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Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?

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REVERSE PIERCING THE CORPORATE VEIL: SHOULD CORPORATION OWNERS HAVE IT BOTH WAYS?

Jurisprudential pragmatism prevents the exaltation of legalities to a sacrosanct status in disregard of realities. Courts do in fact recognize the truth implicit in the Coca-Cola slogan "It's the real thing."[1]

Unfortunately, courts rarely recognize the "real thing" when confronted with a "reverse pierce" of the corporate veil. A reverse pierce of the corporate veil refers to an attempt by shareholders, or the corporation itself, to pierce the corporate veil existing between the corporation and its shareholders.[2] This definition encompasses all shareholder claims that a court should treat the corporation and its shareholders as a single, identical being.

The reverse pierce focuses on the relationship between the corporation owner[3] and the corporation, typically the parent and subsidiary. Traditional corporate entity doctrine draws a line between the owner and the corporation. No matter how fuzzy that line becomes, the line separating the two entities always exists. The existence of this indelible line establishes the artificial personality of a corporation, a personality distinct from its owners, and the foundation of traditional corporate entity doctrine. The reverse pierce strikes at the heart of this concept. Under the reverse pierce, the corporation owner and the corporation become one legal entity when the legal line of demarcation between the entities becomes virtually nonexistent. This conflict between accepted corporate theory and the reverse pierce focuses attention on the line-drawing function of corporate entity theory.

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1. Kingston Dev. Co. v. Kenerly, 132 Ga. App. 346, __, 208 S.E.2d 118, 121-22 (1974).

2. *See* 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 41.70 (rev. perm. ed. 1983 & Supp. 1988).

3. For the purposes of this Note, a corporation owner is more than a shareholder of a corporation. At minimum, a corporation owner owns a sufficiently large block of stock to exert significant control over the corporation. A corporation owner then utilizes this control to take an active role in managing the corporation. The interests of the corporation and the corporation owner are coextensive. A corporation owner may be an individual or another corporation.

Courts have responded to the reverse pierce in a variety of ways, yet courts rarely address the substance of the corporation owner's claim that the corporation owner and the corporation are identical. The law encompassing the reverse pierce is truly one in which form prevails over substance. Courts typically dismiss the corporation owner's plea to reverse pierce by ruling summarily that corporation owners may not " 'have it both ways.' "[4]

The judicial abhorrence to the reverse pierce is the product of several deficiencies in corporate law. Courts adhere to traditional corporate entity theory, under which the shareholder and his corporation are distinct for all purposes.[5] Traditional entity theory, however, is rooted in archaic notions of the corporate entity that are no longer relevant. Unlike the first business corporations of sixteenth- and seventeenth-century England,[6] enormous corporate enterprises consisting of multiple subsidiaries operating on a global scale dominate the modern corporate landscape. Corporate entity theory has failed to evolve at the same pace as the corporation.

The confusion surrounding the conventional veil-piercing doctrine[7] also contributes to the courts' reluctance to reverse pierce. A number of corporate veil-piercing theories exist, but no single test prevails. In fact, courts may apply more than one test within the same jurisdiction.[8] In the face of the resulting confusion, the judicial reluctance to reverse pierce is not surprising.

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4. *See, e.g., In re* Beck Indus., 479 F.2d 410, 418 (2d Cir.), *cert. denied,* 414 U.S. 858 (1973).

5. *E.g.,* Boise Cascade Corp. v. Wheeler, 419 F. Supp. 98, 102 (S.D.N.Y. 1976) (quoting Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 994 (5th Cir. 1972)) ("[I]t is axiomatic that a corporation is a 'creature of the law, endowed with a personality separate and distinct from that of its owners' . . . ."); *see* Schane, *The Corporation is a Person: The Language of a Legal Fiction,* 61 TUL. L. REV. 563, 563 (1987) (Corporate personality doctrine "is one of the most enduring institutions of the law and one of the most widely accepted legal fictions.").

6. *See infra* notes 10-16 and accompanying text.

7. Conventional veil-piercing doctrine refers to the law governing a third party's attempt to pierce the veil separating a corporation's assets from that of its owners. *See generally* P. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 6.01, at 105-06 (1987); 1 W. FLETCHER, *supra* note 2, § 41 (discussion of conventional veil-piercing theory).

8. *See infra* notes 84-85 and accompanying text.

The courts' absolute refusal to examine the economic realities in a particular case underlies the opposition to the reverse pierce. By refusing to look beneath the surface of the corporation/shareholder form, courts avoid addressing the substance of the corporation/shareholder relationship. Praise of the judiciary's ability to avoid "the exaltation of legalities to a sacrosanct status in disregard of realities"[9] is undeserved when it comes to the reverse pierce. Instead, appreciation of the economic reality of a particular case is the foundation of the reverse pierce.

This Note asserts that modern economic realities mandate judicial acceptance of the reverse pierce. The Note first traces the history of the corporation, examining the divergence of traditional concepts of the corporate entity from modern reality. Next, the Note briefly surveys traditional veil-piercing theory and highlights the confused state of the law. Third, the Note reviews existing reverse pierce case law in the context of the various approaches. Finally, the Note criticizes the current approaches to the reverse pierce and proposes that courts adopt a "unitary interest" test.

I. Evolution of the Corporate Entity

A. History of the Corporation

The modern private business corporation has been in existence for approximately two centuries.[10] In England, the first substantial business corporations were the "quasi-governmental foreign trading companies" of the sixteenth and seventeenth centuries.[11] The Crown or the Parliament, by special act, granted charters of incorporation to the trading companies to explore, colonize, and trade in the New World.[12] The trading companies were not regarded as organizations created simply to operate a business but rather "as public agencies, to which had been confided the duty of regulating foreign trade."[13]

Unincorporated joint stock companies followed the trading companies in the evolutionary chain of the modern corporation. Ap-

9. Kingston Dev. Co. v. Kenerly, 132 Ga. App. 346, ___, 208 S.E.2d 118, 121-22 (1974).
10. 1 W. Fletcher, *supra* note 2, § 1, at 2.
11. H. Ballantine, Ballantine on Corporations § 8, at 31 (rev. ed. 1946).
12. *Id.*
13. 1 W. Fletcher, *supra* note 2, § 1, at 3.

pearing in the seventeenth and eighteenth centuries,[14] the joint stock company, although not incorporated, issued transferrable shares.[15] The joint stock company was the predecessor of the modern corporation.[16]

In post-Revolutionary War America, state legislatures initially followed the English method of chartering corporations. Private legislative acts created a particular corporation.[17] As with the English trading companies, "the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable."[18] Creation of a corporation by private legislative act, however, rapidly became impractical. In 1811, New York enacted the first general incorporation law opening certain manufacturing industries to all applicants.[19] General incorporation laws became commonplace by the middle of the nineteenth century.[20]

Despite the rapid acceptance of general incorporation laws, a widespread distrust toward private corporations pervaded the American culture throughout the nineteenth century. The public perceived private corporations as posing "some insidious menace."[21] Justice Brandeis described the popular belief:

> [I]ncorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes. It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.[22]

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14. H. BALLANTINE, *supra* note 11, § 8, at 33.
15. *Id.*
16. *Id. Contra* 1 W. FLETCHER, *supra* note 2, § 1, at 3. ("It was not . . . until the middle of the seventeenth century that there came into existence the great trading corporations of England, which of all ancient forms come nearest to approximating the commercial giants of modern times.").
17. H. BALLANTINE, *supra* note 11, § 9, at 37.
18. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting).
19. H. BALLANTINE, *supra* note 11, § 9, at 37 & n.18.
20. *Id.* at 37-38.
21. *Liggett*, 288 U.S. at 549 (Brandeis, J., dissenting).
22. *Id.* at 548 (footnotes omitted).

The popular distrust of corporations encouraged legislative restrictions on the creation of corporations. Typical restrictions included limitations on the amount of authorized capital, the extent of the corporation's powers, and the scope of a corporation's activity.[23] The various state legislatures did not remove the severe restrictions on the size and scope of the business corporations until the early part of this century.[24]

Ironically, the widespread repeal of the restrictions resulted from a "race to the bottom" among the states. As certain states removed the restrictions, others followed suit to prevent the migration of corporations out of their state.[25] The eventual removal of size and power restrictions thus represented a pragmatic decision, not a change in popular opinion.

The crucial point in the evolution of the American corporation occurred in 1888 when New Jersey empowered a corporation to hold stock in another corporation.[26] Other states adopted similar laws shortly thereafter.[27] This step marked the birth of the modern corporation, a multilayered corporate structure. Consequently, in

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23. *See generally id.* at 550-56 (an overview of limitations placed on nineteenth-century corporations).

24. *Id.* at 550-64.

25. *Id.* at 557-60. Justice Brandeis described the downfall of the restrictions imposed on business corporations:

> The removal by the leading industrial States of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser States, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive. The states joined in advertising their wares. The race was not one of diligence but of laxity. Incorporation under such laws was possible; and the great industrial States yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.

Id. (footnotes omitted).

26. *See* H. BALLANTINE, *supra* note 11, § 9, at 39 & n.25; *see generally* A. CHANDLER, STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE 30-31 (1962) (prior to 1889, no state explicitly allowed a corporation to hold stock of other corporations).

27. *See* H. BALLANTINE, *supra* note 11, § 9, at 39.

the development of the American corporation "a corporation no longer always represented the entire enterprise."[28]

B. The Modern Corporate Enterprise

The modern corporate enterprise assumes many forms. On the one hand, entrepreneurs often form "one man" corporations, or corporations with a handful of shareholders, to obtain the perceived benefits of the corporate form. On the other hand, modern conglomerates constantly devour attractive companies as a means of increasing their already formidable business empires. Interestingly, although these entities are quite dissimilar, the law views them as equals governed by identical rules. This Note analyzes the reverse pierce in the context of the modern, multilayered corporation.[29]

Modern complex corporations[30] dominate the world economy. These corporations possess millions of shareholders and encompass numerous subsidiaries and affiliates. Studies conducted in 1982 examined the number of subsidiaries owned by the larger American industrial, retailing, and diversified service corporations.[31] The 120 corporations studied had a total of 5,894 subsidiaries, or an average of approximately fifty subsidiaries each.[32] Mobil Oil alone had 525 subsidiaries.[33] The significance of these numbers increases dramat-

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28. P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 1.01.1, at 3 (1983).

29. Although this Note deals with the reverse pierce as applied to the members of a corporate group, the arguments advanced apply equally to a close corporation. The reverse pierce focuses on the shared interests of the corporation and its owner. Undoubtedly, a close corporation and its shareholders share a unity of interests.

> When there is one or a few shareholders, practically speaking, the shareholder-owners control and direct the affairs of the corporation for their own personal interests by controlling shareholder meetings and acting as directors and officers of the corporation. Hence, a unity of interest usually will exist between the closely held corporation and its shareholder-owners.

Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 378 (1981); *see* A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 5-6 (rev. ed. 1967).

30. P. BLUMBERG, *supra* note 28, § 1.01.1, at 3. Professor Blumberg defines a complex corporation as "a group of companies collectively constituting the enterprise." *Id.*

31. *Id.* app. 464-70.

32. *Id.* Indeed, this total is a "conservative" figure as Professor Blumberg excluded "subsidiaries whose size in relation to the enterprise [was] . . . of minor significance." *Id.* app. 464.

33. *Id.* app. 465.

ically when one considers that "[m]ost multi-unit corporate enterprises involve interrelated businesses."[34]

The corporate parent creates its family of subsidiaries and affiliates for a number of reasons. Among the primary motivations are:

> [t]he increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complications involved in the purchase of physical assets; the retention of the good will of an established business unit; the avoidance of taxation; the avoidance of cumbersome management structures; [and] the desire for limited liability. . . .[35]

In the final analysis, however, corporation owners clearly choose the corporate form because it is the most economically rational business structure under the circumstances.

Professor Landers maintains that economically rational investors will structure an enterprise into several constituent corporations when such a structure will maximize the return on their investment.[36] The investor's dominant motivation will always be to maximize the return on the enterprise as a whole.[37] As such, the constituent parts concern the enterprise owners[38] only to the extent that they contribute to the profitability of the entire organization.[39] Even diversification, a major reason behind the operation of

34. Landers, *Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy*, 43 U. CHI. L. REV. 527, 532 (1976) (footnote omitted). According to Professor Landers, the reason that corporate groups generally restrict their operations to one area of business "is obvious: separate corporate units are usually formed either to further a business need of the investor or to capitalize on the skills developed in one line of activity." *Id.*

35. Douglas & Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929); *see also* H. BALLANTINE, *supra* note 11, § 135, at 309 (uses and functions of subsidiary and affiliated corporations); Eisenberg, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control*, 84 HARV. L. REV. 1577, 1583-85 (1971) (factors encouraging holding company structure).

36. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 591-92 (1975).

37. *Id.* at 591.

38. "The terms 'enterprise' or 'business enterprise' refer to the combination of parent, subsidiary, and affiliated companies. The ultimate owners of the enterprise—be they stockholders of the parent or of the affiliates—are called 'enterprise owners.'" *Id.* at 590.

39. *Id.* at 591. "In fact, since corporate or tax advantages may be obtained by operating one company at a loss or at the break-even point, the return on investment for the enterprise may even be increased by artificially depressing the profits of a constituent corporation." *Id. Contra* Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L.

multiple businesses under an extended corporate umbrella, maximizes the long-term profitability of the enterprise by stabilizing its profits during shifts in demand.

The economic interdependence of enterprise members requires the corporate executives to manage the members of the enterprise as a single unit.[40] Failure to exert sufficient control over the corporate group members would undoubtedly result in administrative chaos and a lack of the synergy that corporate strategists expect from such relationships. Permitting an enterprise member to pursue an independent course of operations would enable that member to chart a path adverse to the enterprise as a whole. Such a result would decrease the return on the entire enterprise and, therefore, would be economically irrational. The modern corporate family thus requires a strong parent.

The units of a modern corporate group truly operate as one "common business enterprise."[41] The overwhelming concern with overall return on the entire enterprise shifts the focus from the individual group members to the aggregate. Although the group members typically are individually incorporated, the lines of distinction between group units no longer remain clear.[42] "The parent and subsidiary corporations collectively constitute the enterprise, and the crucial distinction between the enterprise itself and its investors has disappeared."[43]

C. Failure of Corporate Entity Theory

The legal concept of corporate personality "is one of the most enduring institutions of the law and one of the most widely accepted legal fictions."[44] Yet, the superficial stability of the doctrine hides a number of grave inadequacies. Despite the preeminence of the doctrine among established legal theories, most modern law-

REV. 499, 513 (1976) (the group's profits are maximized by maximizing each constituent's profits).

40. Landers, *supra* note 36, at 592.

41. P. BLUMBERG, *supra* note 7, at xxxi.

42. *See* P. BLUMBERG, *supra* note 28, § 1.01.1, at 3-4.

43. *Id.* at 4.

44. Schane, *supra* note 5, at 563.

yers do not understand the substance of the concept.[45] In addition, many of the accepted attributes of corporate personality theory were fiercely questioned by the legal theorists whose writings later evolved into the modern doctrine of corporate personality.[46] These scholars examined a number of deficiencies in the corporate personality theory that continue to plague modern legal writers.

The central problem facing legal writers who attempt to define the corporate entity is their preoccupation with devising a universal and fixed corporate entity theory.[47] Professor Latty argued that both courts and commentators place far too much importance on the entity concept.[48] According to Professor Latty, legal writers have developed a "fascination [with] the nature of the corporate entity as the key to problem solution";[49] "[o]n the assumption that corporate entity is the key to the solution, cases have been said to be inconsistent with each other when in fact they are not, and vice versa."[50]

Despite the universal obsession with definitions of corporate entity, scholars have yet to develop a coherent definition of the corporate entity that reflects the reality of the modern corporate structure. This deficiency arises not from want of trying; legal scholars have proposed a multitude of definitions with varying degrees of acceptance.[51] In 1926, Justice Cardozo, then an associate

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45. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441 (1987).

46. For a discussion of the history and development of competing views of corporate personality, see Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Mark, *supra* note 45.

47. *See* Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 599-600 (1936). "One need have no quarrel with use of the term ["entity"] in a proper context, provided that one looks to it advisedly as merely a loose and convenient summary of diverse legal phrases and not as the source of the factors of judicial law-making. . . ." *Id.* at 599. *See also* Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926) (discussing the problems that occur "when one assumes that there is in existence some single and coherent theory of personality").

48. Latty, *supra* note 47, at 627.

49. *Id.*

50. *Id.*

51. *See id.* at 619-20. Professor Latty offered the following synopsis:

> [W]e are . . . told that the corporation admits of a real personality or at least of something so like personality that we may call it by that name; that it is a real person with body, members and will of its own; that it is an artificial person; that it is a real person because what is artificial is real; that even an indi-

judge on the New York Court of Appeals, recognized that the relation between members of a corporate group "is one that is . . . enveloped in the mists of metaphor."[52] Ironically, the corporations existing in 1926, with their more clearly defined organizational lines, were mere babes compared to the modern conglomerates. Yet, corporate theory has evolved little since Justice Cardozo's warning. The failure of corporate law to keep pace with the evolution of the corporate entity resulted in the obsolescence of the line-drawing approach.

The corporate theory of artificial personality has long since diverged from economic reality.[53] The contemporary business enterprise is far from the original concept of a corporation,[54] yet the law has failed to adjust to the reality of the modern corporation.[55] Courts "blindly adopted" the unyielding concept of separate corporate personality to govern the modern corporate groups.[56] Yet, rigid adherence to archaic notions of corporate entity ignores the tremendous interdependence among the units of a corporate group.[57] Instead of adapting corporate theory to fit modern reality, courts manipulated archaic and inflexible notions of separate corporate entity to achieve desired results.[58]

Furthermore, legal scholars have attacked the established legal doctrine that a corporation is always an entity separate from its shareholders. According to Professor Latty:

> [P]recedent does not force one to conceive of the corporation as an entity universally and unqualifiedly separate and distinct from the stockholders regardless of purpose or problem. Equally

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> vidual is after all but an artificial legal person, a subject of rights and duties; that a corporation is not a thing, it is a method; that the entity is a fiction but a rational fiction, not an arbitrary or artificial fiction; that the "person" is a fiction but the entity or "thing" is real.

Id. (footnotes omitted).

52. Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

53. *See* P. BLUMBERG, *supra* note 28, § 1.01.1; Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947).

54. Berle, *supra* note 53, at 344. *See generally supra* notes 10-28 and accompanying text (history of corporation).

55. *See* P. BLUMBERG, *supra* note 28, § 1.01.2, at 4-6.

56. *See id.* § 1.01.2, at 5.

57. *See generally* P. BLUMBERG, *supra* note 7, at xxxi (traditional entity law does not conform to modern complex corporation).

58. *See* Berle, *supra* note 53, at 344.

> consistent with legal precedents is the position that the entity is both separate and distinct from the stockholders and yet equal to the aggregation thereof and that for many (in fact, most) purposes no inquiry into the nature and identity of those constituent parts is essential, for their rights and duties can be determined collectively.[59]

Absolute separation between corporation owner and corporation does not follow inevitably from the fiction that the corporation is a separate legal person.[60]

The quest for the mythical definition of the corporate entity should be abandoned in favor of a flexible approach. One may properly define the corporate entity only in light of "the purpose attempted to be accomplished and the manner of accomplishing it."[61] Whether a corporation is a separate legal entity or depends on the question to be resolved. A corporation may be an entity for some purposes and not for others.[62] The acceptance of this view of the corporate entity provides a strong foundation for the reverse pierce.

II. Traditional Corporate Veil-Piercing Theory

Courts generally have contributed little toward developing a coherent set of principles to govern corporate veil-piercing theory.[63]

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59. Latty, *supra* note 47, at 615.

60. *Id.* at 620 (footnote omitted); *see also* Machen, *Corporate Personality*, 24 Harv. L. Rev. 253, 258 (1911). Machen wrote:

> [I]n respect to the nature of a corporation, there are two basic propositions, (1) that a corporation is an entity distinct from the sum of the members that compose it, and (2) that this entity is a person. These propositions are often confused; but they are properly quite distinct from one another.

Id.

61. Douglas & Shanks, *supra* note 35, at 194. Justice Douglas advocated the position that a corporation is a "method." When defined as a method, the definition of a corporation varies from one purpose to another. *Id.*

62. Hamilton, *The Corporate Entity*, 49 Tex. L. Rev. 979, 1009 (1971). Bryant Smith reached a similar conclusion over 60 years ago:

> It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes . . . is to make . . . corporate personality . . . a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits. Issues do not properly turn upon a name.

Smith, *Legal Personality*, 37 Yale L.J. 283, 298 (1928) (footnote omitted).

63. Note, *Disregard of the Corporate Entity*, 4 Wm. Mitchell L. Rev. 333, 351 (1978).

The confusion existing in the corporate veil-piercing area is the product of several factors. Legal writers fail to agree on a single definition of the corporate entity; a similar lack of consensus plagues corporate veil-piercing jurisprudence. To compound the problem, courts make sloppy use of veil-piercing terminology, often confusing tests: "Devoid of any consistent doctrinal basis, the cases themselves defy any attempt at rational explanation."[64]

No universal test or theory to determine the propriety of piercing the corporate veil exists. Although one commentator has suggested that the formulation of a universal test is impossible,[65] several corporate veil-piercing theories have emerged. The theories most commonly advanced are agency,[66] instrumentality,[67] identity[68] or alter ego,[69] and inequitable use of the corporate form.[70] Unfortunately, such theories have deteriorated to the status of metaphor against which Justice Cardozo had warned previously.[71] As a result, the use of such metaphors by the courts has led to much criticism and is of little practical use.[72]

Despite the multitude of veil-piercing theories, the approaches bear a number of similarities. One commentator suggests that, as a general rule:

> the courts have required that the party seeking to pierce the corporate veil satisfy a two prong test: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual [shareholders] no longer

64. Landers, *supra* note 36, at 620.

65. *See* Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, 18 (1925).

66. *See generally* P. BLUMBERG, *supra* note 7, § 6.06 (analysis of agency theory).

67. *See generally id.* § 6.02 (analysis of the instrumentality doctrine).

68. *See generally id.* § 6.04 (analysis of the identity doctrine).

69. *See generally id.* § 6.03 (analysis of the alter ego doctrine).

70. *See generally id.* § 6.05 (analysis of "sham" or "shell" corporations).

71. *See supra* text accompanying note 52. "Metaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

72. P. BLUMBERG, *supra* note 7, § 6.01, at 107; *see also* H. BALLANTINE, *supra* note 11, § 136, at 312-13 ("The formulae invoked usually give no guidance or basis for understanding the results reached. [They] are the magic words or legal incantations with which counsel will vociferate.").

> exist; and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[73]

This "general rule," along with the various veil-piercing theories on which it is based, suffers from a number of inadequacies.

When deciding whether a plaintiff has met the jurisdiction's veil-piercing test, courts often focus on factors irrelevant to the substance of the plaintiff's claim. The most weighty factor in an analysis often is the observance of corporate formalities.[74] However, the corporation owner's observance of the details of corporate form "may have little or no effect on the plaintiff."[75] By focusing on form rather than substance, courts are able to further hidden agendas while facially applying the jurisdiction's veil-piercing test.

Courts often advance equitable and public policy concerns by applying a veil-piercing test. In fact, corporate veil-piercing doctrine arguably has evolved into essentially an equitable doctrine.[76] Courts frequently choose to pierce whenever it furthers a sufficient public policy concern of the forum.[77] Courts then justify the outcome of the case based on the presence, or absence, of a number of often substantively irrelevant facts.[78] The enormous volume of

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73. Barber, *supra* note 29, at 376 (quoting Automotriz del Golfo de Cal. v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957)). *See also* Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 U. KAN. L. REV. 185, 187 (1971) (the rule's elements are: the inequitable relationship between plaintiff and shareholder and the "instrumentality" relationship between the shareholder and corporation). *Cf.* Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DEN. L.J. 1 (1978). The Krendls suggest that certain "ultimate issues" concern courts in applying the applicable veil-piercing test. These ultimate issues fall into three categories. The first category contains the preconditions which a plaintiff must meet before she can make a veil-piercing case. "Such factors are: dominance of . . . a 'subservient corporation' by . . . 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." *Id.* at 23. The second category requires the showing of an improper purpose, and the final issue to be resolved involves the balancing of policy considerations. *Id.* at 23-24.

74. *See* Note, *supra* note 63, at 340.

75. Dobbyn, *supra* note 73, at 189.

76. *See* Landers, *supra* note 36, at 620. *Cf.* Krendl & Krendl, *supra* note 73, at 6-7 (courts apply a common set of "equitable principles" to various fact situations).

77. *See* H. BALLANTINE, *supra* note 11, § 136, at 314 ("the policy of statutes applicable to the [parent/subsidiary relationship]" is an "operative factor" in determining whether to pierce).

78. *See* Landers, *supra* note 36, at 620 ("the typical veil piercing case is an exercise in cataloging a number of factors in order to reach a normative conclusion that piercing is or is

veil-piercing literature simply catalogues factual circumstances that support piercing.[79] Although legal scholars search for a semblance of consistency between the cases, they are unable to establish a clear pattern to the factors justifying corporate veil-piercing.[80]

A significant part of the chaos surrounding veil-piercing results from the indiscriminate application of veil-piercing theory to strikingly different problems.[81] Although different fact situations involve varying policy considerations, "a common set of rules and equitable principles are usually applied to all of them."[82] This approach to "regarding or disregarding the corporate entity tends to cause different situations to be treated in the same manner."[83]

The failure of state courts to adhere to a single veil-piercing theory also creates much confusion. For example, New York courts apply both the agency theory[84] and the instrumentality rule.[85] No basis for a court's choosing one test over another exists. In addi-

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not appropriate"). An oft-cited opinion applying the instrumentality rule found the following facts as significant:

> (1) The parent corporation owns all or majority 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 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 or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, the "subsidiary" is referred to as such or as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.

Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940). Of the factors listed in *Fish*, only facts (8) and (10) are substantively irrelevant. *See also* Barber, *supra* note 29 at 374-75 (list of 19 factors, one or more of which was present in each case of veil-piercing).

79. Landers, *supra* note 36, at 619-20.

80. Dobbyn, *supra* note 73, at 189.

81. P. BLUMBERG, *supra* note 7, § 6.10, at 136; Latty, *supra* note 47, at 621-22.

82. Krendl & Krendl, *supra* note 73, at 7.

83. Latty, *supra* note 47, at 626.

84. *E.g.*, Astrocom Elecs. v. Lafayette Radio Elecs. Corp., 63 A.D.2d 765, 766, 404 N.Y.S.2d 742, 744 (1978).

85. *E.g.*, Kashfi v. Phibro-Salomon, Inc., 628 F. Supp. 727, 733 (S.D.N.Y. 1986); *see* Dobbyn, *supra* note 73, at 186.

tion, although New York courts generally apply one of the tests to a given case, occasionally they apply the tests in the alternative.[86] Because of such confusion, predicting which test a court will apply in a particular case is impossible. The confusion plaguing the courts in the application of corporate veil-piercing theory multiplies when corporation owners seek to pierce the corporate veil for their own benefit.

III. THE REVERSE PIERCE

Courts generally have adopted three approaches to determine whether corporation owners should be able to pierce the veil of their corporation. The traditional and majority view is that a corporation may not disregard its own separate entity for any reason.[87] The other two approaches permit the reverse pierce under the proper circumstances but differ as to the method of analysis. The second approach entails an application of the traditional corporate veil-piercing test in the jurisdiction.[88] This view attributes no weight to the fact that the corporation is the party seeking to pierce. Under the third method, courts determine whether to pierce the corporate veil after an analysis of the equitable and public policy concerns at issue. Courts adhering to this "equity/policy analysis" will pierce the corporate veil for the benefit of the corporation owners if equity or public policy so requires.[89]

Corporation owners seek to disregard the separate entity of their corporations under a variety of circumstances. Despite the court's approach, its willingness to accept the reverse pierce often turns on public policy considerations implicated in a given case. For example, case law suggests that a bankruptcy court is generally amenable to a reverse pierce to afford relief to a debtor;[90] however, a court is not likely to permit a reverse pierce when the corporation owner seeks to avoid a regulation imposed to protect the public.[91]

86. *See, e.g.*, Minpeco S.A. v. Conticommodity Servs., 549 F. Supp. 857, 858-59 (S.D.N.Y. 1982).

87. *See, e.g.*, Love v. Flour Mills of Am., 647 F.2d 1058, 1062 (10th Cir. 1981).

88. *See, e.g.*, Smith v. Cotton's Fleet Serv., 500 So. 2d 759, 761-63 (La. 1987).

89. *See, e.g.*, *In re* Western World Funding, 52 Bankr. 743, 781-83 (D. Nev. 1985).

90. *E.g.*, *id.*

91. *See* Schenley Distillers Corp. v. United States, 326 U.S. 432, 436-37 (1946) (per curiam).

As a result, one must be wary of the public policy concerns implicated in a case when analyzing the court's approach. For ease of analysis, this Note examines the case law according to the three broad approaches adopted to address the reverse pierce.

A. Strict Adherence to the Separate Personality Doctrine

The traditional judicial response to the reverse pierce is an absolute refusal to pierce the corporate veil in favor of those who created it, the corporation owners. Courts base their refusal to reverse pierce on a strict adherence to the separate personality doctrine embodied in traditional corporate law. The "separate personality" approach enjoys widespread support and is clearly the majority view.

The primary characteristic of the separate personality approach is an unwavering obedience to traditional corporate entity theory. In other words, courts adhering to this approach consider a corporation and its owners to be separate legal entities for all purposes. In *Carey v. National Oil Corp.*,[92] for example, an American parent purchased oil through a wholly-owned foreign subsidiary, which then contracted with another foreign corporation to obtain the oil.[93] The foreign supplier subsequently cancelled its agreement with the foreign subsidiary, and the American parent sought damages for breach of contract.[94] The parent claimed that the foreign subsidiary was amenable to United States jurisdiction because the breach "'cause[d] a direct effect in the United States.'"[95] Concluding that the breach only had a direct effect on the foreign sub-

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92. 592 F.2d 673 (2d Cir. 1979) (per curiam).

93. *Id.* at 675. The foreign oil company involved was the National Oil Corporation, which was wholly owned by the Libyan government. The subsidiary was compelled to contract with the National Oil Corporation after Libya nationalized several foreign-owned oil concessions in September, 1973, forcing the subsidiary's previous supplier to terminate its contract. *Id.*

94. *Id.* The National Oil Company cancelled its contracts due to the Libyan oil embargo imposed on the United States, the Netherlands, and the Bahamas. World oil prices rose dramatically as a result. The parent sought $1.6 billion in damages. *Id.*

95. *Id.* at 676. (quoting Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2)). The National Oil Corporation is a foreign state for the purposes of this Act and is thus immune from United States jurisdiction with certain limited exceptions. *Id.* at 676 & nn.1-2.

sidiary, the court refused to " 'pierce the corporate veil' in favor of those who created that veil."[96]

Courts call upon basic notions of judicial fairness to buttress their strict adherence to traditional corporate entity doctrine. Essentially, courts intimate that because the corporation owner is responsible for the corporate veil, allowing the corporation owner to deny it would be "unfair." Courts articulate this underlying sense of unfairness through two related means.

First, courts view the corporation owner as having made an affirmative and intelligent choice to operate her business in the corporate form. According to this view, the corporation owner considered the respective advantages and disadvantages of the available business structures before selecting the corporate organization as the preferred mode of operation. As a result of this inquiry, the corporation owner was aware that the law views a corporation and its owners as separate entities. Because the corporation owner chose the corporate form with knowledge of this fact, she cannot now decry her separate legal existence.

T.V.A. v. Exxon Nuclear Co. reflected this view.[97] In *T.V.A.*, a corporate parent sought the status of a third party beneficiary under a contract entered into by a wholly-owned subsidiary.[98] The court refused to pierce the veil between the parent and the subsidi-

96. *Id.* at 676 (footnote omitted). The court held that the effect on the American parent could "only be deemed indirect" through the parent's relations with the subsidiary. *Id.*

A court reached a similar result in O'Driscoll v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Fed. Sec. L. Rep. (CCH) ¶ 99,486 (S.D.N.Y. Sept. 8, 1983). A foreign national residing in the United States owned a foreign corporation that purchased and held his personal investments. The court held that the foreign corporation was unable to bring fraud claims in a federal forum because the losses were not the direct result of acts occurring within the United States. The court reasoned that the corporation owner deliberately created the corporation to hold the investments and must abide by that decision. Although refusing to permit the foreign corporation to "pierce its own corporate veil," *id.* at 96,834 n.10, the court did recognize that, because the corporation owner was the sole shareholder and chief executive officer of the foreign corporation, "if [the corporation owner] was deceived, [the corporation] was deceived." *Id.* at 96,835. Such realization is equivalent to an admission that the corporation and the corporation owner share an identity of interests.

97. 570 F. Supp. 462 (E.D. Tenn. 1983), *aff'd*, 753 F.2d 493 (6th Cir. 1985).

98. *Id.* at 464. The subsidiary entered into a supply contract to furnish uranium to the plaintiff. The contract contained an upward price adjustment to cover increased costs of supply. The parent sought increased costs under the price adjustment clause of the contract. *Id.* at 463.

ary, requiring that the two entities "abide by their choices" of business organization.[99]

Many courts take the affirmative decision rationale one step further. These courts focus on the motivation behind the corporation owner's choice of the corporate structure. Courts view the corporation owner as choosing the most advantageous business structure for the organization. The corporation owner should not be heard to deny the existence of the corporation because it later proved disadvantageous in a particular circumstance.

This attitude pervades the opinion in *Chemical Bank v. Howell-Kessler Co.*[100] A partnership claimed equitable ownership of real property held by a corporation owned by the partnership.[101] The partnership asserted that "the corporation [was] an inactive shell with merely nominal title."[102] The court ruled that "it would be particularly inappropriate to permit [the partnership] to deny the independent existence of the corporation" that they created to secure the advantages of the corporate form.[103]

Courts also justify their refusal to reverse pierce on a concern for legal order. Many view the reverse pierce as an opportunity for corporation owners to manipulate the legal status of their corporation to suit current needs.[104] The United States Supreme Court articulated this concern in *Schenley Distillers Corp. v. United*

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99. *Id.* at 465. *Accord* Davidson v. General Motors, 119 Mich. App. 730, 326 N.W.2d 625 (1982) (per curiam); Williams v. American Title Ins., 83 Mich. App. 686, 269 N.W.2d 481 (1978).

100. 447 F. Supp. 976 (S.D.N.Y. 1978).

101. *Id.* at 977. The partnership filed for a real property arrangement under Chapter XII of the Bankruptcy Act to avoid the sale of the property by the mortgagee. Any person, other than a corporation, who was the legal or equitable owner of real property that was security for a debt could apply for protection under Chapter XII. *Id.*

102. *Id.* Although not addressing the viability of the corporation expressly, the court noted that "a respectable argument can be made that the corporation was not simply an inactive shell . . . but did have an independent existence for some period after its formation." *Id.* at 978.

103. *Id.* at 977. The court noted the "tax advantage" expressly. *Id.* The court concluded that "it would be inconsistent with the limited reach of the Bankruptcy Act to permit a debtor to assume or renounce corporate status, and thus take advantage of Chapter XII, depending on its needs of the moment." *Id.* at 978.

104. P. Blumberg, *supra* note 7, § 25.01; *see, e.g.*, *In re* Beck Industries, Inc., 479 F.2d 410, 418 (2d Cir.), *cert. denied*, 414 U.S. 858 (1973); Bross Utils. Serv. Corp. v. Abombshait, 618 F. Supp. 1442, 1445 (S.D.N.Y. 1985); Boswell v. May Centers, Inc., 669 S.W.2d 585, 586 (Mo. Ct. App. 1984).

States.[105] In *Schenley*, a subsidiary sought to avoid the acquisition of a transportation permit. The parent formed the subsidiary to transport property for the parent and other affiliated corporations.[106] The Interstate Commerce Act required any person transporting property in interstate commerce for compensation to obtain a permit.[107] Any person transporting property in the course of a commercial enterprise was exempt from the requirement.[108] The subsidiary asserted that it did not require a permit because the transportation would be "in furtherance of one 'commercial enterprise.' "[109] The Supreme Court rejected tersely the subsidiary's plea to disregard the separate entities:[110] "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."[111]

B. Traditional Corporate Veil-Piercing Theory

Interestingly, courts generally decline to apply traditional corporate veil-piercing theory in the context of a reverse pierce. Indeed, traditional veil-piercing theory is probably the minority approach. However, courts occasionally resort to some veil-piercing analysis when addressing a reverse pierce.

In *Crum v. Krol*,[112] for example, a corporation owner claimed amounts paid by his wholly-owned corporation as personal dam-

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105. 326 U.S. 432 (1946) (per curiam).

106. *Id.* at 436. The subsidiary was to receive compensation from the parent and the affiliated corporations for performing the transportation services. *Id.*

107. *Id.* at 433-34 (quoting Interstate Commerce Act, 49 U.S.C. § 203(a)(15)).

108. *Id.* at 434 (quoting Interstate Commerce Act, 49 U.S.C § 203(a)(17)).

109. *Id.* at 436.

110. The Court previously affirmed the dismissal of the parent from the suit for lack of standing. The sole interest of the parent was that of a shareholder and its status was not "altered by the mere facts that it owns all the stock of the corporation . . . and that the parent manages and controls its subsidiary." *Id.* at 435.

111. *Id.* at 437. *Accord* Sander v. Missouri Real Estate Comm'n, 710 S.W.2d 896 (Mo. Ct. App. 1986). The sole shareholder and an officer of a real estate corporation claimed to be the alter ego of the corporation to avoid penalty under the state law governing real estate brokers. The Court held that because the statute was "enacted to protect the public from fraud and incompetence. . ., [the defendant] should not be permitted to strain statutory construction to avoid regulation under the statutes." *Id.* at 899 (citation omitted).

112. 99 Ill. App. 3d 651, 425 N.E.2d 1081 (1981).

ages. The trial court added the corporation as a party to the action reasoning that the corporation was essentially the alter ego of the owner.[113] The Appellate Court of Illinois applied a two-part test used in typical corporate veil-piercing cases.[114] The court held that the corporation owner satisfied the test and treated the owner and his corporation as one entity for purposes of calculating damages.[115]

In *In re Beck Industries*,[116] the court also approached the reverse pierce as a corporate veil-piercing question. In *Beck Industries*, trustees of a bankrupt parent sought to enjoin a suit brought against a subsidiary. Although not expressly applying any corporate veil-piercing test, the court considered a number of factors typically deemed relevant in a traditional veil-piercing case.[117] On examining these facts, the court determined that the subsidiary was an independent and viable concern, separate from its parent.[118] After applying veil-piercing analysis, however, the court dis-

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113. *Id.* at 659, 425 N.E.2d at 1087. The trial court joined the corporation, in part, because the defendant "had known of the corporation's existence from the beginning and was not unfairly surprised or otherwise prejudiced by the joinder of the corporation." *Id.* The appellate court determined that joinder of the corporation was unnecessary. The trial court had determined that the corporation was an alter ego of the owner; therefore, the owner remained the "real or sole party in interest" without the need for joinder. *Id.* at 660, 425 N.E.2d at 1088.

114. In Illinois, a party seeking to pierce the corporate veil must meet two requirements: "(1) '[T]here must be such unity of interest and ownership that the separate personalities of the corporation and individual no longer exist'; and (2) 'circumstances must be such that an adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.'" *Id.* at 661, 425 N.E.2d at 1088 (quoting Gallagher v. Reconco Builders, 91 Ill. App. 3d 999, 1004, 415 N.E.2d 560, 563-64 (1980)). *See generally supra* notes 63-86 and accompanying text (overview of veil-piercing law).

115. 99 Ill. App. 3d at 661, 425 N.E.2d at 1088. *See also* Messick v. PHD Trucking Serv., 678 P.2d 791 (Utah 1984) (plaintiff corporation owner unable to prove damages through reverse pierce when corporation owner failed to satisfy two-prong test for piercing the corporate veil).

116. 479 F.2d 410 (2d Cir.), *cert. denied*, 414 U.S. 858 (1973).

117. The court examined such facts as: commingling of assets, adequacy of the subsidiary's capital, source of the subsidiary's funds and business, and the maintenance of corporate formalities. *Id.* at 417. *See generally* authorities cited *supra* note 78 (factors present in cases permitting piercing of the corporate veil).

118. 479 F.2d at 417. The subsidiary was perhaps as independent as a wholly-owned subsidiary could be. The parent corporation acquired it recently, and the subsidiary continued to operate in the same manner as it had prior to the acquisition. *Id.*

missed the parent's bid to pierce the corporate veil, reasoning tersely that the "parent cannot 'have it both ways.'"[119]

C. Balancing of Equitable and Public Policy Concerns

Courts are often willing to pierce the corporate veil for the benefit of the corporation owner when equity or public policy so requires. The increasing acceptance of this approach apparently corresponds with the transformation of traditional veil-piercing theory into an equitable doctrine. Like any equitable approach, the equity/policy approach merely involves a balancing of the relevant interests.

Significant public policy concerns usually are determinative under this approach to the reverse pierce. For example, in *Cargill, Inc. v. Hedge*,[120] a husband and wife transferred their interest in their farm to a family farm corporation with the wife becoming sole shareholder.[121] After obtaining a judgement against the husband and the corporation, a creditor successfully bid on the property at an execution sale.[122] State law provided for a homestead exemption that exempted "from seizure or sale '[t]he house owned and occupied by the debtor as his dwelling place, together with the land upon which it is situated.'"[123] However, the court found that this exemption did not apply to a corporation.[124] The Minnesota Supreme Court avoided this prohibition by permitting the corporation owners to reverse pierce the corporate veil.[125] Most importantly, in *Cargill*, strong public policy concerns[126] overshadowed

119. *Id.* at 418.

120. 375 N.W.2d 477 (Minn. 1985).

121. *Id.* at 478. All officers and directors were members of the family, but none received any compensation in that capacity. *Id.* at 479.

122. *Id.* at 478.

123. *Id.* (quoting MINN. STAT. § 510.01 (1984)).

124. *Id.* A corporation is not entitled to the homestead exemption because it is an artificial entity that requires no dwelling. *Id.*

125. *Id.* The court declined to adopt the "equitable interest" theory the court of appeals advanced. Under the equitable interest theory, the court of appeals asserted that the wife's occupancy and status as sole shareholder constituted a sufficient interest for the husband and wife to assert the homestead exemption. *Id.*

126. *Id.* at 479. The homestead exemption is derived from the Minnesota Constitution. *Id.* at 478 (citing MINN. CONST. art. I, § 12). The court cited various cases and statutes to support the overwhelming Minnesota policy of protecting the debtor's home from his creditors. *Id.* at 479.

the absence of many factors important in a traditional veil-piercing case.[127]

Although the Minnesota Supreme Court affirmatively adopted the reverse pierce in *Cargill*, it did so with reservation.[128] The concerns that the court expressed are not unique. Many courts applying the equity/policy approach to the reverse pierce find breaking with traditional entity theory a difficult task.

The Pennsylvania Supreme Court expressed similar concern in *Barium Steel Corp. v. Wiley*.[129] In *Barium*, a corporation owner entered into an agreement to purchase all of the stock of defendants' corporation.[130] The defendants breached the purchasing agreement, injuring the corporation owner's subsidiary.[131] The defendants asserted that the corporation owner could not recover because it suffered no damages. The court made much of the established corporate law principle of separate entity yet ultimately held that it would treat a corporation and its shareholders as identical " 'where . . . justice to all parties requires it.' "[132]

Although many proponents of the equity/policy approach express reservations, courts following this approach generally seem willing to depart from traditional entity theory. For example, *In re Western World Funding*[133] marked a significant break from tradi-

127. *Id.* at 479. Interestingly, although the farm maintained corporate formalities and acted as a corporation in dealing with local agencies, the Minnesota Supreme Court accepted the trial court's finding that the family "operated the farm as their own." *Id.*

128. *Id.* at 480 ("a reverse pierce should be permitted in only the most carefully limited circumstances").

129. 379 Pa. 38, 108 A.2d 336 (1954).

130. The court best described the complicated relationship among the participants in this action: "Barium [the corporation owner] bought all of the stock of, and wholly owned Equipment Company; Barium wholly owned Clyde Iron Works, Inc.; Clyde wholly owned Wiley Manufacturing Company [the injured subsidiary], to whom it transferred all of the assets of Equipment Company, having acquired them through [the defendant]." *Id.* at 47, 108 A.2d at 341.

131. Under the purchase agreement, defendants warranted that the transferred corporation owed no taxes. The state subsequently assessed tax deficiencies. The applicable statute required the transferred corporation or the transferee of the corporation's assets to pay the tax. As a result the subsidiary was the injured party. *Id.* at 41-43, 108 A.2d at 338-39.

132. *Id.* at 48, 108 A.2d at 341 (quoting Edirose Silk Mfg. Co. v. First Nat'l Bank & Trust Co., 338 Pa. 139, 143, 12 A.2d 40, 42 (1940)). *See also* Brown Bros. Equip. Co. v. State, 51 Mich. App. 448, ___, 215 N.W.2d 591, 593 (1974) ("the fiction of separate corporate entity of two corporations will not be extended where to do so would not serve the ends of justice").

133. 52 Bankr. 743 (D. Nev. 1985).

tional entity theory. In *Western World*, the trustee of a debtor corporation sought to hold the corporation owners personally liable for the corporation's debts on an alter ego theory.[134] The corporation owners argued that the trustee's standing was equivalent to a corporation piercing its own veil.[135] The court responded by permitting the trustee to "establish the identity of the alter egos with the corporations in order to determine what are the assets of the estate."[136] Significantly, the court continued:

> Furthermore, it is not at all clear that a corporation would be forbidden to pierce its own corporate veil in a non-bankruptcy context. There is no inconsistency in allowing such an action. The alter ego doctrine is an equitable remedy which may be invoked for some purposes and not others. It may be utilized when equity requires, such as to protect innocent parties, rather than as a defense to the liability of defaulting fiduciaries. . . . *[No] legal or logical difficulty [exists] in a corporation's bringing an alter ego action in its own name.*[137]

IV. Analysis of the Current Approaches to the Reverse Pierce

When presented with a reverse pierce, courts typically choose one of the three approaches examined above. Unfortunately, all three methods provide an inadequate basis for determining whether to permit a reverse pierce. This Note next examines the failings of these approaches.

A. Strict Adherence to the Separate Personality Doctrine

The oft-cited case of *Boggs v. Blue Diamond Coal Co.*[138] is a typical example of the majority view and thus provides a good starting

134. *Id.* at 753. Under Nevada law, the elements of an alter ego action are: the corporation is controlled by an individual; such a unity of interest and ownership makes the two inseparable; and enforcing the separate entity fiction would sanction a fraud or promote injustice. *Id.* at 777 (citing Frank McCleary Cattle Co. v. Sewell, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957)).

135. *Id.* at 784.

136. *Id.*

137. *Id.* (emphasis added). *Accord* Koch Refining v. Farmers Union Cent. Exch., 831 F.2d 1339 (7th Cir. 1987); *In re* S.I. Acquisition, 817 F.2d 1142 (5th Cir. 1987).

138. 590 F.2d 655 (6th Cir.), *cert. denied*, 444 U.S. 836 (1979).

point for analysis. In *Boggs*, plaintiffs[139] brought an action against a parent corporation for negligence and recklessness in maintaining a coal mine.[140] The parent argued that the parent and subsidiary were an integrated business and thus were a single "employer" subject to immunity under the state workers' compensation act.[141] The court rejected this argument, reasoning that "principles of reciprocity" forbade the parent from "avoid[ing] the consequences of its corporate structure in order to claim immunity"[142] from a common law action under the state's workers' compensation act.[143]

The *Boggs* decision warrants sharp criticism.[144] The case contains many of the factors critical to a court's determination whether to pierce the corporate veil of an integrated economic enterprise.[145] The parent owned all of the subsidiary's stock; the subsidiary sold all coal produced to the parent; the parent retained all money received from sales of the coal; and the parent provided all funds needed to pay the subsidiary's expenses.[146] Most significantly, the parent had the "primary responsibility for 'mine safety functions' at the [subsidiary's] mine."[147] Although these factors plainly support piercing the corporate veil, the court concluded that the parent and the subsidiary were separate and distinct cor-

139. *Boggs* emerged from a tragic mine accident. An accumulation of methane gas resulted in an explosion that killed 15 miners. The deceased miners were employees of a wholly-owned subsidiary of the defendant corporation. The plaintiffs were the 15 widows of the miners killed in the accident. *Id.* at 657.

140. *Id.* at 658. Plaintiffs alleged that the parent recognized a need for improved ventilation in the mine but negligently failed to take action. In addition, plaintiffs asserted that the parent removed existing ventilation and safety devices to expand operations and then concealed such removal from federal mine inspectors. *Id.*

141. *Id.* The parent argued alternatively that the subsidiary produced coal for the parent under an agreement, and as a result, the parent was a contractor specifically immune from liability under the act. *Id.*

142. *Id.* at 662.

143. *Id.*

144. *See* Note, *Piercing the Corporate Veil in Workers' Compensation Cases*, 35 U. FLA. L. REV. 701, 713-15 (1983).

145. *See generally supra* notes 77-78 and accompanying text (factors justifying piercing the corporate veil by courts).

146. 590 F.2d at 657. The court's opinion incorporated a portion of the parent's brief describing the relationship between the parent and subsidiary. *Id.*

147. *Id.* at 658.

porations.[148] Typical of the separate personality doctrine, *Boggs* is a celebration of form over substance.

The basic theory underlying the separate personality approach is simply that corporation owners should not be able to enjoy the benefits of incorporated status while avoiding any drawbacks.[149] According to this theory, permitting corporation owners to both raise and lower the corporate shield would be manifestly unfair. On the surface, this notion of reciprocity has a certain attractive quality; it creates a constant world of black and white. This simple world, however, has one serious drawback; it does not reflect reality. Furthermore, not all legal writers conclude that the reverse pierce violates some underlying rule of legal fairness.

In *In re Oil Spill By the Amoco Cadiz*,[150] the court found no unfairness in permitting a reverse pierce. A wholly-owned foreign subsidiary of an American parent purchased an oil tanker from a foreign shipbuilder.[151] The oil tanker broke up off the coast of France, causing extensive damage to the shoreline. The American parent sought indemnification or contribution from the foreign shipbuilder for any judgement awarded against the parent.[152] In addressing the foreign shipbuilder's challenge to the court's personal jurisdiction over the claim, Judge Posner wrote:

> Although [the shipbuilder] makes much of [the subsidiary's] place of incorporation, there do not appear to be any real Liberians in the picture—Liberian registry having been obtained no doubt for the none too creditable purpose of avoiding liability, rather than to conduct business in or from Liberia. The real purchaser of the [oil tanker] was [the American parent], whose headquarters is in [the United States]; and while for many pur-

148. *Id.* at 662-63.

149. *See, e.g.*, T.V.A. v. Exxon Nuclear Co., 570 F. Supp. 462, 465 (E.D. Tenn. 1983) (tax and regulatory advantages), *aff'd*, 753 F.2d 493 (6th Cir. 1985); Chemical Bank v. Howell-Kessler Co., 447 F. Supp. 976, 977 (S.D.N.Y. 1978) (tax advantage); Williams v. American Title Ins. Co., 83 Mich. App. 686, 269 N.W.2d 481 (1978) (business and tax advantages).

150. 699 F.2d 909 (7th Cir.), *cert. denied*, 464 U.S. 864 (1983).

151. A Spanish company built the ship and sold it to a Liberian subsidiary of the American parent. The American parent and Spanish shipbuilder handled all negotiations. The parties signed the contract in the United States, listing the purchaser as a "yet-to-be-formed" Liberian subsidiary. *Id.* at 914.

152. *Id.* at 912. The parent's cross-claim for indemnification or contribution did not include the Liberian subsidiary. *Id.* at 914.

> poses the decision to do business through a subsidiary has legal consequences, we do not believe that [the parent's] decision to create a Liberian subsidiary to hold title to the [oil tanker] should affect our interpretation of the [state] long-arm statute.[153]

The court concluded: "If the plaintiffs can pierce [the parent's] corporate veil to get at [the parent] directly, we cannot see why [the parent] should not be able to pierce its own veil and get at [the shipbuilder]."[154] In stark contrast to the adherents of the separate personality doctrine, Judge Posner viewed the reverse pierce as a means of advancing fairness.

As Judge Posner noted in *Amoco Cadiz*, business persons often choose to operate their enterprise as a corporation to gain the benefit of limited liability.[155] Courts following the separate personality doctrine often base their decisions on their respect for the revered notion of limited liability.[156] The role of limited liability, however, receives unwarranted emphasis when applied to corporate groups. Limited liability is rarely the sole motivation behind the corporation owner's choice of business structure.[157] Justice Douglas noted that "the desire for limited liability has been merely one among many factors"[158] behind a parent's decision to incorporate a portion of its enterprise as a wholly-owned subsidiary. A parent often chooses to incorporate a portion of its business as a subsidiary to streamline management.[159] Certainly, a court should not penalize a corporation owner for seeking to operate his business enterprise in the most efficient manner.

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153. *Id.* The court actually found that the American parent had created the foreign subsidiary in an effort "to keep some of its assets out of the reach of potential creditors." *Id.*

154. *Id.* at 914-15.

155. *See generally* Posner, *supra* note 39, at 503 (Judge Posner's views on the importance of limited liability).

156. *See, e.g., In re Oil Spill*, 699 F.2d at 914; *In re* Beck Industries, 479 F.2d 410, 417 (2d Cir.), *cert. denied*, 414 U.S. 858 (1973); Smith v. Cotton's Fleet Serv., 500 So. 2d 759, 763 (La. 1987); Boswell v. May Centers, Inc., 669 S.W.2d 585, 587 (Mo. Ct. App. 1984).

157. *See generally* note 35 and accompanying text (motives behind incorporating a business). Certainly, instances exist when the corporation owner's desire to limit liability may be his only concern when selecting a business structure. For example, a business entity that transports and disposes of hazardous chemicals would do well to operate as a corporation.

158. Douglas & Shanks, *supra* note 35, at 193.

159. *Id.*

Other commentators argue that traditional limited liability concepts should not even apply to corporate groups. The purpose of limited liability is to facilitate business investment by protecting the investor, the shareholder. Judicial extension of limited liability to the parent of a corporate group was not necessary to protect the ultimate investor,[160] the shareholder of the parent corporation. Limited liability of a corporate group, in fact, creates two layers of protection.[161] Courts extended limited liability blindly without recognizing that the relationship between members of a unitary enterprise is remarkably different than the link between the ultimate investor to the enterprise.[162] As a result, the importance courts place on limited liability between members of a corporate group is misplaced.

Courts adhering to the separate personality approach stretch the doctrine of artificial personality beyond its originally conceived limits. The artificial personality theory was never intended to be the unyielding concept it has become. Over fifty years ago, the Michigan Supreme Court stated:

> "The doctrine . . . that a corporation is a legal entity existing separate and apart from the persons composing it is a *mere fiction*, introduced for purposes of *convenience* and to subserve the *ends of justice. This fiction cannot be urged to an extent and purpose not within its reason and policy*, and it has been held in an appropriate case, and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical."[163]

In addition, Professor Berle noted:

> [B]elow the corporation papers there is always an enterprise; that, prima facie, the corporate papers, minute books and books of account describe and indicate that enterprise; but that *it is always open to inquiry whether the enterprise-fact corresponds to the corporate-fact*. If it does not, the court may, on cause

160. P. BLUMBERG, *supra* note 7, § 3.02.1, at 60.
161. *Id.*
162. *Id.*
163. Montgomery v. Central Nat'l Bank & Trust, 267 Mich. 142, 147-48, 255 N.W. 274, 276 (1934) (emphasis added) (quoting 7 RULING CASE LAW 27 (1929)).

> shown, insist upon dealing with the actuality of the enterprise-fact.[164]

The courts' rigid adherence to the artificial personality doctrine, the cornerstone of the separate personality approach, finds little support in the history of the doctrine itself.

Further, this emphasis on the corporate form ignores an important element in traditional veil-piercing jurisprudence: control.[165] A superficial examination of the corporate form is grossly inadequate for two reasons. First, the parent and subsidiary almost always maintain corporate formalities.[166] Second, this cursory review ignores the reality of the modern corporation's authority structure.[167]

> In a group of related corporations the locus of the decision-making authority will be determined by the needs of the enterprise as a whole. Yet the courts often talk about the necessity that subsidiary and affiliated corporations have a separate and independent will, as if corporations themselves had some sort of incorporeal existence apart from their owners. *Even if a subsidiary has its own management team, it would be naive to expect the enterprise owners to remain silent if they disagree with the subsidiary's policies; if heads roll, there is no doubt whose heads they will be.*[168]

Again, the courts' refusal to look beneath the surface of the corporate form blatantly exalts form over substance.

The separate personality approach places excessive emphasis on the importance of limited liability in situations in which the concept does not belong. Courts assume that corporation owners will incorporate solely to avoid liability; however, that simply is not the case. Proponents of this approach fail to recognize the economic and functional realities of the marketplace. In short, the separate personality approach simply exalts form over substance.

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164. Berle, *supra* note 53, at 354 (emphasis added).

165. Barber, *supra* note 29, at 398.

166. *Id.*

167. *See* Note, *supra* note 63, at 340.

168. Landers, *supra* note 36, at 592 (emphasis added); *see* H. BALLANTINE, *supra* note 11, at 308; Note, *Suits in a Parent Corporation to Redress Injuries to the Subsidiary*, 64 HARV. L. REV. 1313, 1317 (1951).

B. Traditional Veil-Piercing Theory

Application of traditional veil-piercing theory to a reverse pierce case warrants both praise and criticism. The decision merits praise because it represents a step in the right direction: a refusal to sanction outdated concepts of absolute separate entity. The traditional veil-piercing approach recognizes that conventional corporate law theories are ill-suited to the modern corporation. Courts following this approach appreciate that permitting corporation owners to pierce the corporate veil results in no manifest unfairness.

The application of the corporate veil-piercing doctrine in reverse is, however, subject to the same criticism as traditional veil-piercing theory.[169] Essentially void of definite standards, corporate planners are unable to predict accurately when courts will use the veil-piercing doctrine. Lack of consensus in the area results in substantial confusion. Furthermore, courts often examine factors irrelevant to the reality of the situation. Whether a subsidiary is listed as a division on the parent's stationery should have no bearing on whether to pierce the veil between the two entities. Because of the substantial deficiencies in traditional veil-piercing theory, application of the veil-piercing doctrine to a reverse pierce is particularly inappropriate.

C. Balancing of Equitable and Public Policy Concerns

The equity/policy theory also has advantages and disadvantages. Illustrative of the courts' retreat from an absolute refusal to pierce the veil for the benefit of the corporation owner, the equity/policy approach to the reverse pierce embodies two significant concepts. It represents both an increasingly flexible approach to the concept of separate corporate entity and an appreciation of the role of equity and public policy in a reverse pierce.

Yet, the equity/policy theory is subject to many of the same criticisms as the traditional veil-piercing doctrine. Like any balancing doctrine, an equity/policy reverse pierce theory is inherently standardless. Based on notions of justice and equity, such a theory does not provide standards critical to corporate planners in deter-

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169. *See generally* notes 63-86 and accompanying text (discussion of traditional veil-piercing theory).

mining the status of the corporate structure. Further, courts applying this approach need not examine the relationship between the parent and the subsidiary. Again, a more doctrinally sound and predictable approach is needed.

V. A Proposal

A. The Unitary Interest Test

Due to the deficiencies in the three accepted approaches to the reverse pierce, a more comprehensive analysis is necessary. This test must look beneath the surface of corporate formalities and examine the relationship between the parent and the subsidiary. Yet, the test must also remain sensitive to equitable and public policy concerns.

The Supreme Court of Michigan took a significant step toward developing such a test in *Wells v. Firestone Tire & Rubber Co.*[170] In *Wells*, an injured employee of a wholly-owned subsidiary[171] brought a third-party products liability action against the parent.[172] The parent asserted statutory immunity as the "real" employer of the subsidiary's employee. In establishing whether the

170. 421 Mich. 641, 364 N.W.2d 670 (1984). A court developed a similar test in Latham v. Technar, Inc., 390 F. Supp. 1031 (E.D. Tenn. 1974). In *Latham*, the court ruled that a parent could enjoy statutory immunity as employer of the subsidiary's employee "if the two . . . concerns were so completely integrated and commingled that neither party could be realistically viewed as a separate economic entity." *Id.* at 1037. Recently, the same court addressed the identical issue again and declined "to adopt a *per se* rule that any parent corporation automatically would share in its subsidiary's statutory immunity as an employer." Gaines v. Excel Indus., 667 F. Supp. 569, 575 (M.D. Tenn. 1987) (footnote omitted).

171. In addition to the parent owning all the capital stock of the subsidiary, the two maintained a close relationship. The parent handled all accounting; all money was deposited in a bank account bearing the parent's name; the parent charged the subsidiary a certain percentage for workers' compensation insurance; employees of the subsidiary were all under the supervision of the parent and abided by the parent's rules and regulations; employees of the subsidiary received paychecks from the parent; and the parent maintained all employment records of the subsidiary's employees. 421 Mich. at 648-50, 364 N.W.2d at 673-74 (quoting Wells v. Firestone Tire & Rubber, 97 Mich. App. 790, 794-96, 296 N.W.2d 174, 176-77 (1980)).

172. *Id.* at 645-46, 364 N.W.2d at 672. The employee had previously sought and received workers' compensation benefits listing the parent as his employer. *Id.* at 645, 364 N.W.2d at 672.

parent was entitled to statutory immunity, the court applied the "economic reality test."[173]

The court defined the economic reality test as "'a broad approach which . . . looks to the totality of the circumstances surrounding the performed work.'"[174] The economic reality test examines such factors as: "(1) control of the worker's duties, (2) payment of wages, (3) hiring, firing, and responsibility for the maintenance of discipline, and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal."[175] Although tailored to the workers' compensation arena, these factors share a unifying theme: a concern for identifying the true locus of control in the enterprise. As the court recognized, the economic reality test results in "a 'reverse-piercing' of [the parent's] corporate veil."[176]

The court based its readiness to accept the reverse pierce on a flexible definition of the corporate entity. The court viewed the fiction of a corporation's separate personality as a "convenience introduced in the law to subserve the ends of justice [which] . . . will be respected, unless doing so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy."[177] In light of the public policy supporting the workers' compensation statute and other equitable considerations, the court disregarded the separate corporate entities of the parent and the subsidiary.[178]

The Supreme Court of Michigan's opinion in *Wells* embodies many of the desired elements of an acceptable approach to the reverse pierce. The court focused on the enterprise's true locus of control, considered equitable and public policy concerns, and based its approach on a flexible definition of the corporate entity. The court failed, however, to weave these elements into a single, concise framework of analysis for a reverse pierce. The "unitary

173. *Id.* at 648-50, 364 N.W.2d at 673-74.

174. *Id.* at 648, 364 N.W.2d at 673 (quoting Farrell v. Dearborn Mfg. Co., 416 Mich. 267, 276, 330 N.W.2d 397, 400 (1982)).

175. Parkkonen v. Cleveland Cliffs Iron Co., 153 Mich. App. 204, __, 395 N.W.2d 289, 291 (1986) (per curiam).

176. *Wells*, 421 Mich. at 650, 364 N.W.2d at 674.

177. *Id.*

178. *Id.* at 651, 364 N.W.2d at 674.

interest" test, a variation of the economic reality test espoused most prominently in *Wells*, accomplishes this task.

The unitary interest test requires a court to make a two-step inquiry before it may reverse pierce the corporate veil. A court must first determine whether the interests of the corporation and its owners are so completely merged that neither concern could realistically be considered a separate economic entity. Factors relevant to making such a determination include:

> extensive reciprocal dealing either in goods or services or in financing or promotion, . . . an independent management structure [,] and an absence of direction from the owners of the enterprise. In the case of a newly acquired company, the factual showing would probably involve a comparison of pre-acquisition and post-acquisition levels of inter-corporate activity, and in the case of developed subsidiaries, industry comparisons would be appropriate.[179]

Second, if the corporation and its owner share such a unitary interest, the court then must examine relevant public policy and equitable considerations and determine whether such concerns weigh for, or against, permitting a reverse pierce.[180] A court need only reach the second step of the inquiry if it finds that the corporation and its shareholder(s) are an integrated economic enterprise under step one.

B. The Unitary Interest Test Applied

Application of the unitary interest test to varying fact patterns is helpful.

Example 1: Lemon Motor Cars, Inc. ("LMC") manufactures automobiles. As part of its sales and distribution effort, LMC owns a number of dealerships in key metropolitan areas. One such dealership is Colonial Lemon of Williamsburg. LMC owns one hundred

179. Landers, *supra* note 34, at 539-40. This list is not exclusive. *See* Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940) (factors (1)-(7) and (9)).

180. Difficulty arises, of course, when an examination of equitable and policy concerns yields a neutral result; neither public policy nor equity weighs in favor or against a decision to reverse pierce. In such a case, the court should reverse pierce because the true focus of the unitary interest test is on step one, whether the corporation owner and the corporation are an integrated economic group.

percent of Colonial Lemon's stock, and Colonial Lemon distributes all of its annual profits to LMC. The president and operating manager of Colonial Lemon serve at the will of LMC. Furthermore, LMC executives make all major Colonial Lemon spending decisions, and LMC dictates the models and quantities of automobiles sold in Colonial's showroom.

A state statute requires that car dealers disclose all defects in "new" cars that delayed their production.[181] The statute expressly exempts manufacturers from this duty.[182] Colonial failed to notify a customer of major repairs done to a car's steering mechanism at LMC's plant. Upon the later failure of the car's steering mechanism, the customer discovers that LMC reconditioned the steering mechanism at the manufacturing plant.

The customer sues Colonial for violating the disclosure statute. Colonial defends on the ground that it is entitled to the manufacturer's statutory exemption from the notice provision because it is part of LMC's larger economic enterprise; thus, Colonial seeks to reverse pierce the corporate veil.

The LMC/Colonial Lemon relationship is sufficiently interrelated to meet the first prong of the unitary interest test. LMC and Colonial engage in extensive reciprocal dealing. Colonial is entirely dependent on LMC for its supply of automobiles. In addition, Colonial's manager is directly responsible to LMC, and LMC officials make all of Colonial's major operational decisions. LMC owns all of Colonial's stock and the two are truly an integrated economic enterprise.

Although Colonial satisfies the first prong of the unitary interest test, it fails to meet the second prong of the test. The disclosure statute clearly expresses a legislative intent to protect consumers by providing complete information of a new car's manufacturing history. Permitting a reverse pierce in this instance would frustrate this public policy. As a result, Colonial fails to meet the requirements of the unitary interest test's second step and cannot claim

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181. This hypothetical statute requires disclosure of all major repairs to new cars. The statute does not apply to "used" cars, cars previously owned by someone other than the manufacturer. The statute would cover, for instance, the overhauling of a car's transmission that was found to be defective during inspection following assembly.

182. The statute exempts automobile manufacturers because they do not deal with the public directly.

the manufacturer's exemption by reverse piercing the corporate veil between LMC and Colonial.

Example 2: To promote oil production and boost the state's economy, an economically depressed, southwestern state enacts a statute prohibiting the award of punitive damages against any company engaged in the production of oil. The protection extends only to companies that own or lease oil rights within the state and to incidents connected directly to the exploitation of those rights. Absent this statue, state law permits punitive damages when the defendant is reckless.

Marshall Oil Corporation enters the state to drill for oil under several recently acquired oil leases. Marshall utilizes the services of its wholly-owned subsidiary, Wythe Oil Rigs, Inc., to assemble and operate the oil rigs. Over eighty percent of Wythe's revenues result from services performed for Marshall. Further, Wythe only operates in markets in which Marshall has a significant presence. Wythe's president and chief executive officer is a former vice president of Marshall who continues to sit on Marshall's board. In addition, several key Wythe executives are former Marshall employees who transferred to Wythe. Sixty percent of Wythe's directors are current or former Marshall executives.

Due to a Wythe employee's reckless installation of a safety device, an oil rig explodes. The resulting fire causes extensive damage to nearby property. The injured property owners sue Wythe, seeking both compensatory and punitive damages. Wythe petitions the court to rule as a matter of law that Wythe is entitled to the statutory protection against punitive damages afforded its parent corporation, Marshall.[183]

The Marshall/Wythe relationship is clearly sufficient to pass the first prong of the unitary interest test. Their relationship includes extensive reciprocal dealing; services performed for Marshall represent more than eighty percent of Wythe's revenue. The presence of current and former Marshall executives in the executive ranks of Wythe and on Wythe's board of directors also impugns the independence of Wythe's management structure. Finally, Marshall dictates what markets that Wythe may enter.

183. The statute's protection does not facially cover Wythe because it neither owns nor leases oil rights within the state.

Unlike example one, Wythe also passes the second step of the unitary interest test. The statute involved in this scenario supports extending the ban on punitive damages to this action against Wythe. The statute expresses a legislative decision to encourage investment in oil production by eliminating the risk of crippling punitive damage awards against oil producers. Although the wording of the statute apparently excludes Wythe from protection, the policy embodied in the statute encourages shielding Wythe from punitive damage liability. Wythe was actively engaged in the furtherance of Marshall's extended economic enterprise. Marshall is, then, the real party in interest and deserves protection.

Example 3: Assume the same facts as example two, except that McOil Corporation, an entirely unrelated corporation, engaged Wythe's services. The Marshall/Wythe relationship in this example is identical to example two. As a result, Wythe again passes the first step of the unitary interest test.

In this example, however, Wythe fails to meet the second step of the test. Protecting Wythe from punitive damages in this case would not further the statutory intent because Marshall's investment in *oil rights* is not at risk. Insulating Wythe from punitive damage liability would have no effect on Marshall's investment in the state. Because the exculpatory statute is not applicable in this instance, the court must look to the policy in the state law allowing punitive damages: deterrence of reckless conduct. An award of punitive damages in this case would deter reckless behavior and thus serve the purpose of the law permitting such damages. As a result, the court should not reverse pierce and should hold Wythe liable for punitive damages.

Example 4: Assume the same facts as example two, except that Marshall only recently acquired eighty-five percent of Wythe's stock from Tucker, who holds the remaining fifteen percent. As part of the deal, Tucker remains as Wythe's president and chairman of the board, and the majority of pre-acquisition management retain their positions. Marshall, however, replaced over fifty percent of Wythe's board of directors with Marshall executives. Wythe receives over fifty percent of its revenue from sources other than Marshall and markets it services in areas where Marshall does no business. The pre- and post-acquisition business dealing between Marshall and Wythe increased by five percent.

In this example, the Marshall/Wythe relationship does not survive scrutiny under the first step of the unitary interest test. Although Marshall and Wythe have extensive reciprocal dealings, Wythe receives the majority of its revenue from outside sources. In addition, Wythe maintains a relatively independent management structure, free to pursue opportunities unconnected to Marshall. Although Wythe receives some direction from Marshall through the presence of Marshall executives on Wythe's board of directors, this fact alone is not sufficient to show an integrated economic enterprise. Finally, the pre- and post-acquisition levels on intercorporate activity are fairly constant. The court should hold that Marshall and Wythe are separate economic entities and that, as a result, Wythe is amenable to punitive damages. (The court need not reach the second step of the unitary interest test due to its disposition of the first step).

C. *Impact on Corporate Entity Theory*

For several reasons, the unitary interest test is the superior approach to the reverse pierce. First, the unitary interest test recognizes the nature of the modern corporate enterprise. The test is sensitive to the economic realities of the contemporary marketplace. Second, the test examines the substance of the relationship between the corporation and its owner more stringently than the form of that relationship. It emphasizes the item most crucial in determining whether a corporation is the alter-ego of its owners: control. Third, the test applies equally well to cases involving a close corporation or a corporate group. Also, the unitary interest test reflects the prominent role of public policy considerations in deciding to reverse pierce.[184] Finally, the unitary interest theory also provides for a better distribution of the costs and benefits an integrated enterprise generates.

Undoubtedly, courts and commentators share a great fear that pandemonium will result from widespread judicial acceptance of the reverse pierce. The overwhelming reluctance to disregard the

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184. "Analysis [of whether a corporation is a separate entity] should not be directed to the nature of the corporateness but to the substantive policies underlying the issues." Hamilton, *supra* note 62, at 1009. *See* notes 59-62 and accompanying text.

separate corporate entity for the benefit of the corporation owners concretely manifests this sentiment. This reluctance is unwarranted for three reasons.

The idea that the separate entity of corporations may be respected for certain purposes and later disregarded for others enjoys wide support.[185] Additionally, the unitary interest approach follows the traditional concept that under usual circumstances a court must respect the separate entity of a corporation.[186] Corporation owners must overcome the court's customary reluctance to pierce the corporate veil indiscriminately. The significance of this barrier increases when one considers the factual showing required under the first step of the unitary interest test. The unitary interest test demands nearly complete identity between the entity and the corporation owners; in reality the owner and the corporation are one economic unit. Such a relationship is difficult to prove.

Finally, the vast majority of corporation owners will maintain the separate existence of their corporations diligently to limit their liability. Corporation owners must decide whether to integrate their businesses or keep them separate.[187] Maintaining a relationship between the owner and the corporation that is amenable to a reverse pierce carries with it the significant possibility that third parties will themselves pierce the corporate veil. Corporation owners clearly desire to avoid such a result. As such, the benefits of the reverse pierce will accrue to a limited number of corporation owners.

CONCLUSION

In 1926, John Dewey wrote:

> [O]ld non-legal doctrines which once served to advance rules of law may be obstructive today. We often go on discussing problems in terms of old ideas when the solution of the problem depends upon getting rid of the old ideas, and putting in their

185. Many commentators recognize that a corporation may be treated as a separate entity for some purposes and not for others. *See* notes 59-62 and accompanying text.

186. Ballantine, *supra* note 65, at 17.

187. *See* Berle, *supra* note 53, at 357; Davis, *Workmen's Compensation—Using an Enterprise Theory of Employment to Determine Who Is a Third Party Tortfeasor*, 32 U. PITT. L. REV. 289, 301 (1951).

> place concepts more in accord with the present state of ideas and knowledge.[188]

This advice applies with particular force to the reverse pierce of the corporate veil.

Courts must permit corporation owners to pierce the veil of their corporation for their own benefit under appropriate circumstances. The current refusal to permit a reverse pierce is based on archaic notions of corporate entity and a longstanding distrust of corporations. Traditional corporate entity theory does not contemplate the modern corporation. The economic reality of the modern marketplace demonstrates that the interests of the corporation owners and their corporations often merge. The unitary interest test enables a court to determine whether such integration exists and permits the court to pierce the corporate veil for the benefit of the corporation owner. The test focuses the court's attention on the economic reality of the relationship between the corporation and the owner and any relevant public policy concerns. Courts must cease exalting form over substance and understand that the concept of absolute separate entity no longer mirrors reality.

Michael J. Gaertner

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188. Dewey, *supra* note 47, at 657. Professor Morton Horwitz labels Dewey's article "the last great analysis" of corporate personality theory. Horwitz, *supra* note 46, at 175.