn by the great analytic philosopher, Ludwig Wittgenstein. Wittgenstein pointed out that there are at least some words for which there is no single definition or common denominator which will be found in all definitions. Instead, he proposed an analogy comparing such words to a piece of thread composed of many fibers, with no fiber running the entire length of the thread, but all of which are intertwined and together form a single strand.[214] We would suggest that the corporate veil is woven from Wittgensteinian threads. We can identify what we have called "ultimate issues," but we cannot say that any one will control every case. We hope, however, that an identification of such ultimate issues may be helpful in focusing the inquiry and leading to an equitable result.

The resolution of any corporate veil case involves the collision of an irresistible force–the power of equity—with an immovable object—corporate limited liability. Each case must be decided on the basis of its unique factors. Efforts at simplistic rules—*e.g.*, piercing the veil whenever there is inadequate capitalization—may have disastrous effects not only on the theoretical structure of corporate law but on the much more important underlying economic policies. We therefore suggest that the law must continue to struggle with concepts and rules that may lack logical purity but which enable the courts to continue their delicate balancing act.

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* Partner, Cohen, Brame, Smith & Krendl, Denver, Colorado; B.A., 1963, Harvard University; J.D., 1970, Harvard Law School.

** Associate Professor of Law, University of Denver College of Law; B.A., 1967, North Texas State University; J.D., 1970, Harvard Law School. The authors wish to acknowledge their appreciation to Mr. Arnold Guttenberg, a third-year law student at the University of Denver, who diligently and skillfully performed much of the legal research for this article.

[1] *See* H. Ballantine, Corporations, § 122 at 293 (rev. ed. 1946) [hereinafter cited as Ballantine]; W. Fletcher, Cyclopedia of Corporations, § 25 at 100 (rev. vol. 1974) [hereinafter cited as Fletcher]; H. Henn, Law of Corporations, § 252 at 501 (2d ed. 1970) [hereinafter cited as Henn]; F. Powell, Parent and Subsidiary Corporations, § 1 at 1 (1931) [hereinafter cited as Powell]. The general rule cited by these authorities is usually cast in these words of Judge Sanborn in United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905):

> If any general rule can be laid down in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

For an English case illustrating the strong policy of recognizing corporateness, see Salomon v. A. Salomon & Co., L.R. [1897] A.C. 22, 38 *rev'g* Broderip v. Salomon, L.R. [1895] 2 Ch. 323, *cited in* Ballantine, *supra* note 1, at 298-99.

[2] Subscribers and shareholders will normally be liable to the corporation or its creditors for the full consideration for which their shares are issued. *See, e.g.,* Cal. Corp. Code § 410 (West 1977); Colo. Rev. Stat. § 7-4-120 (1973); Del. Code tit. 8 § 162 (1974); Ill. Rev. Stat. ch. 32, § 157.23 (1975); N.Y. Bus. Corp. Law § 628 (McKinney 1963); Tex. Bus. Corp. Act Ann. art. 2.21 (Vernon1956).

[3] For a discussion of the theories of corporateness (separate artificial entity versus collections of persons), see Fletcher, *supra* note 1, at §§ 24-25; Henn, *supra* note 1, at § 78.

[4] For a brief review of the history of limited liability in English common law and in the United States, see Carolan, *Disregarding the Corporate Fiction in Florida,* 27 U. Fla. L. Rev. 175, 177 n.10 (1974) [hereinafter cited as Carolan]. For the general rationale behind the policy of limited liability, see Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 Yale L.J. 193, 193-94 (1929) [hereinafter cited as Douglas & Shanks]; Comment, *Should Shareholders be Personally Liable for the Torts of Their Corporations?*, 76 Yale L.J. 1190, 1190-91 (1967). *See also* Zaist v. Olson, 227 A.2d 552 (Conn. 1967) (Cotter, Assoc. J., dissenting).

[5] *See* note 1 *supra*. In 1929, Douglas & Shanks confidently proclaimed:

> Yet in spite of this apparent recession no one would claim that the availability of limited liability played an insignificant part in the expansion of industry and in the growth of trade and commerce. It has had a potent influence. Limited liability is now accepted in theory and in practice. It is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it. It is legitimate for a man or group of men to stake only a part of their fortune on an enterprise. Legislatures, courts and business usage have made it so. Douglas & Shanks, *supra* note 4, at 193-94. *See* Lowendahl v. Baltimore & O.R.R., 247 App. Div. 144, 287 N.Y.S. 62, 72 (1936).

[6] *See* Ballantine, *supra* note 1, § 122 at 326; Fletcher, *supra* note 1, § 141 at 559; Henn, *supra* note 1, § 146 at 250.

[7] *See* Ballantine, *supra* note 1, § 136 at 292-93; Henn, *supra* note 1, § 147, 148 at 293; Fletcher, *supra* note 1, at § 41; Powell, *supra* note 1, § 18 at 95; R. Stevens, Handbook on the Law of Private Corporations, § 17 at 86 (1949) [hereinafter cited as Stevens].

[8] For a succinct description of the noncorporate theories of liability, see Note, *Liability of a Corporation for Acts of a Subsidiary or Affiliate,* 71 Harv. L. Rev. 1122, 1123-25 (1958).

[9] Distinguished scholars have wrestled with the difference between an agency theory and a piercing-the-corporate-veil theory for more than half a century. Although the distinction they make seems clear, some courts seem to confuse the issues. Consequently, each new article on the subject must reiterate the distinction. In 1925, Professor Ballantine stated that most of the opinions which disregard the corporate veil can be explained by a liberal

application of ordinary agency rules. *See* Ballantine, *Separate Entity of Parent and Subsidiary Corporations,* 14 Calif. L. Rev. 12, 15 (1925). Justice Cardozo in 1926 seemed to agree that agency per se might not always be present in situations where justice requires piercing the veil. In Berkey v. Third Ave. R.R., 244 N.Y. 84, 155 N.E. 58, 61 (1926), he stated:

> Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice. Ballantine, Parent and Subsidiary Corporations, 14 Cal. Law Review, 12 18, 19, 20. The logical consistency of a juridical conception will indeed be sacrificed at times, when the sacrifice is essential to the end that some accepted public policy may be defended or upheld. This is so, for illustration, though agency in any proper sense is lacking, where the attempted separation between parent and subsidiary will work a fraud upon the law. Chicago, M. & St. P. R. Co. v. Minneapolis Civil & Commerce Ass'n, 247 U.S. 490, 38 S. Ct. 553, 62 L. Ed. 1229; United States v. Reading Co., 253 U.S. 26, 61, 63, 40 S. Ct. 425, 64 L. Ed. 760. At such times unity is ascribed to parts which, at least for many purposes, retain an independent life, for the reason that only thus can we overcome a perversion of the privilege to do business in a corporate form. We find in the case at hand neither agency on the one hand, nor, on the other, abuse to be corrected by the implication of a merger. On the contrary, merger might beget more abuses than it stifled.

In 1929, Judge Leaned Hand made the most sensible distinction: that express agency would not provide a remedy because the consensual element would be lacking and that implied agency would be inappropriate because that would mean that the veil would be pierced in every situation. In Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 256, 267 (2d Cir. 1929), Judge Hand stated:

> One corporation may, however, become an actor in a given transaction, or in part of a business, or in a whole business, and, when it has, will be legally responsible. To become so it must take immediate direction of the transaction through its officers, by whom alone it can act at all. [Citations omitted.] At times this is put as though the subsidiary then became an agent of the parent. That may no doubt be true, but only in quite other situations; that is, when both intend that relation to arise, for agency is consensual. This seldom is true, and liability normally must depend upon the parent's direct intervention in the transaction, ignoring the subsidiary's paraphernalia of incorporation, directors and officers. The test is therefore rather in the form than in the substance of the control; in whether it is exercised immediately, or by means of a board of directors and officers, left to their own initiative and responsibility in respect of each transaction as it arises. Some such line must obviously be drawn, if shareholdering alone does not fuse the corporations in every case.

Hand's distinction was adopted and elaborated by Powell, *supra* note 1, at 94. This same analysis is often made by modern commentators. *See* note 8 *supra,* at 1124. However, some courts continue to be confused. They use agency as a synonym for instrumentality and then also use agency in the correct sense. The difference between the two, or indeed the meaning of agency in a particular opinion, is often not clear. *See* Fletcher, *supra* note 1, § 43 at 209-10. For a general survey of the instances where the traditional rules of agency would be appropriate, see Fletcher, *supra* note 1, § 30 at 130.

[10] Misrepresentation is often not a helpful remedy in these situations, either because the misrepresentation is in the nature of an opinion or conclusion, because there is no proof of detrimental reliance, material misrepresentation, intent, or because of statutes of limitations. *See* Powell, *supra* note 1, at 63. Powell illustrates a kind of misrepresentation often found in the corporate veil area with these examples: where the officers of the parent corporation in their reports or correspondence or in their oral statements to the plaintiff state that the parent is "back of" the subsidiary or that the subsidiary is the same as the parent or a mere department or division of its business. *See* notes 111-19 *infra* and accompanying text.

For examples of the corporate entity being disregarded in the case of fraudulent transfer in hindrance of corporate creditors, see generally Fletcher, *supra* note 1, § 44 at 238-39; Henn, *supra* note 1, § 146. For an illuminating description of the relationship between fraudulent transfers and piercing the corporate veil, see Clark, T*he Duties of the Corporate Debtor to Its Creditors,* 90 Harv. L. Rev. 505 (1977).

[11] Traditional estoppel will often be useless because it requires proof of detrimental reliance which is usually not present in the typical piercing-the-corporate-veil case. *See generally* Restatement (Second) Of Contracts, § 90 at 215 (1975). For a comparison of traditional estoppel with the kind of estoppel-like conduct present in piercing-the-veil cases, see Fletcher, *supra* note 1, § 47 at 274; Powell, *supra* note 1, § 13(e) at 66; Note *supra* note 8, at 1125.

[12] *But see* United States v. Dean Van Lines, 531 F.2d 289 (5th Cir. 1976), where the United States brought suit against a Belgian subsidiary's American corporate parent, seeking an accounting and collection of overcharges allegedly made by the subsidiary. The Belgian subsidiary had overcharged the United States when acting as its freight forwarder, and the parent had sold the stock of its subsidiary. The Government alleged that the parent had realized an inflated price for the shares as a result of the overcharges. The parent had not liquidated the subsidiary, and, according to the court, there was no showing that the United States could not pursue its claim against the subsidiary. The Government admitted that it could not prove that the former subsidiary was the alter ego or instrumentality of its parent and that, therefore, it was proceeding on an unjust enrichment theory, not the corporate theory of piercing the veil. The Fifth Circuit reversed the lower court and held that on these facts—particularly in view of the failure of the Government to show a unity of interest between these two corporations—the government could not recover.

[13] For a recent discussion of the requirements of the fiduciary duty theory, see generally Comment, *Corporate Fiduciary Doctrine in the Context of Parent-Subsidiary Relations,* 74 Yale L.J. 338 (1964). For example, in Zohn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947), the directors of the corporation were found liable for calling certain stock of minority shareholders in order to increase the value of stock held by another corporation

which controlled such directors. On slightly different facts, it can be seen that the corporate shareholder might be liable on a piercing-the-veil cause of action for causing the partially owned subsidiary to take actions in the interest of the parent.

[14] *See, e.g.,* Bernardin, Inc. Midland Oil Corp. 520 F.2d 771 (7th Cir. 1975) (fraudulent transfer possible alternative theory); Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157 (7th Cir. 1963) (agency pleaded); Puamier v. Barge BT 1793, 395 F.Supp. 1019 (E.D. Va. 1974) (misrepresentation or estoppel possible theories); Whayne v. Transportation Management Serv., Inc., 252 F.Supp. 573 (E.D. Pa. 1966) (agency pleaded); Savage v. Royal Properties, Inc., 4 Ariz. App. 116, 417 P.2d 925 (1966) (estoppel); Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355 (1974) (court said judgment could be upheld on the theories of agency and estoppel).

[15] *See, e.g.,* Bernardin, Inc. v. Midland Oil Corp., 520 F.2d 771 (7th Cir. 1975); Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8th Cir. 1964); Puamier v. Barge BT 1793, 395 F.Supp. 1019 (E.D. Va. 1974); Zaist v. Olson, 154 Conn. 563, 227 A.2d 552 (1967); Ampex Corp. V. Office Elecs., Inc., 24 Ill. App. 3d 21, 320 N.E.2d 486 (1974); Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355 (1974).

[16] *See, e.g.,* Zubik v. Zubik, 384 F.2d 267 (3d Cir. 1967), *cert. denied,* 390 U.S. 988 (1968).

[17] *See, e.g.,* Berger v. Columbia Broadcasting Sys., Inc., 453 F.2d 991 (5th Cir.), *cert. denied,* 409 U.S. 848 (1972).

[18] *See, e.g.,* Walkovsky v. Carleton, 18 N.Y.2d 414, 223 N.E.2d 6 (1966), 276 N.Y.S.2d 585.

[19] *See, e.g.,* Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir. 1973) (creditor); Soderberg Advertising Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355 (1974) (optionee).

[20] *See, e.g.,* Paumier v. Barge BT 1793, 395 F.Supp. 1019 (E.D. Va. 1974).

[21] *See, e.g.,* Black & White, Inc. v. Love, 236 Ark. 529, 367 S.W.2d 427 (1963). For other examples of the vast variety of contexts in which this question arises, see Ballantine, *supra* note 1, § 121 (tax), §§ 129, 139 (bankruptcy and receivership), 140 (jurisdiction and service of process); Fletcher, *supra* note 1, §§ 40, 43, 45.1 (tax); Henn, *supra* note 1, §§ 149-153; Stevens, *supra* note 7, § 17.

[22] The creditor elects to extend credit to a corporate entity; the tort victim does not. On that basis, most commentators suggest that the courts should view such claims from different perspectives. *See* Ballantine, *supra* note 1, § 137 at 315; Henn, *supra* note 1, § 146 at 252-54; Douglas & Shanks, *supra* note 4, at 210-11; Carolan, *supra* note 4, at 194; Hamilton,

The Corporate Entity, 49 Tex. L. Rev. 979, 984 (1971) [hereinafter cited as Hamilton]; Comment, *supra* note 4, at 1190. *See also* Chengelis v. Cenco Instruments Corp., 386 F.Supp. 862 (W.D. Pa. 1975); Siboney Corp. V. Dresser Indus., Inc., 521 S.W.2d 639, 643 (Tex. Civ. App. 1975); *But see* notes 121-25 *infra* and accompanying text.

The policy considerations are different when the defendant is a corporation rather than an individual. Should the veil of one corporation (a subsidiary, for example) be pierced to reach the assets of another corporation (the parent), the personal assets of the shareholders of the parent corporation are still protected by the parent's corporate shield. In other words, such shareholders have a double layer of insulation not available in situations where piercing the veil of a closely held corporation would immediately jeopardize all of the personal assets of the shareholders. *See* text accompanying note 155 *infra*.

[23] Generally, the principles governing one-man, family, and other close corporations are applicable to subsidiary and other affiliated corporations. *See* Ballantine, *supra* note 1, § 136 at 311; Fletcher, *supra* note 1, § 43 at 209; Henn, *supra* note 1, § 148 at 258-59; Stevens, *supra* note 7, at 85. It has, however, been suggested that courts are more willing to pierce the veil when a corporation rather than an individual is the defendant. *See* Hamilton, *supra* note 22, at 992.

[24] *See* Fletcher, *supra* note 1, § 41.2 at 179; Henn, *supra* note 1, § 94 n.5; § 146 n.2; § 148 n.7; § 150 n.16.

[25] In 1925, Ballantine, *supra* note 9, at 15, described this area of law as a "legal quagmire." In 1926, Justice Cardozo stated in Berkey v. Third Ave. R.R., 244 N.Y. 84, 155 N.E. 58 (1926), that this subject was enshrouded in "mists of metaphors," a phrase which Douglas agreed was appropriate in 1929. *See* Douglas & Shanks, *supra* note 4, at 218. Professor Ballantine in his treatise in 1946, *supra* note 1, § 136 at 312, stated that there was still no guidance in the opinions to solve the variety of problems in this area: "The deciding and differentiating factors in any particular situation are often difficult to discover in the opinions. The formulae invoked usually give no guidance or basis for understanding the results reached." Current commentators continue to emphasize the confusion in this area of law, and the general failure of courts to articulate reasoned grounds of decision. *See* Hamilton, *supra* note 22 and note 8. Courts also decry the confusion; *see, e.g.,* Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1103 (5th Cir. 1973).

[26] This article will deal primarily with corporate cases subject to presumably uniform rules. However, it should be recognized that numerous cases apply specialized rules. *See* Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634 (8th Cir. 1975) (corporate veil of fund raising company is pierced to find in personam jurisdiction over chief executive officer of company resulting from breach of contract); Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agriculture, 438 F.2d 1332 (8th Cir. 1971) (corporate veil pierced to find parent corporation liable for evasion of Packers and Stockyards Act by subsidiary); Griffin & Co. v. United States, 389 F.2d 802 (Ct. Cl. 1968) (veil of the subsidiary is pierced to hold the parent liable for federal income taxes of subsidiary in a two year period in which the subsidiary did not carry on a substantial

business); Hillebrand v. Sav-Co., 353 F.Supp. 19 (E.D. Ill. 1972) (corporate veil of parent pierced to allow trustee in bankruptcy to set aside certain voidable transfers occurring within four months of bankruptcy by the subsidiary); ABC Great States, Inc. v. Globe Ticket Co., 304 F.Supp. 1052 (N.D. Ill. 1969) (corporate veil of parent is pierced to subject the subsidiary to venue in the jurisdictions where venue was proper on the parent in antitrust proceeding); *In re* Farmers Federation Cooperative, Inc., 242 F.Supp. 400 (W.D.N.C. 1965), *modified on other grounds,* 368 F.2d 934 (4th Cir. 1966) (in a bankruptcy proceeding subsidiary given same status as parent); Co-Con, Inc. v. Bureau of Revenue, 87 N.M. 118, 529 P.2d 1239, *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974) (parent and subsidiary corporation are treated as one corporation for purpose of taxing gross receipts, based on certain construction equipment without regard to which corporation had the legal title to the equipment); People ex rel. Bolton v. Progressive Gen. Ins., 44 Ill.2d 392, 256 N.E.2d 338 (1969) (in insurance company rehabilitation proceeding, sole shareholder is ordered to "turn over" certain premium trust funds); State Bank of Cerro Gordo v. Benton, 22 Ill. App.3d 1007, 317 N.E.2d 578 (1974) (corporation's veil is pierced to prevent controlling shareholder from avoiding sales tax and transferring property to himself to avoid paying a creditor's claim); Palm Gardens, Inc. v. Oregon Liquor Control Comm'n, 15 Or. App. 20, 514 P.2d 888 (1973) (corporate veil pierced to find corporation liable for violation of liquor license law because of previous conduct of corporation's sole shareholder). Most of these cases will be disregarded in the course of this article because they involve special considerations which are not applicable to the area generally.

[27] Henn, *supra* note 1, § 146 n.2.

[28] 253 U.S. 26 (1920). This case was cited by the early commentators. *See* Powell, *supra* note 1, at 7. It is occasionally cited by courts today. *See, e.g.,* Int'l R.R. v. United Brands, 532 F.2d 231, 248 (2nd Cir. 1976); Cleary v. Chalk, 488 F.2d 1315, 1319 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1103 (5th Cir. 1973); Kansas City Star Co. v. United States, 240 F.2d 643, 650 (8th Cir. 1957), *cert. denied*, 354 U.S. 923 (1959).

[29] 244 N.Y. 84, 155 N.E. 58, 217 N.Y.S. 156 (1926). In Powell, *supra* note 1, at 93, it is noted that *Berkey* was a widely discussed case in the late 20's and early 30's. This case continues to be cited frequently. *See* Fletcher, *supra* note 1, § 41.3, n.52, and Henn, *supra* note 1, § 94, n.5, § 146, nn.2 & 24, § 148, n.7, § 150, n.16. *See also* Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 90 (2d Cir. 1975); Krivo Indus. Supply Co., v. National Distillers & Chem. Corp., 483 F.2d 1098, 1103 (5th Cir. 1973); Estate of Stranahan v. Commissioner, 472 F.2d 867, 870 (6th Cir. 1973); Murray v. Murray Laboratories, 223 Ark. 907, 912-13, 270 S.W.2d 927, 930 (1954); Independent Bankers Ass'n of Ga., Inc. v. Dunn, 230 Ga. 345, 371, 197 S.E.2d 129, 143 (1973), (Hawes, J., dissenting); Carrol v. Caldwell, 12 Ill.2d 487, 497, 147 N.E.2d 69, 74 (1958); Goodwin v. S.A. Healy Co., 383 Mich. 300, 309, 174 N.W.2d 755, 759 (1970); Petition of White Mountain Power Co., 96 N.H. 144, 150, 71 A.2d 496, 502 (1950); Ford v. McCue, 163 Ohio St. 498, 502, 127 N.E.2d 209, 212 (1955); United Transit Co. v. Nunes, 99 R.I. 501, 509, 209 A.2d 215, 220 (1965); Bell Oil & Gas Co. v. Allied Chem. Corp., 431 S.W.2d 336, 339 (Tex. 1968).

[30] 244 N.Y. 84, 155 N.E. 58, 217 N.Y.S. 156 (1926).

[31] *Id.*

[32] *Id.* at 91, 155 N.E. at 60. *But see* Douglas & Shanks, *supra* note 4, at 198-99, who argue that the subsidiary would not be an instrumentality in the absence of the criminal statute.

[33] 244 N.Y. 84, 94-95, 155 N.E. 58, 61 (1926).

[34] *See* note 1 *supra*.

[35] *See* note 7 *supra*.

[36] 247 App. Div. 144, 287 N.Y.S. 62, *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936).

[37] 247 App. Div. at 158, 287 N.Y.S. at 77.

[38] *Id.* at 160-61, 287 N.Y.S. at 79-80.

[39] *Id.* at 157, 287 N.Y.S. at 76.

[40] *See* Berger v. Columbia Broadcasting Sys., Inc., 453 F.2d 991, 995 (5th Cir. 1972); Acme Precision Prods., Inc. v. American Alloys Corp., 422 F.2d 1395, 1398 (8th Cir. 1970); Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160-61 (7th Cir. 1963); Fisser v. International Bank, 282 F.2d 231, 238 (2d Cir. 1960); Atlantic Mgmt. Corp. v. American Cas. Co., 141 F.2d 108, 110 (3rd Cir. 1944); Johnson v. Warnaco, Inc., 426 F.Supp. 44, 48 (S.D. Miss. 1976); Omaha Pollution Control Corp. V. Carver-Greenfield Corp., 413 F.Supp. 1069, 1091 (D. Neb. 1976); Garrow v. Soo Line R.R., 361 F.Supp. 764, 768 (E.D. Wis. 1973); American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 311 F.Supp. 412, 413 (N.D. Ill. 1970); Nato v. Cia Secula Di Armanento, 310 F.Supp. 639, 647 (S.D.N.Y. 1970); Broene v. Beaunit Corp., 305 F.Supp. 688, 694 (E.D. Wis. 1969); Brown v. Margrande Compania Naviera, S.A., 281 F.Supp. 1004, 1005 (E.D. Va. 1968); National Bond Fin. Co. v. General Motors Corp., 238 F.Supp. 248, 255 (W.D. Mo. 1964); Jackson v. General Elec. Co., 514 P.2d 1170, 1173 (Alas. 1973); Zaist v. Olson, 154 Conn. 563, 577, 227 A.2d 552, 558 (1967); Grand Lodge of Iowa of the Independent Order of Odd Fellows v. Grand Lodge No. 18, Independent Order of Odd Fellows, 178 N.W.2d 362, 368 (Iowa 1970); Shirley v. Drackett Prods. Co., 26 Mich. App. 644, 182 N.W.2d 726, 728 (1970); Mills v. Murry, 472 S.W.2d 6, 14 (Mo. 1971); Chatterley v. Omnico, Inc., 26 Utah 2d 88, 91, 485 P.2d 667, 670 (1971); Musman v. Modern Deb, Inc., 50 App. Div. 2d 761, 762, 377 N.Y.S.2d 17, 20 (1975); Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 450, 181 S.E.2d 799, 803 (1971); Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 732, 524 P.2d 1355, 1363 (1974).

[41] In Henn, *supra* note 1, § 147 at 256-59, it is stated that corporateness may be disregarded if (1) the corporation is used for an illegitimate purpose or, absent such a purpose, (2) the

corporation is conducted on a personal not a corporate basis (specifically, in the case of parent-subsidiaries, intermingling of business, lack of formalities, representing to the public that the enterprises are the same), or (3) the enterprise is inadequately capitalized. Similarly, in Fletcher, *supra* note 1, § 43 at 209, it is stated that the corporate veil will be pierced either upon a showing of instrumentality *or* fraud. *Accord,* Ballantine, *supra* note 1, at 302-05. *But see* Note, *supra* note 8, at 1125, where the author concluded that most courts require a showing of both "instrumentality" and "injustice." He observes that "instrumentality" seems to imply some form of injustice.

42 *See* Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 155 N.E. 58 (1926).

43 Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265 (2d Cir. 1929).

44 *See generally* note 15 *supra.*

45 *See* Powell, *supra* note 1, at 32-33. *See also* Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 266 F.Supp. 79 (S.D.N.Y. 1967), where in a breach of contract action the court refused to pierce the veil of a subsidiary because under New York law the creditor cannot bring an action against the parent until he exhausts his remedy against the subsidiary by the return of an execution wholly or partly unsatisfied. Such a requirement—which necessitates time and expense in attorney's fees—serves little purpose since one of the issues in a case of this nature is whether the subsidiary is adequately capitalized. That issue can be—as it is in other jurisdictions—determined without demanding the return of execution.

46 In 1925, in Ballantine, *supra* note 9, at 20, it was said that the courts usually pierced the corporate veil upon a showing of (1) agency or (2) the use of the corporation as an instrumentality to sanction a fraud or promote injustice. Douglas & Shanks, in 1929, *supra* note 4, at 218, said that the courts would pierce the veil under circumstances they categorized as (1) inadequacy of capital; (2) direct intervention which ignores the normal and orderly procedure of corporate control; or (3) avoiding an inequitable result. The recent attempts to categorize the case law, see Note, *supra* note 8, at 1125-28 (inadequate capitalization and intermeddling) and Hamilton, *supra* note 22, at 985 (inadequate capitalization and the commingling of shareholder and corporate affairs). All of these considerations and categories are subsumed in the Powell approach.

47 *See, e.g.,* Minton v. Cavaney, 56 Cal.2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961); W. Cary, Corporations at 127 (4th ed. 1969).

48 For application of the alter ego approach, *see, e.g.,* House of Koscot Dev. Corp. v. American Line Cosmetics, Inc., 468 F.2d 64 (5th Cir. 1972); Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8th Cir. 1964); Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960); United States v. Reserve Mining Co., 380 F.Supp. 11 (D. Minn. 1974); Schlecht v. Equitable Builders, Inc., 272 Or. 92, 535 P.2d 86 (1975); Gentry v. Credit Plan Corp., 528 S.W.2d 571 (Tex. 1975); Ampex Corp. v. Office Elecs., Inc., 244 Ill. App. 3d 21, 320 N.E.2d 486 (1974). These cases use the "alter ego" jargon, but apply at least the first two

legs of the Powell test. Indeed, the *Koscot* court at 468 F.2d 64, 67 n.2, stated that although commentators have attempted to distinguish among the various theories, they are all interchangeable. *See* Fletcher, *supra* note 1, § 41.1 at 171, where the alter ego approach is described in the same terms as the Powell rule:

> To establish the alter ego doctrine it must be shown that shareholders' disregard of the corporation made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and to adhere to the doctrine of corporate entity would promote injustice or protect fraud.

[49] *See* Carolan, *supra* note 4, at 181. In Ballantine, *supra* note 1, § 138 at 318, it is said that the question turns not on instrumentality but rather on inadequacy of capital or other abuse of control.

[50] *See* note 32 *supra*. *See also* Chatterley v. Omnico, Inc., 26 Utah 2d 88, 485 P.2d 667 (1971).

[51] Berle, *The Theory of Enterprise Entity,* 47 Colum. L. Rev. 343 (1947). For a judicial consideration of this theory see Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 266 F.Supp. 79 (S.D.N.Y. 1967); Walkovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966).

[52] United States v. Wood, 366 F.Supp. 1074, 1083 (1973), *rev'd*, 505 F.2d 1400 (C.C.P.A. 1974) (distinction between managerial and ministerial assimilation); Siboney Corp. v. Dresser Indus., 521 S.W.2d 639 (Tex. Ct. App. 1975) (key is whether control over routine business transactions exists). *See* Ballantine, *supra* note 1, § 136 at 313 (shareholder must control and manipulate corporation); Fletcher, *supra* note 1, § 43 at 209 (the corporation must have no separate mind, will, or existence of its own and be merely a business conduit for its principal). *See also* Douglas & Shanks, *supra* note 4 (assimilation for management purposes).

[53] Fletcher, *supra* note 1, § 33 at 144-46, § 41.2 at 180; § 43 at 210; Henn, *supra* note 1, § 147 at 256; Stevens, *supra* note 7, § 17.

[54] *See* note 26 *supra* and accompanying text.

[55] Powell, *supra* note 1, at 9.

[56] *See* Caple v. Raynel Campers Inc., 90 Nev. 341, 526 P.2d 334 (1974).

[57] *See* Henn, *supra* note 1, § 147 at 257.

[58] Essentially this represents an allocation of the risk and is particularly justified in the case of a creditor who voluntarily assumes the risk of dealing with the corporate entity. Thus,

the law requires that he show injustice before the risks shift to the corporation. *See* Note, *supra* note 8, at 1130.

[59] In Powell, *supra* note 1, § 13, the following illustrations of improper purposes are given:

1. actual fraud;
2. violation of a statute;
3. stripping the subsidiary of its assets;
4. misrepresentation;
5. estoppel;
6. torts;
7. other cases of wrong or injustice.

For other lists of improper purposes, see generally Ballantine, *supra* note 1, § 136 at 314, and, for specific examples, § 130 at 303 (evasion of contracts and obligations), § 131 at 304, and, for specific examples, § 130 at 303 (evasion of contracts and obligations), § 131 at 304 (fraudulent conveyance), § 132 at 305, § 12 at 329 (evasion of statutes), § 141 at 326 (abuse of control). *See also* Fletcher, *supra* note 1, § 43 at 209, § 45.2 at 268.

[60] *See, e.g.,* Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8th Cir. 1964).

[61] 43 Del. Ch. 516, 239 A.2d 629 (1968).

[62] *Id.* at 518, 239 A.2d at 631.

[63] *Id.* at 521, 239 A.2d at 633.

[64] 355 F.2d 801 (8th Cir. 1964).

[65] 341 Mo. 299, 107 S.W.2d 41, 54 (1937).

[66] Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801, 806 (8th Cir. 1964).

[67] *See, e.g.,* Bernardin Inc. v. Midland Oil Corp., 520 F.2d 771 (7th Cir. 1975); United States v. Reserve Mining Co., 38 0 F.Supp. 11 (D. Minn. 1974); Cohen v. Williams, 294 Ala. 417, 318 So. 2d 279 (1975).

[68] *Compare* United States v. Reading Co., 253 U.S. 26 (1920) *with* Westcott Constr. Corp. v. Cumberland Constr. Co., 328 N.E.2d 522 (Mass. 1975). *See* text accompanying notes 29-32 *supra* and text accompanying notes 105-13 *infra*.

[69] *See* text accompanying notes 106-08, 155-56, *infra*. *See, e.g.,* Black & White, Inc. v. Love, 236 Ark. 529, 367 S.W.2d 427 (1963) and Shirley v. Drackett Prods. Co., 26 Mich. App. 644, 182 N.W.2d 726 (1970). *See also* International Controls Corp. v. Vesco, 490 F.2d 1334 (2d Cir.), *cert. denied,* 417 U.S. 932 (1974) (holding company allegedly created solely to protect fraudulently acquired stock from execution of judgment in favor of defrauded corporation).

[70] *See, e.g.,* Zaist v. Olson, 154 Conn. 563, 227 A.2d 552(1967), and text accompanying notes 115-19 *infra*.

[71] *See, e.g.,* Chengelis v. Cenco Instruments Corp., 386 F.Supp. 862 (W.D. Pa. 1975); Tiernan v. Sheldon, 191 So.2d 87 (Fla. Ct. App. 1966).

[72] *See* note 10 *supra*.

[73] Powell argues that proximate cause may be lacking either because the complainant has not been injured by the domination of the corporation or because the complainant has an adequate remedy without resort to the corporation. *See* Powell, *supra* note 1, at § 14. Acceptance by the complainant of the relationship between the parent and subsidiary, independence of the subsidiary when the obligation to complainant arose, availability of the subsidiary for redress, and, according to Powell, the unresolved situation where the subsidiary is financially able to satisfy a judgment are examples of the absence of proximate cause. Powell, *supra* note 1, at § 15. For resolution of the latter problem in New York, *see* Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 266 F.Supp. 79 (S.D.N.Y. 1967).

[74] 272 Or. 92, 535 P.2d 86 (1975). *Compare* Chatterley v. Omnico, Inc., 26 Utah 2d 88, 485 P.2d 667 (1971).

[75] 272 Or. 92, 95, 535 P.2d 86, 89 (1975).

[76] *See* note 46 *supra*.

[77] *See, e.g.,* United States v. Reserve Mining Co., 380 F.Supp. 11 (D. Minn. 1974) and United States v. Wood, 366 F.Supp. 1074 (1973), *rev'd,* 505 F.2d 1400 (C.C.P.A. 1974).

[78] *See* Berger v. Columbia Broadcasting Sys., Inc., 453 F.2d 991 (5th Cir.), *cert. denied,* 409 U.S. 848 (1972).

[79] For other categories of improper purposes, see note 59 *supra*.

[80] 11 Wash. App. 721, 524 P.2d 1355 (1974).

[81] 483 F.2d 1098 (5th Cir. 1973).

[82] *See* note 52 *supra*.

[83] *See, e.g.,* Gentry v. Credit Plan Corp., 528 S.W.2d 571 (Tex. 1975); Chatterley v. Omnico, Inc., 26 Utah 2d 88, 485 P.2d 667 (1971).

[84] 335 F.2d 801 (8th Cir. 1964).

[85] *Id.* at 804-05.

[86] *See* Ampex v. Office Elecs., Inc., 24 Ill. App.3d 21, 320 N.E.2d 486 (1974); *see* text accompanying notes 168-75 *infra*.

[87] 282 F.2d 231 (2d Cir. 1960).

[88] *Id.* at 236-37.

[89] *Id.* at 239. *See also* Chengelis v. Cenco Instruments, 386 F.Supp. 862 (D. Pa. 1975) (instrumentality but no fraud because of creditor's knowledge); Tiernan v. Sheldon, 191 So. 2d 87 (Fla. Ct. App. 1966).

[90] 90 Nev. 341, 526 P.2d 334 (1974).

[91] *Id.* at 343, 526 P.2d 336.

[92] *Id.* at 344, 526 P.2d at 336. *See* International Controls Corp. v. Vesco, 490 P.2d 1334 (2d Cir.), *cert. denied,* 417 U.S. 932 (1974) (court pierced veil to hold that its jurisdiction over Vesco gave it jurisdiction over a holding company formed by him solely for the purpose of holding the stock he received as a result of his alleged fraud on the plaintiff).

93 247 App. Div. 144, 287 N.Y.S. 62 (1936). *See* text accompanying notes 37-39 *supra*. Another way of stating this requirement is that the defendant's domination must be shown to harm the plaintiff in the particular transaction at issue. *See generally* Fletcher, *supra* note 1, § 43 at 209; Hamilton, *supra* note 22, at 990-91. *Compare* Bernardin, Inc. v. Midland Oil Co., 520 F.2d 771, 774 (7th Cir. 1975) (court pierced veil because improper purpose related to particular transaction) *with* Lowendahl v. Baltimore & O.R.R., 247 App. Div. 144, 287 N.Y.S. 62, 79 (1936).

94 *See* text accompanying notes 142-51 *infra*.

95 272 Or. 92, 535 P.2d 86 (1975).

96 An interesting variation on this concept is demonstrated by Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 144, 181 S.E.2d 799 (1971). There, Northwestern Bank obtained a mortgagee's title policy to secure a purported debt of a subservient corporation. The title company prevailed in a declaratory judgment on the title policy on the basis that the subservient corporation's veil could be pierced to show that the bank had no true economic interest in enforcing the policy. Thus, there was no injury to the bank because the subsidiary's veil *could* be pierced.

97 *See* notes 6-7 *supra*.

98 Another type of improper purpose of factor which courts and commentators often mention is the failure of the corporation to engage in proper formalities (holding annual meetings recorded in minutes, etc.). *See* Henn, *supra* note 1, § 148 at 258, and Hamilton, *supra* note 22, at 990. We suspect that the theoretical origins of this approach may be somewhat related to defective incorporation—that is, to a concept that the subservient corporation does not validly exist if it does not have proper meetings, records, and other formal procedures just as it would not exist if it failed to file its articles of incorporation. We contend that such an approach is theoretically unsound; witness the failure of most corporate statutes to penalize a corporation for such failures. For example, Colo. Rev. Stat. § 7-4-111 (1973) requires n annual shareholder meeting but provides that failure to hold such a meeting will not work a forfeiture or dissolution of the corporation. *See also* Del. Code tit. 8, § 141 (1974); N.Y. Bus. Corp. Law § 91 (McKinney 1963). On the other hand, a Colorado corporation may be declared defunct for failure to file its annual report or pay its franchise fees. *See* Colo. Rev. Stat. § 7-10-109 (1973). For similar provisions, see Cal. Corp. Code § 1801 (West 1977); Del. Code tit. 8, § 502 (1974); N.Y. Bus. Corp. § 91 (McKinney 1963). Likewise, a corporation may be dissolved for failure to maintain a registered agent. *See* Cal. Corp. Code § 1504 (West 1977); Colo. Rev. Stat. § 7-8-113 (1973); Del. Code tit. 8, § 136 (1974). It may thus be implied that a corporation should not cease to exist for technical violations other than those for which the statutes provide such a remedy.

No doubt a failure to follow formalities may be somewhat indicative of treatment of the corporation as a mere instrumentality. It may also have some tendency to mislead third parties. However, insofar as there is any valid significance in corporate formalities which are not required by statute as conditions to continued corporate existence, such significance is adequately recognized by the misrepresentation issue. *See* text accompanying notes 110-28 *infra*. For other criticism of the rise of the "formalities" consideration in piercing the corporate veil, see Carolan *supra* note 4, at 186 (inappropriate for small corporation), Note, *supra* note 8, at 1126.

99 For categorizations of other commentators, see note 57 *supra*.

100 *See* note 7 *supra*.

101 253 U.S. 26 (1920). *See* text accompanying notes 27-32 *supra*.

102 473 F.2d 1317 (5th Cir. 1973).

103 Sundaco, Inc. v. State, 463 S.W.2d 528 (Tex. Ct. App. 1970).

[104] 363 F.Supp. 110 (D. Vt. 1973). *See also* Bruhn's Freezer Meats v. Department of Agriculture, 438 F.2d 1332, 1343 (8th Cir. 1971) (court upheld cease and desist orders against individuals who owned the corporation which in turn owned all the stock of corporate defendants charged with violations of the Packers & Stockyards Act; if the court restrained only the corporate defendants, its order "would prove futile as the corporations could be dissolved and the individual petitioners could then, under the cloak of new corporations, engage in the proscribed activities and thereby frustrate the purposes of the Act.")

[105] 366 F.Supp. 1074 (1973), *rev'd,* 505 F.2d 1400 (C.C.P.A. 1974).

[106] 366 F.Supp. At 1085.

[107] *See, e.g.,* Swearngin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967); Shirley v. Dracket Prods. Co., 26 Mich. App. 644, 182 N.W.2d 726 (1970).

[108] *See, e.g.,* Black & White, Inc. v. Love, 236 Ark. 529, 367 S.W.2d 427 (1963). Black & White concealed its defense—that the tort was committed by an employee of Checker in a cab owned by Checker—until the statute of limitations had run on Checker.

[109] 328 N.E.2d 522 (Mass. App. Ct. 1975).

[110] Although judicial use of the work "misrepresentation" seems too well established to be displaced, some alternative term such as "misleading," "passive misrepresentation," or "corporate veil misrepresentation" might avoid some confusion.

[111] *See* note 10 *supra*.

[112] 395 F.Supp. 1019 (1974). *See also* Houston Oil Field Material Co. v. Stuard, 406 F.2d 1052 (5th Cir. 1969) (misrepresentation to employee).

[113] 395 F.Supp. at 1039.

[114] *Id.* Zapetis' good faith might have been difficult to prove. In addition to his misrepresentation to Brawley as to the ownership of the tug, Zapetis through OSC refused to pay Brawley when Brawley presented the bill for $53,101.81 to OSC. Then Zapetis agreed to have Ship Sales Corp., another corporation he controlled, lend Brawley $500 to prosecute his claim against OSC, in exchange for 50% of whatever Brawley recovered!

[115] 353 Mass. 614, 233 N.E.2d 748 (1968). This case also demonstrates the close interrelationship of the various ultimate issues. Although the case involved elements of corporate veil misrepresentation, there were also elements of agency-like intervention in the form of direct instructions given to employees of the various corporations by the dominant individual of Cumberland Farms.

[116] The principal shareholders of the defendant corporations had apparently instructed the subsidiaries not to return the racks, which act gave rise to this suit. *Id.* at 615, 233 N.E.2d at 749.

[117] 154 Conn. 563, 227 A.2d 552 (1967).

[118] *Id.* at 577, 227 A.2d 559.

[119] A strongly worded dissent suggests that even though Olson conducted his business in a "free and easy" fashion, he did not use the corporation unjustly in contravention of the plaintiff's rights. It noted that East Haven had paid the plaintiffs $169,652.66 over a period of years and was unable to pay the $23,000 (exclusive of interest) in question here because of the general financial decline of the early 1960's. Heavily influenced by the necessity of limited liability, the dissent chided the majority for its failure to require a stronger showing of

improper purpose. *Id.* at 580-83, 227 A.2d at 560-61.

[120] Most commentators have taken the position that tort victims should be able to pierce the corporate veil on a weaker showing than creditors because only creditors voluntarily assume the risk of doing business with the corporate entity. *See* note 22 *supra*. It seems to us that creditors who have behaved reasonably and who have not knowingly assumed the risks—because of their lack of financial sophistication—should not be held to the higher standard.

[121] *See, e.g.,* Elvalsons v. Industrial Covers, Inc., 269 Or. 441, 450, 525 P.2d 105, 109 (1974) (creditor dealt with general manager of parent in negotiating deal with subsidiary); Ampex Corp. v. Office Elecs. Inc., 24 Ill. App. 3d 21, 24, 320 N.E.2d 486, 489 (1974) (undercapitalization and defendant had in past paid creditor for debts of its subsidiary); Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 726-27, 524 P.2d 1355, 1359 (1974) (representations by parent that it was behind the subsidiary and undercapitalization—subsidiary's bank account kept near zero balance).

[122] 282 F.2d 231 (2d Cir. 1960).

[123] *See* Minton v. Cavaney, 56 Cal.2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961).

[124] *See, e.g.,* Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960). *Compare* Fletcher, *supra* note 1, § 41.3 at 191 *with* Henn, *supra* note 1, § 146 n.16 & 17 at 253. *See* Carolan, *supra* note 4, for Florida practice.

[125] *See generally* Ballantine, *supra* note 1, § 129 at 302-03, § 137 at 314-15; Fletcher, *supra* note 1, § 44.1 at 249; Henn, *supra* note 1, § 148 at 258-59. In Fletcher, *supra* note 1, § 44.1 at 249, it is stated that:

> It is coming to be recognized as the policy of the law that stockholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is ground for denying the separate entity privilege.

[126] An example of traditional undercapitalization is Yacker v. Weiner, 109 N.J.Super. 351, 263 A.2d 188 (1970). In that case, the receiver of Mar Building Co., Inc. (Mar), an insolvent construction corporation, sought to pierce the corporate veil of Mar to hold Middlesex Apt., Inc., (Middlesex), the owner of the realty, responsible for obligation due from Mar to certain creditors. The sole asset of Mar was a contract whereby Mar was to construct an apartment building for Middlesex for $680,000. In the opinion of the court, the construction cost would far exceed $680,000. (One expert had suggested the reasonable cost would have been $900,000.) In piercing the veil of Mar to hold Middlesex liable to the creditors, the courts stressed that this scheme was "all too often seen," that it was inequitable for the incorporators of Middlesex to "grow fat on the work of laborors," and that Middlesex had recognized its responsibility to the creditors by undertaking to negotiate with them on behalf of Mar. *See also* Weisser v. Mursam Shoe Corp., 127 F.2d 344 (2d Cir. 1942). *But see* Bartle v. Home Owners Co-operative, Inc., 309 N.Y. 103, 127 N.E.2d 832 (1955). *See, e.g.,* Luckenbach S.S. Co. v. W.R. Grace & Co., 267 F. 676 (4th Cir. 1920); Ampex Corp. v. Office Elecs. Inc., 24 Ill. App. 3d 21, 320 N.E.2d 486 (1974); *see* Hamilton, *supra* note 22, at 986. State legislatures have been reluctant to define adequate capitalization in any helpful way. The statutes that do require minimum paid-in capital as a condition precedent to doing business typically require token amounts. *See, e.g.,* Ill. Rev. Stat. ch. 32, § 157.47 (1975) ($1,000), Ohio Rev. Code Ann. § 1701.04 (Page:1964) ($500), Tex. Bus. Corp. Act Ann. art. 3.02 (Vernon:1956) ($1,000).

[127] *See* Note, *supra* note 8, at 1129, for more specific examples (such as causing the payment of unwarranted dividends, exacting unreasonable management charges).

[128] *See, e.g.,* United States v. Ira S. Bushey & Sons, Inc., 363 F.Supp. 110 (D. Vt.), *aff'd.,* 487 F.2d 1393 (2d Cir. 1973), *cert. denied,* 417 U.S. 976 (1974) (net profits of all subsidiaries remitted to parent by dividends); Yacker v. Weiner, 109 N.J. Super. 351, 363 A.2d 188 (1970); Erickson v. Minnesota & Ontario Power Co., 134

Minn. 209, 158 N.W. 979 (1916), *cited in* Douglas & Shanks, *supra* note 4, at 203.

129 520 F.2d 771 (7th Cir. 1975).

130 380 F.Supp. 11 (D. Minn. 1971), *modified on other grounds,* 514 F.2d 492 (8th Cir. 1975).

131 *See* note 123 *supra*.

132 *See* Salomon, *Limited Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 Temple L.Q. 321 (1974); Carolan, *supra* note 4.

133 *See* Comment, *supra* note 4.

134 *See* note 124 *supra*.

135 *See, e.g.,* United States v. Reserve Mining Co., 380 F.Supp. 11 (D. Minn. 1971), *modified on other grounds,* 514 F.2d 492 (8th Cir. 1975); Zaist v. Olson, 154 Conn. 563, 227 A.2d 552 (1967); Evalsons v. Industrial Covers, Inc., 269 Or. 441, 525 P.2d 105 (1974); Ampex Corp. v. Office Elecs., Inc., 24 Ill. App. 3d 21, 320 N.E.2d 486 (1974).

136 See Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960) (initial capitalization $500); Tiernan v. Sheldon, 191 So. 2d 87 (Fla. Ct. App. 166). See note 89 *supra*.

137 *But see* text accompanying notes 121-22 *supra*.

138 *But see* Salomon, *supra* note 132, at 337-38 and Carolan, *supra* note 4, at 193-95. Our point is not to criticize the abilities of the courts but to indicate that the determination of how much capital is necessary at a given time for a given business is an issue ill-suited for any adjudicative process. The courts may properly find that a given amount of capital was inadequate and—in conjunction with other factors—use this as a basis for piercing the veil. They should not however have the task of making the much more difficult decision of how much capital would have been enough.

139 For analysis of the different policy considerations in this area for the creditor and tort victim, see Hamilton, *supra* note 22, at 986-89.

140 Such a policy would, in effect, make all corporations insurers for the benefit of the general public. It seems improper that such a far reaching policy change should be made through the medium of the corporate veil doctrine. It further appears discriminatory to give such insurance protection to the victims of corporate torts as opposed to other classes of tort victims.

141 *See, e.g.,* United States v. Reserve Mining Co., 380 F.Supp. 11 (D. Minn. 1971), *modified on other grounds,* 514 F.2d 492 (8th Cir. 1975), where the court noted that the eventual judgments might be in the neighborhood of $100 million. *See also* text accompanying note 130 *supra*.

142 My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 233 N.E.2d 748 (1968). *See* text accompanying notes 115-16 *supra*.

143 468 F.2d 64 (5th Cir. 1972).

144 For a general discussion of the distinction between the agency and corporate veil theories, see note 9 *supra*.

145 463 S.W.2d 288 (Tex. Ct. App. 1970).

[146] 386 S.W.2d 215 (Tex. Ct. App. 1965).

[147] 191 So.2d 87 (Fla. Ct. App. 1966).

[148] See Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960) for a similar example.

[149] 453 F.2d 991 (5th Cir. 1972).

[150] *Id.* at 996.

[151] *See* text accompanying note 39 *supra*.

[152] *See generally* note 4 *supra*.

[153] Such legitimate purposes would include the full range of purposes which are recognized as a matter of economic policy as justifying corporate limited liability.

[154] *See* note 23 *supra*.

[155] 384 F.2d 267 (3d Cir. 1967), *cert. denied*, 390 U.S. 988 (1968).

[156] *See* text accompanying notes 107-08 *supra*.

[157] *See* note 22 *supra*.

[158] *See* text accompanying notes 121-22 *supra*.

[159] *See* W. Prosser, The Law of Torts, ' 4 (4th ed. 1971).

[160] 236 Ark. 529, 367 S.W.2d 427 (1963).

[161] 324 F.2d 157 (7th Cir. 1963).

[162] *See* Comment, *supra* note 4, at 1191.

[163] For example, one factor common to both the *Black & White* and *Turner* cases is that the plaintiff contracted with the corporate defendant and may have believed that the taxi and plane respectively were controlled by the corporate defendant being sued. Arguably, this misrepresentation could shift the risk of loss to the defendant. For other discussion of the risk of loss consideration, see Douglas & Shanks *supra* note 4, at 195; Hamilton, *supra* note 22, at 986-87; Comment *supra* note 4, at 1195-96. *See also* Gentry v. Credit Plan Corp. of Houston, 528 S.W.2d 571, 573 (Tex. 1975), where the court said that the problem was essentially one of allocating the loss.

[164] 311 F.Supp. 412 (N.D. Ill. 1970).

[165] *Id.* at 415.

[166] *Id.* at 414, 416.

[167] *Id.* at 414.

[168] *Id.*

[169] *Id.* at 414-15.

[170] *Id.* at 415.

[171] *Id.*

[172] 24 Ill. App. 3d 21, 320 N.E.2d 486 (1974).

[173] *See* note 48 *supra*.

[174] *See*, *e.g.*, Overstreet v. Southern Ry., 371 F.2d 411 (5th Cir. 1967); Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157 (7th Cir. 1963); Fanfan v. Berwind Corp., 362 F.Supp. 793 (D. Penn. 1973); American Trading & Professional Corp. v. Fischbach & Moore, Inc., 311 F.Supp. 412 (D. Ill. 1970); Brown v. Margrande Compania Naviera, S.A. 281 F.Supp. 1004 (E.D. Va. 1968); Fawcett v. Missouri Pac. Ry., 242 F.Supp. 675 (W.D. La. 1965). *But see* Fletcher, *supra* note 1, ' 41.3 at 191: "[Although summary judgment may be granted in a proper case where no genuine issue of fact is raised or shown, the determination of whether there are sufficient grounds for piercing the corporate veil should not ordinarily be disposed of by summary judgment in view of the complex economic questions."

[175] There is no firm relationship between the ultimate issues and the factors. The factors, to a large extent, are relevant in demonstrating that the corporation in question is an instrumentality and to a much lesser extent can also show an improper purpose.

[176] *See, e.g.*, American Trading & Professional Corp. v. Fischbach & Moore, Inc., 311 F.Supp. 412, 413 (D. Ill. 1970).

[177] *See* text accompanying notes 120-41 *supra*.

[178] *See* United States v. Reserve Mining Co., 380 F.Supp. 11 (D. Minn. 1971), *modified on other grounds*, 514 F.2d 492 (8th Cir. 1975) (all profits and tax losses of subsidiary flow through to parent); Gentry v. Credit Plan Corp., 528 S.W.2d 571 (Tex. 1975) (subsidiary had operated at deficit for number of years).

[179] *Compare American Trading*, 311 F.Supp. at 416, *with* My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 233 N.E.2d 748 (1968) *and* Zaist v. Olson, 154 Conn. 563, 227 A.2d 552, 557 (1967) (confusion led to misunderstanding).

[180] *Compare American Trading*, 311 F.Supp. at 416, *with* Puamier v. Barge BT 1793, 395 F.Supp. 1019, 1039 (E.D. Va. 1974).

[181] *Compare American Trading*, discussed in text accompanying notes 155-62 *supra, with* Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355 (1974) (same employees) *and* House of Koscot Dev. Corp. v. American Line Cosmetics, Inc., 468 F.2d 64, 66 (5th Cir. 1972) (Turner fired American line and Koscot employees) *and* Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573-74 (Tex. 1975) (controlling corporation interviewed, evaluated, and selected managers).

[182] *Compare American Trading*, 311 F.Supp. at 414 (paid by subsidiary but subject to review by parent) *with* Elvalsons v. Industrial Covers, Inc., 269 Or. 441, 525 P.2d 105, 108 (1974) (paid by parent and court does pierce veil) *and House of Koscot*, 468 F.2d at 66 (paid by parent and court does pierce veil) and Bell Oil & Gas Co. v. Allied Chem. Corp., 431 S.W.2d 336 (Tex. 1968) (employees paid by parent but court does not pierce veil).

[183] *See, e.g., American Trading,* 311 F.Supp at 414.

[184] *Compare American Trading*, 311 F.Supp. at 414, *with* Elvalsons v. Industrial Covers, Inc., 269 Or. 441, 446, 525 P.2d 105, 108 (1974) *and* My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 616-17, 233 N.E.2d 748, 750 (1968).

[185] *Compare American Trading*, 311 F.Supp. at 414, *with* Chatterley v. Omnico, Inc., 26 Utah 2d 88, 485 P.2d 667, 669 (1971) *and* United States v. Reserve Mining Co., 380 F.Supp. 11, 28 (D. Minn. 1974) (subsidiary board had not met since 1971 and when it did it merely rubber stamped the decisions of parent boards).

[186] *Compare American Trading,* 311 F.Supp. at 414, *with* Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573 (Tex. 1975) (management firm hired by parent keeps records).

[187] *Compare American Trading*, 311 F.Supp. at 414, *with* Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355, 1359-60 (1974) (subsidiary held own bank account but balance kept at zero).

[188] *But see* Jackson v. General Elec., 514 P.2d 1170, 1172 (Alas. 1973).

[189] *Compare* Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573 (Tex. 1975), *with* United States v. Wood, 366 F.Supp. 1074, 1081-82 n.11 (Cust. Ct. 1973) *rev'd,* 505 F.2d 1400 (C.C.P.A. 1974) (court said ministerial cooperation was permissible).

[190] *See, e.g., American Trading*, 311 F.Supp. at 414.

[191] *See, e.g.,* Soderberg Advertising Inc. v. Kent-Moore Corp.¸ 11 Wash. App. 721, 524 P.2d 1355, 1362 (1974).

[192] *Compare American Trading*, 311 F.Supp. at 414 (loans evidenced by formalities) *with* Soderberg Advertising Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355, 1357 (1974) (unclear if formalities observed).

[193] *Compare* United States v. Reserve Mining Co., 380 F.Supp. 11, 28 (D. Minn. 1974) (debts of subsidiary guaranteed by parent) *with* Schlecht v. Equitable Builders, Inc., 272 Or. 92, 95, 535 P.2d 86, 89 (1975) (loans to parent guaranteed by subsidiary and other loans secured by assets of subsidiary but court did not pierce veil because no harm to plaintiff) *and* Siboney Corp. v. Dresser Indus., 521 S.W.2d 639, 642 (Tex. Ct. App. 1975) (parent guaranteed only certain of subsidiary's debts and these were discharged by subsidiary).

[194] *Compare American Trading*, 311 F.Supp. at 414 (small percentage of income) *with* Shirley v. Drackett Prods. Co., 26 Mich. App. 644, 648-49, 182 N.W.2d 726, 728 (1970) (parent's only source of revenue was sales of subsidiary).

[195] *Compare American Trading*, 311 F.Supp. at 414, *with* Consolidated Sun Ray, Inc. v. Oppenstein, 355 F.2d 801, 804 (8th Cir. 1964).

[196] *Compare* Siboney Corp. v. Dresser Indus., 521 S.W.2d 639, 642 (Tex. Ct. App. 1975) (president of subsidiary did not require parent's authorization in making purchases and sales within ordinary course of business) *with* Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 524 P.2d 1355, 1359 (1974) (parent paid bills).

[197] *Compare American Trading*, 311 F.Supp. at 414, *and* Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 725, 524 P.2d 1355, 1358-59 (1974) (both cases involved some joint advertising; veil pierced in *Soderberg* but not in *American Trading*) *with* Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801, 804 (8th Cir. 1964) (parent controlled advertising).

[198] *Compare American Trading*, 311 F.Supp. at 414, *with* GAF Corp. v. Hanimex Corp., 294 F.Supp. 493, 497 (N.D. Ill. 1968) (corporation referred to as Chicago office of another) *and* Steven v. Roscoe Turner Aeronautical

Corp., 324 F.2d 157, 162 (7th Cir. 1963) (TAC not described as a division).

199 *See, e.g., American Trading*, 311 F.Supp. at 415.

200 *Compare American Trading*, 311 F.Supp. at 415, *with* Soderberg Advertising, Inc. v. Kent-Moore Corp., 11 Wash. App. 721, 729, 524 P.2d 1355, 1362 (1974).

201 *Compare American Trading*, 311 F.Supp. at 414, *with* Shirley v. Drackett Prods., 26 Mich. App. 644, 648-49, 182 N.W.2d 726, 728 (1970) (exclusive distributorship).

202 *Compare* Bay Sound Trans. Co. v. United States, 350 F.Supp. 420, 424 (S.D. Tex. 1972), *aff'd*, 474 F.2d 1397 (5th Cir. 1973) (no other business) *and* Shirley v. Drackett Prods. Co., 26 Mich. App. 644, 648-49, 182 N.W.2d 726, 728 (1970) (exclusive distributorship) *and* United States v. Reserve Mining Co., 380 F.Supp. 11, 28 (D. Minn 1974) (no other customers) *with* Jackson v. General Elec., 514 P.2d 1170, 1172 (Alas. 1973).

203 *Compare American Trading*, 311 F.Supp. at 415, *with* My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 620-21, 233 N.E.2d 748, 753 (1968) (parent negotiates for subsidiary).

204 *Compare American Trading*, 311 F.Supp. at 414, *with* My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 620-21, 233 N.E.2d 748, 752 (1968) (corporate defendant ordered not to return racks giving rise to cause of action) *and* Elvalsons v. Industrial Covers, Inc., 269 Or. 441, 445-46, 525 P.2d 105, 108 (1974) (manager of subsidiary required to report to parent's general manager).

205 *See, e.g.,* House of Koscot Dev. Corp. v. American Line Cosmetics, 468 F.2d 64, 66 (5th Cir.. 1972); Bland v. Kentucky Fried Chicken Corp., 338 F.Supp. 871, 876 (S.D. Tex. 1974); United States v. Reserve Mining Co., 380 F.Supp. 11, 28 (D. Minn. 1974).

206 *Compare* Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573 (Tex. 1975), *with* Steven V. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 158 (7th Cir. 1963), *and* Allegheny Airlines, Inc. v. United States, 504 F.2d 104, 113 (7th Cir. 1974).

207 For other lists of factors, see Ballantine, *supra* note 1, § 136 at 314; Fletcher, *supra* note 1, § 41.3 at 191; Henn, *supra* note 1, §§ 147, 148 at 256-59; Douglas & Shanks, *supra* note 4, at 195-96; Note; *supra* note 8, at 1126; Hamilton, *supra* note 22, at 998. For a list of factors by Colorado courts, see Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940).

208 For a more general checklist of procedures to be followed to weave an impenetrable veil, see Stevens, *supra* note 7, at 87-88; Douglas & Shanks, *supra* note 4, at 196-98, and Hamilton, *supra* note 23, at 993-94.

209 *See* note 164 *supra*.

210 380 F.Supp. 11 (D. Minn. 1974). *See* text accompanying note 130 *supra.*

211 *See, e.g.,* Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157 (7th Cir. 1963), where causal handling of two separate corporations proved disastrous after one of them carried passengers for the other and was involved in a fatal accident.

212 *See, e.g.,* Miles v. Coca-Cola Bottling Co., 360 F.Supp. 869 (E.D. Wis. 1973) (the veil was not pierced to find parent liable for subsidiary's pricing policies which were allegedly in violation of Robinson-Patman Act. The case was decided on a summary judgment because the only facts presented were that the subsidiary was wholly owned and an affidavit of the plaintiff which claimed generally that the parent controlled the subsidiary's pricing policies, which was unequivocally denied by the parent and the subsidiary). *See also* Fanfan v. Berwind

Corp., 362 F.Supp. 793 (D. Pa. 1973).

[213] Berkey v. Third Ave. R.R., 244 N. Y. 84, 155 N.E. 58, 217 N.Y.S. 156 (1926). *See* text accompanying notes 32-33 *supra*.

[214] L. Wittgenstein, Philosophical Investigations ' 67 (1953):

> And for instance the kinds of number form a family in the same way. Why do we call something a "number"? Well, perhaps because it has a—direct—relationship with several things that have hitherto been called number; and this can be said to give it an indirect relationship to other things we call the same name. And we extend our concept of number as in spinning a thread we twist fibre on fibre. And the strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres.

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370 Seventeenth Street
Suite 5350
Denver, Colorado 80202

(303) 629-2600
(303) 629-2606 - fax
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