C. Christopher Adkins
Oklahoma City University School of Law
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Unraveling the Veil: The Concepts of Limited Liability and Disregard of the Corporate Entity

I. Limited Liability:

The limited liability of the corporate shareholder is a traditional cornerstone in American corporate law.[1] It has been the prevailing rule for corporations in the United States for more than a century.[2] Limited liability restricts the liability of a company's owners for nothing more than the capital they have invested in the business.[3] This is one of the main reasons people form corporations. An adequately formed corporation will normally prevent the shareholders from being personally liable for the corporation's debts. The shareholders' liability is usually limited to the amount that they have invested. Thus, if the corporation falls into debt after the shareholders have made their initial capital contribution, the shareholders are not typically responsible for those debts.[4]

There are many advantages of allowing limited liability in the corporate setting. Limited liability encourages capital formation by the pooling of assets from numerous investors.[5] This is necessary to finance enterprises which a single investor may find too risky or may lack adequate capitalization. Limited liability also encourages corporate entities to take risks that they might otherwise avoid.[6] Risk is necessary for growth, and investors are more likely to take risks when their personal assets are not subjected to the probability of the business enterprise's success.[7] Furthermore, since limited liability allows investors to invest with more assurance in ventures where they have no executive involvement, they can considerably expand their number of investments and thus attain more extensive diversification in their portfolios.[8] This is important for investors because diversification is recognized as an efficient pattern for investments.[9]

Scholars have heavily debated the concept of limited liability.[10] While most favor limited liability, many scholars argue that limited liability creates an incentive for corporations to manipulate the law and engage in unduly risky activities.[11] For instance, a large corporation may create many separate subsidiary corporations to minimize its exposure to liability. This is in fact what most large corporations do to enable insulation for the parent company for liability for the obligations of its various subsidiaries.[12] For example, the Mobil Oil Corporation operates in over 60 countries through 525 subsidiaries.[13] While this is legal, many argue that a system of pro rata shareholder liability may be a rational approach.[14] This system would hold each shareholder liable for damages according to their respective ownership in the corporation. However, other scholars have pointed out that any pro rata shareholder liability system may fail because it would be virtually impossible to obtain personal jurisdiction over out-of-state shareholders who have insufficient contacts with the forum state apart from their shares in the liable corporation.[15]

In any event, the majority of scholars and politicians believe that any propositions of unlimited liability are simply impracticable. Most corporations and small businesses in the United States rely on limited liability in order to operate.[16] Furthermore, the U.S. Supreme Court recently endorsed the common law rule of limited liability in *U.S. v. Bestfoods*.[17] This dispels any discussion of limited liability being proved unwarranted in the federal courts.[18] In any case, the eradication of limited liability would necessitate legislative action; action that any politician would most likely not want to pursue as it would appear "anti-small business."[19] According to Professor David Leebron of Columbia University, "[n]o principle seems more established in capitalist law, or more essential to the functioning of the modern corporate economy" than limited liability.[20]

In summary, limited liability shields the personal assets of corporate shareholders from the claims of corporate creditors. A shareholder's liability is restricted to the capital which the shareholder has invested in the corporation.[21] Since a corporation is a legal entity separate from its shareholders, it is solely liable for its debts.[22] However, the courts will disregard the corporate entity and "pierce the corporate veil" when the corporation has been used in a fraudulent manner to deceive creditors or others dealing with them.[23]

II. Piercing the Corporate Veil:

Despite the advantages of limited liability in the corporate setting, it also means that creditors of failed corporations are not going to be paid what the corporation may owe them. The likely response of the unpaid creditors is to attempt to sue the shareholders of the failed corporation. The unpaid creditors will argue that due to abuse of the corporate form by persons in control of the corporation, limited liability should not be upheld. The unpaid creditors will argue that the court should extend liability beyond the corporate entity, or, "pierce the corporate veil."[24] The veil is pierced, so to speak, if the court imposes liability upon the shareholders for the corporation's debt to the creditor.[25] This is done when a court determines that the debt in question is not really a debt of the corporation but in fairness should be viewed as a debt of the individual or the shareholder.[26] This is not done without due consideration. The court's decision depends on the facts of each case. Typically, the party seeking to pierce the veil must show that an individual controlled or used the business so as to evade a personal obligation, perpetrate a fraud or a crime, gain an unfair advantage, or commit an injustice.[27]

The law surrounding the doctrine of piercing the corporate veil is somewhat complex and confusing.[28] The facts of each case are important and wide variation exists from case to case.[29] The doctrine has been given many labels including the "alter ego" theory, the "instrumentality" theory, and the "corporate disregard" theory.[30] Moreover, the doctrine of piercing the corporate veil is used to explain a variety of different problems.[31] Not only does the doctrine concern when the limited liability of the corporate entity should be disregarded, but it is also used in situations where a corporate shareholder may want to pierce the veil of his own corporation and sometimes in reverse to allow someone to reach the assets of the corporation to satisfy a claim or judgment against a corporate insider or a shareholder.[32]

Furthermore, there are many doctrinal offshoots such as the "enterprise liability" theory, holding a group of corporations under common control as one enterprise for liability purposes, and "equitable subordination," holding the claims of shareholders subordinate in favor of outside creditors.[33] However confusing and complex the doctrine and its offshoots may be, it is invoked quite frequently.[34] In fact, according to Professor Robert Thompson of Washington University, "[p]iercing the corporate veil is the most litigated issue in corporate law…"[35] Although Professor Thompson concedes later in that same sentence that the issue "remains among the least understood."[36] Even Judge Cardozo declared in *Berkley v. Third Ave. Ry. Co.* that the entire doctrine of piercing the corporate veil is "enveloped in the mists of metaphor."[37]

Piercing the corporate veil is an equitable remedy which must be examined on an ad hoc basis.[38] The court's analysis is highly dependent on the facts of each case.[39] Courts usually consider a variety of factors in determining whether to pierce the veil.[40] Traditionally, courts have been more likely to pierce the corporate veil when there has been a presence of two or more of the following factors: (1) the failure to maintain adequate corporate records or to comply with corporate formalities; (2) the corporation's initial financing was not reasonably adequate, i.e., undercapitalization; (3) the commingling of funds or assets; (4) one corporation treating the assets of another corporation as its own; or (5) the corporation was formed to evade existing obligations or otherwise to cheat or defraud creditors.[41] In other words, when "corporate formalities are substantially observed, initial financing reasonably adequate, and the corporation was not formed to evade an existing obligation or a statute or to cheat or to defraud, even a controlling shareholder enjoys limited liability."[42] Furthermore, before a court will disregard the corporate fiction and impose personal liability on the shareholders for the obligations of the corporation, there must be an abuse of the corporate form to evade the corporate obligation such that adherence to the concept of limited liability would sanction a fraud or promote an injustice.[43]

According to Professor Stephen B. Presser of Northwestern University, perhaps the most commonly quoted general rule of piercing the corporate veil is stated by Judge Sanborn in *United States v. Milwaukee Refrigerator Transit Co.*[44]:

> [A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

Accordingly, Professor Robert Clark, the former Dean of Harvard Law School, suggests that the basic legal rule of piercing the corporate veil is rather straight-forward[45]:

> The corporate veil will be pierced, and the shareholders and/or the controlling parties will be subjected to personal liability for the debts of the corporation, when the corporation has served as the instrumentality or alter ego of shareholders or controlling parties.

Professor Clark asserts that while the basic rule is rather undemanding, the complications come in its application.[46] Clark admits that while this basic rule may be helpful in an academic setting, it is not particularly useful to practitioners who need to focus more on the individual facts involved in each case.[47] Of course, Professor Presser points out that the doctrine of piercing the corporate veil is an ever-changing doctrine that is "never likely to be pinned down to rigid particulars, and that it will evolve and change as long as our conception of, and ours goals for, the corporation remain changing."[48]

An important thing to note before invoking the doctrine of piercing the corporate veil is that a plaintiff must first establish an independent basis to hold the corporation liable.[49] The plaintiff must prove that the corporation is liable for a tort or breach of contract.[50] If the corporation has insufficient assets to cover the judgment, the plaintiff may then attempt to disregard the corporate entity and pierce through the veil that protects the shareholders from liability.[51] This is important because without an independent basis to hold the corporation liable, the issue of piercing the corporate veil will never emerge.

Furthermore, it is important to consider what the substance of the claim is. According to a study of over 1600 veil piercing cases by Professor Robert Thompson, courts upheld piercing the corporate veil in about 40% of contract cases and in about 30% of tort cases.[52] This goes to show that not only have courts "been reluctant to pierce the corporate veil,"[53] but the success of any suit is correlated to the underlying substance of the claim.[54] While some commentators suggest that courts are more willing to pierce the corporate veil and extend liability to shareholders when a tort has been committed,[55] Professor Thompson's study shows us that this is not always necessarily true.[56] Thompson argues that the most troublesome problems in the area of veil piercing are fraudulent transactions and misrepresentation.[57] While Thompson does concur that courts will frequently pierce the corporate veil for undercapitalization of the corporate entity in tort, he explains that these represent only a small portion of veil-piercing cases.[58] In summary, Thompson argues that contract claims are more frequent than tort claims, and while courts may in certain circumstances be more willing to pierce the corporate veil when a tort has been committed, every claim depends on the specific facts.[59]

III. Factors to Consider in Piercing the Corporate Veil:

Many courts vary in their willingness to pierce the corporate veil.[60] Even in courts that are willing to do so, this is considered an extreme remedy.[61] Courts have usually been reluctant to pierce the corporate veil when three elements are satisfied: (i) corporate formalities are substantially observed; (ii) the corporation's initial financing was reasonably adequate; and (iii) the corporation was not formed to evade existing obligations or otherwise defraud creditors.[62] However, there are no definite rules to determine when the corporate veil will be pierced.[63] Courts must instead contemplate a number of factors in determining whether to pierce the veil. There is no definitive list of factors which a court will consider. As a general rule, courts usually require at least two factors be present before the corporate veil will be pierced.[64] Additionally, many courts require that an element of injustice or fundamental unfairness be present before they will pierce the corporate veil.[65] According to many scholars and courts, the most common grouping is usually inadequate capitalization along with failure to follow corporate formalities.[66] Discussed below are the most prominent factors a court will consider.

a. Inadequate Capitalization:

Perhaps the single most important factor which most courts consider in whether to pierce the corporate veil is whether the corporation has been inadequately capitalized.[67] The incorporators and directors of a corporation have an obligation to provide adequate capitalization upon incorporation.[68] Inadequate capitalization is measured at the time of formation and is a continuing obligation from then on during the corporation's operations.[69] Inadequate capitalization or "undercapitalization" has been identified as a ground to pierce the corporate veil "[i]f the capital be trifling or illusory compared with the business to be done or the risks of loss, this is a ground for denying the separate entity privilege."[70] This places a requirement on incorporators and directors to fund the corporation with an adequate amount of capital upon incorporation for a transitional period of time.[71] However, it is important to keep in mind that corporate liability must be determined before any question relating to shareholder liability from inadequate capitalization will be considered.[72]

Professor Presser has determined that the basic concept behind theory of inadequate capitalization "is that if the shareholder or shareholders deliberately incorporate with initial capital they know to be inadequate to meet the expected liabilities of the business they intend to be doing, they are engaging in an abuse of the corporate form, and ought to be individually liable when those liabilities actually occur."[73] Thus, incorporators and directors must consider many factors in determining how much capital should be placed in the corporation upon incorporation. They must consider things such as what type of corporation they are creating, how long the transitional period of time will be until the corporation should become profitable, and how much funding the corporation will require to be considered adequate.[74]

Since a corporation must be initially adequately capitalized to avoid veil piercing, it is important to consider what "capital" actually is for these purposes. Black's Law Dictionary defines "capital" as "money or assets invested, or available for investments, in a business."[75] Capital has also been defined as equity which is permanently contributed to the corporation and subject to control by the corporation's board of directors.[76] Other scholars consider capital to include everything a corporation owns which is available to satisfy their liabilities.[77] Moreover, some courts have held that liability insurance coverage, purchased by corporations to cover possible liabilities, may be considered to be the capital of the business.[78] Therefore, it is important to remember that not only the initial money and/or assets invested into a corporation may be considered "capital," but a court must also consider other contributions such as liability insurance coverage, loans, and other equity which a corporation may attain.[79]

Furthermore, it is important to consider when capital will be deemed adequate. According to Professors Pinto and Branson,[80] there is very little authority on what constitutes inadequate capitalization.[81] Most courts usually cite to Professor Ballantine's well-known "trifling or illusory" epigram in comparing the capital to the type of corporation involved.[82] If the amount of capital is "trifling or illusory" in comparison with the type of corporation involved, it is usually ruled to be inadequate. According to

Pinto and Branson, courts apply a "know it when they see it" standard, or let the jury decide whether the capital was adequate.[83]

A common issue of debate is whether inadequacy of capital alone is a sufficient ground to pierce the corporate veil. Some scholars point out that older statutes placed a requirement upon corporations to provide a certain amount of capital actually paid in prior to commencing business.[84] However, current corporate statutes allow persons to incorporate with minimum capital or without capital at all. Thus, once the corporation's articles of incorporation have been accepted by the Secretary of the State, the corporation is provided with limited liability, regardless of whether any capital has been paid in.[85] Therefore, some scholars argue that courts should not be able to circumvent the desires of the legislature and disregard limited liability by requiring some form of minimum capital if the corporate statutes do not require it.[86] The courts are split on this issue.

The minority view holds that the corporate veil may be pierced if there has been grossly inadequate capitalization of a corporation.[87] The best-known case representing this view is *Minton v. Cavaney*.[88] In *Minton*, a young girl drowned in a swimming pool owned by the Seminole Hot Springs Corporation (Seminole). The Mintons, the young girl's parents, sued Seminole and received a judgment against them which remained unsatisfied. The Mintons then sought to pierce the corporate veil and hold Cavaney, the director, secretary, treasurer, and majority owner of Seminole stock, personally liable for the judgment against Seminole. Justice Traynor of the California Supreme Court identified three alternative grounds for piercing the corporate veil holding that "[t]he equitable owners of a corporation…are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will; when they hold themselves out as being personally liable for the debts of the corporation; or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs."[89] However, the Court only focused on the issue of undercapitalization in this case. The Court found that there "was no attempt to provide adequate capitalization" in this case since "Seminole never had any substantial assets," they "leased the pool that [they] operated," and they "forfeited [the lease] for failure to pay the rent."[90] The Court held that this was reason enough to pierce the corporate veil and hold Cavaney liable for the judgment against Seminole. However, it should be noted that this is one of the very few sources of authority for this point of view and that "inadequate capitalization per se [may no longer] trigger veil piercing in California."[91]

Nevertheless, most courts and scholars agree that undercapitalization alone should not be enough to trigger veil piercing.[92] While the *Minton* case and some dicta from other cases seem to maintain the idea that grossly inadequate capitalization alone will support veil piercing, the consensus from the majority of scholars is that you need undercapitalization plus some other factor/s present to pierce the veil.[93] Typically, most courts require that there be either some affirmative fraud or wrongdoing by the shareholder, or failure to follow the formalities of corporate existence before the corporate veil will be pierced.[94] According to Professor Berle, the typical case of piercing the veil for undercapitalization occurs where a "central corporation owns a controlling interest in one or more other corporations, but has so handled them that they have ceased to represent a separate enterprise and have become, as a business matter, more or less indistinguishable parts of a larger enterprise."[95] Berle proposes that the typical case involves undercapitalization plus another factor, which is most commonly the intermingling of business affairs.[96] Berle suggests that undercapitalization alone is insufficient to pierce the corporate veil and something more is needed.[97]

Perhaps the most well-known case representing the majority view that grossly inadequate capitalization is only a factor in determining whether to pierce the corporate veil is *Walkovszky v. Carlton*.[98] In *Walkovszky*, John Walkovszky was injured when he was hit by a cab owned by the Seon Cab Corporation (Seon). Seon was owned by William Carlton, who also owned ten other cab corporations. Seon and the ten other cab corporations each had only two cabs registered in their name and the cabs carried only the minimum liability insurance required by law of $10,000. Walkovszky alleged that the corporations "operated as a single entity…with regard to financing, supplies, repairs, employees, and garaging." Walkovszky thus sought to hold Carlton personally liable for his injuries "because the multiple corporate structure constitute[d] an unlawful attempt to defraud members of the general public who might be injured by the cabs." The court acknowledged the fact that the "corporations were intentionally undercapitalized for the purpose of avoiding responsibility for acts which were bound to arise as a result of the operation of a large taxi fleet having cars out on the street 24 hours a day and engaged in public transportation."[99] However, the court held that this was the very purpose of allowing limited liability for those engaged in this type of business. The court held that the corporate entity may not be disregarded simply because of the fact that "the assets of the corporation, together with the mandatory insurance coverage of the vehicle…are insufficient to assure [Walkovszky] the recovery [he] sought."[100] The court further held that it is up to the legislature to determine the amount of minimum liability insurance required by law. Thus, unless Walkovszky could show that Carlton conducted the business in his individual capacity or used some type of fraud, the court found that Walkovszky could not recover. It is worth mentioning, however, that Walkovszky eventually won his case when he filed an amended complaint alleging that not only were the corporations undercapitalized, but Carlton intentionally undercapitalized the corporations in the way they were organized and insured, and by siphoning profits from the companies.[101]

Another key case supporting the view that undercapitalization alone is not enough to pierce the corporate veil is *Fletcher v. Atex, Inc.*[102] In *Fletcher*, Marianne Fletcher sued Atex, Inc. (Atex) and its parent corporation, Eastman Kodak Company (Kodak), for damages from repetitive stress injuries due to the faulty design of computer keyboards manufactured by Atex. Fletcher sought to pierce the corporate veil and hold Kodak liable alleging Atex was intentionally left undercapitalized due to Kodak's centralized cash management system. Through this system Atex maintained zero balance bank accounts and funds were only transferred from Kodak when Atex was in need. The court held that "without considerably more," the use of a centralized cash management system was not enough to pierce the corporate veil.[103] Thus, Fletcher was unable to pierce the corporate veil solely for reasons of undercapitalization.

Scholars Pinto and Branson[104] believe that *Fletcher* does damage to the veil piercing doctrine by encouraging parent corporations to purposely leave their subsidiaries undercapitalized and thus deprive them "of any financial independence."[105] Pinto and Branson suggest that any centralized cash management system will encourage fraudulent bookkeeping by allowing excessive cash flow to be "upstreamed" to the parent corporation while the subsidiary retains the liabilities.[106] At any rate, most courts agree that the practice is completely acceptable.[107]

It is important to note that courts are especially likely to pierce the corporate veil when the incorporator has invested no capital whatsoever in the corporation.[108] In these cases a court will usually require less evidence of other factors than if the capitalization was merely inadequate.[109] The best example of this comes from the well-known *Kinney Shoe Corp. v. Polan* case.[110] In *Kinney Shoe Corp.*, Kinney Shoe Corp. (Kinney) leased a building to Industrial Realty Co. (Industrial), a corporation owned by Lincoln Polan (Polan). Industrial had no assets, no income, no bank account, and Polan was the sole shareholder and officer. Polan had Industrial sub-lease the building to another of his corporations, Polan Industries, Inc. who refused to make any sub-lease payments to Industrial. Industrial, consequently, made no lease payments to Kinney. Kinney sought to pierce the corporate veil and hold Polan liable for the lease to Industrial. The court agreed with Kinney holding that Industrial was "no more than a shell." The court further held that "[w]hen nothing is invested in the corporation, the corporation provides no protection to its owner; nothing in, nothing out, no protection."[111]

Another issue of debate is whether shareholders or a parent corporation must add new capital as a business grows. For instance, suppose the initial capital contributed at formation is adequate, but the business grows to the point where the initial contribution is no longer adequate to meet the new responsibilities of the company. Many scholars argue that this should be considered inadequate capitalization making veil-piercing more probable. However, others argue that they must be protected as long as the capital contributed at formation was more than "trifling or illusory."[112] An example of this comes from the case of *Arnold v. Phillips*.[113] In *Arnold*, A. M. Arnold founded the Southern Brewing Company (Southern), a beer brewing business, with $125,000 in initial capital. Southern had a two year period of success, followed by a sharp decline which required Arnold to make additional loans to Southern. The court held that the additional funds provided to Southern did not render the initial capital contribution inadequate because the "nature and purpose" of the business had not changed. The court further held that this was not a case "where the corporate entity ought to be disregarded as being a sham, a mere obstacle to justice, or an instrument of fraud."[114] However, the court mentions that if a corporation were to change its "nature and purpose," the adequacy of the additional capital would have to be considered in that light.[115] In these types of cases a plaintiff may have a better chance of veil-piercing if the corporation's success is dwindling rather than succeeding. After all, an argument that a stockholder's failure to replenish the capital of a failing corporation is very similar to that of inadequate initial capitalization. However, few courts would probably accept this argument. According to Professor Clark, "there is no affirmative duty on [shareholders'] part to supply an additional investment to a dying corporation. Such a duty would be in fundamental contradiction to the policy of permitting limited liability."[116]

b. Lack of Corporate Formalities:

Lack of corporate formalities is another important factor a court will consider in determining whether or not they will pierce the corporate veil.[117] If a corporation has failed to follow corporate formalities in the running of the business, a court is more likely to pierce the veil.[118] The failure to follow corporate formalities can be achieved in a number of ways. For instance, a corporation has failed to follow corporate formalities when shareholders' meetings and directors' meetings are not held; corporate financial records are not kept; shares of the corporation are never officially issued, or consideration for them is never received by the corporation; and when shareholders do not distinguish between personal property and corporate property.[119] Courts usually determine that a lack of corporate formalities indicates an impermissible intermixture of affairs or the use of a corporation as a "mere instrumentality."[120] Furthermore, when corporate formalities are ignored, courts usually require at least one other independent factor for piercing the corporate veil.[121]

An example of a case where a court pierced the corporate veil for failure to follow corporate formalities can be found in *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*[122] In *House of Koscot Development Corp.*, House of Koscot Development Corp. (Development) and American Line entered into an agreement for Development to sell retail cosmetic store franchises for American Line. Glenn Turner was a director and majority shareholder of American Line. American Line subsequently breached their contract with Development at the request of Turner. Development sought to pierce the corporate veil and hold Turner personally liable for the breach of contract. Development relied primarily on the theory that American Line was an instrumentality for the business activities of Turner. Development produced a substantial amount of evidence that Turner failed to follow normal corporate formalities by personally hiring and firing American Line employees, making corporate decisions without consulting officers or other directors, and converting corporate funds for Turner's personal use.[123] Development also produced considerable evidence of inadequate capitalization on the part of Turner. The court, considering these factors of failure to follow corporate formalities and inadequate capitalization, ruled in favor of Development holding that "[w]henever one uses control of a corporation to further his own, rather than the corporation's business, he will be liable for the corporation's acts under the doctrine of agency or under the principle of identity."[124]

Another example where the court pierced the corporate veil for failure to follow corporate formalities can be found in the frequently cited case of *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co*.[125] In *DeWitt Truck Brokers, Inc.*, DeWitt Truck Brokers, Inc. (DeWitt) furnished transportation to W. Ray Flemming Fruit Co. (Fruit Co.), a corporate fruit jobber.[126] Fruit Co. became unable to pay DeWitt and DeWitt sought to pierce the corporate veil and impose liability on Flemming, the president of Fruit Co., personally. DeWitt provided evidence that Flemming was completely dominant over Fruit Co.'s affairs, that there were no corporate records of directors' or stockholders' meetings, that Flemming had issued 5,000 shares of Fruit Co. stock for consideration of one dollar each, that no director or officer had ever been paid by Fruit Co., and that there probably were no other active officers or directors.[127] The court found that "corporate formalities, even rudimentary formalities, were not observed by [Flemming]," and that the corporation was operated in a "purely personal matter."[128] The court also found that Flemming had undercapitalized Fruit Co. and thus allowed DeWitt to pierce the veil and hold Flemming liable.

An issue of debate is whether lack of corporate formalities alone is enough to constitute piercing the corporate veil. Most courts and scholars have held that it is not and will require the presence of another factor/s before the veil will be pierced.[129] The Model Business Corporation Act is in accordance with this viewpoint that the failure to follow corporate formalities, standing alone, is not a ground for piercing the corporate veil.[130] The relevant provision provides that:

> The failure of a statutory close corporation to observe the usual corporate formalities or requirements relating to the exercise of its corporate powers or management of its business and affairs is not a ground for imposing personal liability on the shareholders for the liabilities of the corporation.[131]

The court in *Tannahill v. Aunspach* considered this issue.[132] In *Tannahill*, Paul Aunspach, the president and a shareholder of American Delivery Services Corporation (American), leased cars from Rent-A-Dent for American's delivery business. American later sold all their assets and defaulted on the leased cars from Rent-A-Dent. Rent-A-Dent sought to pierce the corporate veil and hold Aunspach liable for the money American owed on the leased cars. Rent-A-Dent claimed there was an "absence of corporate references in any of the documents exchanged in the Rent-A-Dent transaction" and thus the corporate entity should be disregarded for failure to follow corporate formalities. The court acknowledged that "[a] corporation's failure to follow corporate formalities is among the factors considered in making [a] determination" to pierce the corporate veil. However, the court held that "[t]his is not a situation in which we believe the corporate entity should be disregarded" because "[f]ailure to follow corporate formalities in the ordinary course of business does not necessarily justify piercing the corporate veil." The court indicated that something more was needed to pierce the corporate veil, not just "failure to follow corporate formalities" alone.

Another case which held that lack of corporate formalities alone is not enough to constitute veil-piercing is *Scott Graphics, Inc. v. Mahaney*.[133] In *Scott Graphics, Inc.*, Scott Graphics, Inc. (Scott) obtained a judgment against Copy Machines, Inc. (CMI) which CMI never satisfied. Scott subsequently sought to pierce the corporate veil and hold Mahaney, an officer, director, and shareholder of CMI, personally liable for the debt. Scott provided evidence of substantial disregard of corporate formalities on the part of Mahaney. The court agreed that there "was disregard of corporate formality in the operation of" CMI, however, lack of corporate formalities alone is "not enough to warrant disregarding the corporate entity."[134]

The main rationale for courts in considering the lack of corporate formalities in determining whether to pierce the veil is that the failure to follow formalities may cause injury to corporate creditors.[135] For example, if a shareholder fails to follow corporate formalities by removing cash from the corporation to use for his own personal debts, he is causing injury to the creditor by removing money which the creditor may have recovered.[136] Furthermore, the failure to follow corporate formalities may also injure the creditor by misleading him. For example, a creditor may be mislead by a shareholder who uses his personal name on business cards instead of the corporate name, and who may pay corporate bills with personal checks, etc.[137] This causes injury to the creditor because he may now believe that he was dealing personally with the shareholder and not the corporation. In these situations it may be easier for the creditor to prove an element of injustice or fundamental unfairness, and that the shareholder should be personally liable for the injury.[138]

However, some scholars and courts claim that it is somewhat irrational to point to lack of corporate formalities as a reason to pierce the corporate veil since in most of the cases the failure to follow formalities did not injure the creditors.[139] For example, if the lack of corporate formalities is in the form of failure to hold shareholders' and directors' meetings, this will almost never directly injure the creditor.[140] For this reason, some courts hold that failure to follow corporate formalities is no longer a factor to consider in determining whether to pierce the corporate veil.[141] Consider the case of *Scott v. McKay*.[142] In *Scott*, John McKay was the president and general manager of Willow Creek Entertainment, Inc. (Willow). Willow owned a number of radio stations and was experiencing financial difficulties. At the request of McKay, Lynwood Scott loaned $100,000 to Willow. Willow then defaulted on the loan and sold all of their assets. Scott sought to pierce the corporate veil and hold McKay liable for the loan. The only evidence Scott could present was lack of corporate formalities on the part of Willow. The court refused to pierce the veil holding that "failure to comply with corporate formalities is no longer a factor in considering whether alter ego exists."[143]

In any case, the majority of scholars and courts agree that "the shareholder should not be permitted first to ignore the rules of corporate behavior and then later to claim the advantage of the corporate shield."[144] It seems that failure to follow corporate formalities is a persuasive factor in considering whether to pierce the corporate veil in a majority of jurisdictions in the United States. The court in *Kinney Shoe Corp*. sums it up best when it held that "[i]f a shareholder wishes the protection of a corporation to limit his liability, then he must follow the simple formalities of maintaining the corporation."[145]

c. Intermixture of Affairs:

According to Pinto and Branson,[146] the term "intermixture of affairs" or "intertwined operations" refers to "the blurring of the distinction between the concerns of the corporation and those of the owners."[147] When the affairs of the corporation and those of the owner/s become intertwined, it becomes difficult for an outside party to determine where the owner's affairs end and where the corporation's affairs start.[148] This factor is closely related to and often overlaps with "lack of corporate formalities."

An example of when the business affairs of two corporations are intermixed, and separate corporate formalities are not followed, would occur if both corporations have exactly the same board of directors, have the same directors' meetings, and have the same set of minutes for their meetings.[149] Evidence of any intermixture of affairs makes veil-piercing more likely. When the business operations of the owner and the corporation are completely intertwined, a court will usually apply the "instrumentality theory" to extend liability to the owners.[150]

The court in *American Trading and Production Corp. v. Fischback & Moore* considered whether to pierce the corporate veil through the instrumentality theory for intermixture of affairs.[151] In *American Trading and Production Corp.*, American Trading and Production Corp. (American) suffered losses when a fire destroyed the exposition hall housing their property. The fire was caused by the faulty wiring installed by a subsidiary of Fischback & Moore (Fischback). Fischback owned more than twenty subsidiaries which wired buildings for electricity. American sought to pierce the corporate veil and hold Fischback liable for the shoddy work done by their subsidiary. American invoked an instrumentality theory alleging that Fischback dominated and controlled their subsidiary through their intermixture of business affairs. The court refused to hold Fischback accountable holding that "[t]he corporate entity is only ignored when the ends of justice require it."[152] The court considered the evidence of the business's intertwined operations and held that it was not sufficient to invoke liability under a theory of instrumentality.[153]

An example of a court which did pierce the corporate veil for intermixture of affairs can be found in *Kramer v. Keys*.[154] In *Kramer*, Jerry Kramer was killed when his vehicle was struck by a tractor-trailer driven by J.T. Keys, an employee of Ralph Walker, Inc. (RWI). Kramer's wife brought suit against Keys and RWI, and sought to pierce the corporate veil to hold Ralph Walker, owner of RWI, personally liable. Mrs. Kramer alleged that Walker had intermingled his business affairs with RWI to such an extent that the corporate entity was indistinguishable. The court found sufficient justification to pierce the corporate veil finding evidence that Walker had included his personal assets among those that were depreciated on the corporation's tax return, Walker had executed leases for RWI and filed other RWI reports in his own name, and had endorsed RWI checks by signing his own name.[155] In establishing liability for Walker the court held that "courts will ignore separate corporate entities in order to defeat a fraud, wrong, or injustice, at least where the rights of third persons are concerned."[156]

Scholars point out that when business affairs are intertwined between the corporation and the owners, an inference is usually made that the owners are more accountable for the obligation.[157] In order to avoid this assumption, the shareholder/s must preclude from intertwining their business affairs, and clearly document their dealings with their corporation.[158] This must especially be done in "one-man corporations" where the corporation is owned by a single person who is the sole shareholder, director, etc.[159] Lack of corporate formalities and intermixture of affairs have proven to be "unique hazards" for one-man corporations because they are inherently characteristic of one-man corporations.[160] For example, there is no need to have one-man shareholders' and directors' meetings, the sole shareholder will more than likely invest his personal funds to keep the corporation capitalized, the sole shareholder will also often intermingle his funds with that of the corporation's funds, and one-man corporations are almost always controlled exclusively by the sole shareholder.[161] These are seemingly necessities in running a one-man corporation but will still be considered factors in determining whether to pierce the corporate veil.[162] That is why it is of key importance that the sole shareholder keeps scrupulous records in his dealings with his corporation. Failure to do so may give the court more reason to pierce the corporate veil.

In any case, when the owners of a corporation treat its assets as their own, and the affairs of the corporation are intermixed with the owner's affairs, the separate corporate entity can no longer be observed and a court must pierce the corporate veil.[163] This is necessary to protect the corporation's creditors.[164] According to Professors Cox and Hazen,[165] "[i]f the shareholders themselves disregard the separateness of the corporation, the courts also will disregard it so far as necessary to protect individual and corporate creditors."[166]

d. Fraud / Wrongdoing / Misrepresentation:

Another factor that courts consider in determining whether to pierce the corporate veil is whether there has been a serious fraud or wrongdoing by the corporation's shareholder/s.[167] Courts have defined "fraud" as "a misrepresentation or a suppression of the truth with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."[168] Similarly, "wrongdoing" has been defined as "using the corporation as a device or sham to accomplish some ulterior purpose such as fraud or some illegal purpose."[169] When a corporation has been formed for the sole purpose of perpetrating a fraud or wrongdoing, a court may disregard the corporate entity.[170] Courts usually focus on whether the corporation had any other reason to exist other than to perpetrate a fraud or wrongdoing.[171] In other words, a court will ask whether the only purpose of creating the corporation was to carry out a fraud. An example of a fraud or wrongdoing would occur if a shareholder was siphoning profits from the corporation thus leaving the corporation unable to pay their creditors (this is considered by some courts to be a form of inadequate capitalization), or if a corporation was formed to evade existing obligations such as a contract or a statute.[172] It is important to note that while many scholars consider undercapitalization to be the most important factor to consider in piercing the corporate veil,[173] courts will most often pierce the corporate veil in cases where fraud / misrepresentation is present.[174]

When a corporation is created for the sole purpose of perpetrating a fraud, the court will usually pierce the corporate veil.[175] This is exemplified in the case of *Linn & Lane Timber Co. v. United States*.[176] In *Linn & Lane Timber Co.*, the United States brought suit against Smith to recover lands conveyed to him under the Timber and Stone Act of 1878. The United States claimed that Smith obtained the lands from the United States in a fraudulent manner. Smith subsequently created a corporation to which he conveyed the property until the statute of limitations had run. After the statute of limitations had run, Smith re-conveyed the lands back to himself. The court held "that the corporation was the mere tool of Smith [in] an effort to keep the title concealed until it was too late for the United States to complain."[177] The court then awarded the lands to the United States holding that "the difference in legal personality between Smith and the corporation [gave] the corporation no greater rights than Smith" due to his fraudulent use of the corporate form.[178]

When a shareholder sets up a corporation with adequate initial capital, but then siphons out all of the profits and/or capital while the company operates, the court will consider this to be fraud or wrongdoing.[179] This leaves the corporation with too little cash to satisfy corporate creditors, thus giving courts more reason to pierce the corporate veil. This is what happened in *Sea-Land Services, Inc. v. Pepper Source*.[180] In *Sea-Land Services, Inc*., Sea-Land Services, Inc. (Sea-Land), an ocean carrier, shipped freight on behalf of Pepper Source (Pepper). Pepper subsequently failed to pay Sea-Land for the freight bill. Sea-Land sued Pepper and obtained a default judgment. However, Sea-Land was unable to collect its judgment because Pepper had dissolved and had no assets. Sea-Land then sought to pierce the corporate veil and hold Gerald Marchese, the sole owner of Pepper, liable for the judgment. After the court considered evidence that Marchese failed to follow corporate formalities, it focused on fraud and wrongdoing. The court found that Marchese had siphoned funds from Pepper, leaving Pepper unable to pay Sea-Land, by withdrawing a salary from Pepper and frequently taking "shareholder loans" from Pepper to pay personal expenses.[181] The court concluded that Marchese deliberately manipulated the assets of Pepper to ensure that Sea-Land would not be paid. The court further held that the corporate veil should be pierced in order to prevent "a fraud or promote injustice."[182]

Another example of fraud or wrongdoing can be found when a corporation is formed to evade existing obligations such as a contract or a statute.[183] This was the case in *Sundaco, Inc. v. State*.[184] In *Sundaco, Inc*., the State of Texas had a law mandating that businesses close on alternative weekends. In order to circumvent this law, the owners of Sundaco, Inc. (Sundaco) formed another corporation named Clark's. Clark's would buy all of Sundaco's goods, wares, and merchandise every other week in order to stay open every day of every weekend. The City of Abilene, Texas (Texas) brought suit claiming a violation of the statute. Texas alleged that Sundaco was the alter ego of Clark's and was created for the purpose of achieving weekend sales. The court held that sale and resale transaction was a ploy created to evade the statute prohibiting a store from selling items on consecutive Saturdays and Sundays.[185] The court thus allowed Texas to disregard the separate identity of Clark's in bringing suit against Sundaco.

An issue of debate is whether fraud is a necessary element that is required before a court will pierce the corporate veil.[186] This varies somewhat from jurisdiction to jurisdiction, but the overall consensus is that it is probably not necessary, as long as there is some sort of injustice present.[187] The court in *DeWitt Truck Brokers, Inc*. held that "[c]ontrary to the basic contention of the defendant…proof of fraud is not a necessary element in a finding to disregard the corporate entity."[188] The court in *Trs. of the Nat'l Elevator Indus. Pension…v. Lutyk*, elaborated on this view in holding that actual fraud was not required "as a prerequisite for piercing the corporate veil. However, where the conduct alleged to justify piercing the corporate veil is that the corporation as a whole is a "sham" or "façade," a finding akin to fraud is necessary."[189] This view that fraud is not a necessary element to pierce the corporate veil, except in situations where the corporation is alleged to be a sham, façade, or the alter ego of the defendant, is probably the most common position taken amongst the courts.[190] Most courts only consider fraud to be a factor in the overall determination of whether to pierce the corporate veil.[191] According to Cox and Hazen, fraud is not necessarily required to pierce the corporate veil as long as "[t]he facts presented…demonstrate some misuse of the corporate privilege or establish a need to limit it in order to do justice."[192]

e. The Instrumentality Doctrine[193]:

When a court finds that an individual treats a corporation "as an instrumentality through which he conduct[s] personal business," the corporate entity will be disregarded and liability will be extended to the owner.[194] A corporation is found to be a "mere instrumentality" of the shareholder/s when a court finds that it has no independent reason for its existence but to carry out the owner's agenda.[195] The instrumentality doctrine requires proof of three elements: (1) "control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own;" (2) the "control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights;" and (3) the "control and breach of duty must proximately cause the injury or unjust loss" of the plaintiff.[196]

Of course, all corporations are used in some way as business instrumentalities.[197] The scope of the question here must be whether the harm done by the owner's "control and domination" would make separation of the owner and corporation inequitable.[198] According to Pinto and Branson, "[t]here must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal."[199] Instrumentality theories are most commonly used in the case of a parent corporation's liability for the torts and contracts of its subsidiaries.[200]

Perhaps the leading case extending liability to the owner of a corporation for his use of the entity as a "mere instrumentality" is *Zaist v. Olson*.[201] In *Zaist*, Martin Olson was the owner of a number of corporations involved in real estate development. John Zaist and others (Zaist) supplied services and materials to East Haven Homes, Inc. (East Haven), one of Olson's corporations. Proof was established that Olson freely used the services and materials provided to East Haven with his other corporations in the construction of a shopping center. East Haven subsequently became defunct and could not compensate Zaist for the unpaid balance of $21,100. Zaist sought to pierce the corporate veil and hold Olson personally liable for the debt, claiming that East Haven was an instrumentality of Olson. The court held that Olson, and another corporation under his control, so completely controlled East Haven that it had "no separate mind, will or existence of its own."[202] The court extended liability to Olson holding that when a "corporation is so manipulated by an individual or another corporate entity as to become a mere puppet or tool for the manipulator, justice may require the courts to disregard the corporate fiction and impose liability on the real actor."[203]

Another prominent case extending liability under the instrumentality theory is *OTR Associates v. IBC Services, Inc.*[204] In *OTR Associates*, IBC Services, Inc. (IBC), a subsidiary of Blimpie International, Inc. (Blimpie), rented a space in a shopping mall owned by OTR Associates (OTR). IBC was created for the sole purpose of holding the lease and had no assets, employees, or business premises of its own.[205] Samyrna, Inc. (Samyrna) subsequently entered into an agreement with Blimpie to sublease the space from IBC as a Blimpie franchisee. Samyrna defaulted on the rent to IBC, who in turn, defaulted on the rent to OTR. OTR then sought to pierce the corporate veil and hold Blimpie responsible for the unpaid rent. OTR argued that IBC was the mere instrumentality of Blimpie through Blimpie's "[d]omination and control" of "IBC to commit a fraud or injustice" by avoiding to compensate OTR for the unpaid rent.[206] The court agreed that IBC was a mere instrumentality of Blimpie holding that when "the parent so dominate[s] the subsidiary that it ha[s] no separate existence," liability may be extended to the parent corporation.[207]

Cases extending liability under the instrumentality doctrine almost always contain one or more of the main factors of consideration for veil piercing discussed earlier.[208] Determining that a corporation is nothing but a "mere instrumentality," acting with "no separate mind, will or existence of its own," is somewhat of a conclusory finding.[209] It is not especially useful for purposes of deciding whether the corporate veil should be pierced. Instead, it is "used as a matter of emphasis or posturing by litigants and courts," rather than as an independent basis for piercing the corporate veil.[210] Nonetheless, courts do consider "mere instrumentality" as an independent factor to consider in determining whether to pierce the corporate veil.[211]

<u>IV. Conclusion:</u>

Clearly the doctrine of piercing the corporate veil is a "befuddled" area of law. The lack of any definite rules and the heavy reliance on the specific facts of each case make it difficult to generalize as to the factors that will lead a court to disregard the corporate entity.[212] Courts will require considerably more than a simple presentation of abuses or manipulations on the part of the corporate owner/s. There must be a strong factual basis demonstrating that the abuses or manipulations actually took place before the court will extend liability to the shareholders.[213]

Determining between proper corporate use and abuse is a difficult task. Many of these issues fall within a gray area of legality. While a corporate entity is disregarded for one purpose, it may not necessarily be disregarded for other purposes.[214] It is clear, however, that courts are much more likely to extend liability to either a parent corporation or to shareholders of a close corporation, as opposed to shareholders of a publicly traded company, for whom courts virtually never pierce the corporate veil. Not every factor will be present in each case. The decision to pierce the corporate veil must rest on a number of such factors.[215] However, the more factors that are present, the more probable it is that a court will pierce the corporate veil and hold its shareholders jointly and severally liable on those unsatisfied debts.[216]

[1] Philip Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573 (1986); See James D. Cox, Thomas Lee Hazen, F. Hodge O'Neal, *Corporations*, 108, (Aspen 1997) ("No principle is more engrained in corporate law than that shareholders enjoy limited liability. Indeed, limited shareholder liability is not simply a principle of corporate law, but a cornerstone of capitalism.").

[2] Henry Hansman & Reinier Kraakman, *Toward Unlimited Liability for Corporate Torts*, 100 Yale L. J. 1879 (1991); *Secon Service System, Inc. v. St. Joseph Bank and Trust Co.*, 855 F.2[d] 406, 413 (7[th] Cir. 1988) ("The general principle of investors' limited liability for the consequences of corporate acts developed in the United States during the early years of the nineteenth century, and despite occasional experiments with corporation statutes passing liability through to shareholders, by 1860 shareholders were protected against recovery by tort and contract claimants.") citing Philip Blumberg, *The Law of Corporate Groups: Tort, Contract, and other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations*, at §1.04.6 (1987); Cox, Hazen, and O'Neal, supra note 1, at 108 ("[L]imited liability became well established in this country by the middle of the nineteenth century.").

[3] Black's Law Dictionary 740 (7[th] ed. 2000) (Limited liability – "Liability restricted by law or contract; esp., the liability of a company's owners for nothing more than the capital they have invested in the business."); See Delaware General Corporate Law §102(b)(6) ("…stockholders or members of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts."); See the Revised Model Business Corporation Act §6.22(b) ("…a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or control.").

[4] Stephen Presser, *Piercing the Corporate Veil* at Chapter 1 §1:1, p. 1-4, 1-5 (2004).

[5] Blumberg, supra note 1, at 611.

[6] *Id*. at 616.

[7] Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1040 (1991) (An empirical study analyzing 1600 cases involving piercing the corporate veil); See Cox, Hazen, and O'Neal, supra note 1, at 110.

[8] Frank Easterbrook & Daniel Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 96 (1985).

[9] Blumberg, supra note 1, at 613; See Easterbrook & Fischel, supra note 8, page 96 ("“…limited liability allows more efficient diversification. Investors can minimize risk by owning a diversified portfolio of assets. Firms can raise capital at lower costs because investors need not bear the special risk associated with nondiversified holdings. This is true, though, only under a rule of limited liability or some good substitute. Diversification would increase rather than reduce risk under a rule of unlimited liability. If any one firm went bankrupt, an investor could lose his entire wealth. The rational strategy under unlimited liability, therefore, would be to minimize the number of securities held. As a result, investors would be forced to bear risk that could have been avoided by diversification, and the cost to firms of raising capital would rise.", and page 97, ("[Under a system of limited liability] [e]ach investor can hedge against the failure of one project by holding stock in other firms. In a world of unlimited liability, though, managers would behave differently. They would reject as "too risky" some projects with positive net present values. Investors would want them to do this because it would be the best way to reduce risks. By definition this would be a social loss, because projects with a positive net present value are beneficial uses of capital."); Coz, Hazen, and O'Neal, supra note 1, at 109.

[10] Cox, Hazen, and O'Neal, supra note 1, at 108.

[11] See Hansman & Kraakman, supra note 2 (as pointed out in Presser, supra note 4, Chapter 1, §1:1, page 1-8, footnote 24, the Hansman and Kraakman article, supra note 2, page 1880, n.1, contains a list of scholars

who suggest the elimination or alteration of the limited liability doctrine); See Thompson, supra note 7; See Meiner, Mofsky, and Tollison, *Piercing the Veil of Limited Liability*, 4 Del. J. Corp. L. 349 (1979) (Discussing and questioning the value of limited liability).

[12] Blumberg, supra note 1, at 575.

[13] *Id*. at 575 citing *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 428 (1980).

[14] Hansman & Kraakman, supra note 2, at 1880.

[15] Jane Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 Harv. L. Rev. 387, 388 (1992).

[16] David Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 Colum. L. Rev. 1565, 1566 (1991); See Presser, supra note 4, at Chapter 1 §1:3, page 1-14, 1-15 ("[L]imited liability was…a means of encouraging the small-scale entrepreneur, and keeping entry into business markets competitive and democratic.") citing Ronal E. Seavoy, *The Origins of the American Business Corporation, 1784-1855* (Greenwood Press: Westport & London, 1982), at 185.

[17] *U.S. v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876 (1998). In this case the U.S. Supreme Court endorsed the common law rule of limited liability holding that "[i]t is a general principle of corporate law deeply ingrained in the U.S. economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Neither does the mere fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate." The Court further held that any parent corporation liability must stem directly from its control over a subsidiary, and that "[t]he corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf."

[18] Presser, supra note 4, at Chapter 1 §1:1, p. 1-3.

[19] *Id*., supra note 4, at Chapter 1 §1:2, p. 1-12.

[20] Leebron, supra note 16, at 1566.

[21] Blumberg, supra note 1, at 577.

[22] *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976) ("A corporation is an entity, separate and distinct from its officers and stockholders, and its debts are not the individual indebtedness of its stockholders.")

[23] *Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2[d] 565, 69-70 (7[th] Cir. 1985); *Walkovsky v. Carlton*, 223 N.E.2[d] 6, 7 (N.Y. 1966) ("The courts will disregard the corporate form, or, to use accepted terminology, "pierce the corporate veil," whenever necessary to prevent fraud or to achieve equity.")

[24] According to Presser, supra note 4, at Chapter 1 §1:1, p.1-6, footnote 15, and see §1:5, p.1-26 , Professor Maurice Wormster of Fordham University popularized the term "piercing the corporate veil" to stand for the imposition of liability on shareholders in his article, *Piercing the Veil of the Corporate Entity*, 12 Colum. L. Rev. 496 (1912). Wormster coined the term in an article rejecting the "natural entity" theory of the corporation. Wormster believed the state's allowance of usage of the corporate form carried strong responsibilities which ought to often result in the denial of the corporate privilege. Wormster argued that the corporate form "must be used for legitimate business purposes and must not be perverted…and, just as night follows day, so the courts should and will disregard this fiction 'when it is urged for an intent or purpose not within its reason and policy.'"

[25] Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 Or. L. Rev. 853 (1997).

[26] Presser, supra note 4, at Chapter 1 §1:1, page 1-6 citing *In re Payroll Exp. Corp.*, 216 B.R. 344 (S.D.N.Y. 1997), judgment aff'd, 186 F.3[d] 196 (2[d] Cir. 1999).

[27] *King v. Modern Music Co.*, 33 P.3[d] 947, 953 (Okla. Civ. App. 2001) ("Oklahoma permits the court to disregard the corporate entity if used: (1) to defeat public convenience; (2) justify wrong; (3) to perpetrate fraud whether actual or implied; or (4) to defend crime. If the legal entity is used to accomplish these purposes, the law may treat the corporation as an association of persons. The goal in piercing the corporate veil is to impute liability for the acts of the corporation to the responsible persons.").

[28] Easterbrook & Fischel, supra note 8, at 89 (The law of piercing the corporate veil is "like lightning…is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law."); *DeWitt Truck Brokers, Inc.*, supra note 22, at 684 ("The circumstances which have been considered significant by the courts in actions to disregard the corporate fiction have been 'rarely articulated with any clarity.'" The court mentions later in that same page that this is due to the fact that the facts and issues present in each case are different.).

[29] Thompson, supra note 7, at 1036-37.

[30] Norwood P. Beveridge, *Piercing the Corporate Veil: The Oklahoma Law of Corporate Alter Egos, Adjuncts, and Instrumentalities*, 26 Okla. City U. L. 503, 506 (2001); *Minton v. Cavaney*, 56 Cal. 2d 576, 579 (Cal. 1961) ("The figurative terminology "alter ego" and "disregard of the corporate entity" is generally used to refer to the various situations that are an abuse of the corporate privilege."); See Krendl and Krendel, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 Den. L. J. 1 (1978).

[31] Beveridge, supra note 30, at 505.

[32] *Id*.; See Elham Youabian, *Reverse Piercing of the Corporate Veil: The Implications of Bypassing "Ownership" Interest*, 33 Sw. U. L. Rev. 573 (2004).

[33] *Id*.

[34] Thompson, supra note 7, at 1036.

[35] *Id*.

[36] *Id*.

[37] 244 N.Y. 84, 94 (1926) ("The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. At times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an "alias" or a "dummy." All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation.").

[38] *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 348 (W.Va. 1986).

[39] *Id*. at 348 ("Piercing the corporate veil is an equitable remedy, the propriety of which must be examined on an ad hoc basis. Decisions to look beyond, inside and through corporate facades must be made case-by-case, with particular attention to factual details."); *Kinney Shoe Corp. v. Polan*, 939 F.2[d] 209 (4[th] Cir. 1991) ("A totality of the circumstances test is used in determining whether to pierce the corporate veil, and each case must be decided on its own facts."); *Southern Electrical Supply Co. v. Raleigh County National Bank*, 320 S.E.2[d] 515, 523 (W.Va. 1984) ("[D]ecisions to look beyond, inside, and through corporate facades

must be made case-by-case, with particular attention to factual details…"); 1 William Fletcher, *Cyclopedia of the Law of Private Corporations* § 41.25.

[40] See *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, (W.Va. 1986) ("Some of the factors to be considered in deciding whether to pierce the corporate veil are: (1) commingling of funds and other assets of the corporation with those of the individual shareholders; (2) diversion of the corporation's funds or assets to noncorporate uses (to the personal uses of the corporation's shareholders); (3) failure to maintain the corporate formalities necessary for the issuance of or subscription to the corporation's stock, such as formal approval of the stock issue by the board of directors; (4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation; (5) failure to maintain corporate minutes or adequate corporate records; (6) identical equitable ownership in two entities; (7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties); (8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking; (9) absence of separately held corporate assets; (10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation; (11) sole ownership of all the stock by one individual or members of a single family; (12) use of the same office or business location by the corporation and its individual shareholder(s); (13) employment of the same employees or attorney by the corporation and its shareholder(s)."); See *Galgay v. Gangloff*, 677 F.Supp. 295, 299-300 (M.D. Pa. 1987) citing *U.S. v. Pisani*, 646 F.2[d] 83, 88 (3[d] Cir. 1981) ("[T]he following are relevant factors in determining the applicability of the alter ego doctrine: 1. Failure to observe corporate formalities; 2. Nonpayment of dividends; 3. Insolvency of the debtor corporation; 4. Siphoning of funds from the corporation by the dominant shareholders; 5. Nonfunctioning of other officers and directors; 6. Absence of corporate records; 7. The corporation is a mere facade for the operation of the dominant shareholder or shareholders; 8. Gross undercapitalization."); See *Frazier v. Bryan Memorial Hosp. Authority*, 1989 OK 73, 775 P.2[d] 281, 288 (Okla. 1989) ("The question whether an allegedly dominant corporation may be held liable for a subservient entity's tort hinges primarily on control. Factors which may be considered at trial include whether 1) the parent corporation owns all or most of the subsidiary's stock, 2) the corporations have common directors or officers, 3) the parent provides financing to its subsidiary, 4) the dominant corporation subscribes to all the other's stock, 5) the subordinate corporation is grossly undercapitalized, 6) the parent pays the salaries, expenses or losses of the subsidiary, 7) almost all of the subsidiary's business is with the parent or the assets of the former were conveyed from the latter, 8) the parent refers to its subsidiary as a division or department, 9) the subsidiary's officers or directors follow directions from the parent corporation and 10) legal formalities for keeping the entities separate and independent are observed."); For a more extensive list of factors see *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2[d] 825, 26 Cal. Rptr. 806, 813 (1[st] Dist. 1962).

[41] *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 521 (7th Cir. 1991), ("As for determining whether a corporation is so controlled by another to justify disregarding their separate identities, the Illinois cases focus on four factors: (1) the failure to maintain adequate corporate records or to comply with corporate formalities, (2) the commingling of funds or assets, (3) undercapitalization, and (4) one corporation treating the assets of another corporation as its own."); *Goetz v. Goetz*, 567 S.W.2[d] 892, 895 (Tex. Civ. App. 1978) ("Generally, courts cannot disregard the corporate entity unless the corporation has been employed to defraud existing creditors, circumvent a statute, evade an existing obligation, protect crimes or perpetrate a monopoly."); *Norris Chem. Co. v. Ingram*, 679 P.2d 567, 570 (Ariz. Ct. App. 1984) ("Where corporate formalities are substantially observed, initial financing reasonably adequate, and the corporation not formed to evade an existing obligation or a statute or to cheat or to defraud, even a controlling shareholder enjoys limited liability.") citing H. Henn, *Law of Corporations*, § 146 at 253-254.

[42] H. Henn, *Law of Corporations*, § 146 at 253-254 (Westlaw Publishers, 1970); Also see Henn and Alexander, infra note 159, at 353 "[C]ourts have conditioned recognition of corporateness on compliance with two requirements: (a) Business must be conducted on a corporate and not a personal basis; (b) The enterprise must be established on an adequate financial basis.").

[43] James D. Cox and Thomas Lee Hazen, *Cox & Hazen on Corporations*, at 275 (2[d] Ed. Aspen).

[44] Presser, supra note 4, at Chapter 1 §1:1, page 1-7 citing *U.S. v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905).

[45] See Robert Clark, *Corporate Law*, 37-38 (Little, Brown 1986); See Robert Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 Harv. L. Rev. 505 (1977) citing as authority *Zaist v. Olsen*, 154 Conn. 563, 227 A.2[d] 552, 558 (1967) ("The instrumentality rule requires, in any case but an express agency, proof of three elements: control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.").

[46] Clark, supra note 45, *Corporate Law* at 37.

[47] *Id*.

[48] Presser, supra note 4, at Chapter 1 §1:2, page 1-9. Presser also points to an interesting article on the competing theoretical approaches to limited liability which consistently evolve and disagree about the piercing doctrine thus preventing any attempt by scholars to crystallize the piercing doctrine. See Ribstein, *Limited Liability and Theories of the Corporation*, 50 Md. L. Rev. 80 (1991); See M. Wormster, *Disregard of the Corporate Fiction and Allied Corporation Problems* 37-38 (New York: Baker, Voorhis and Co. 1927) ("In my judgment [it] is not only impossible but preposterous [that the rules as to when the corporate veil could be pierced ought to be codified]. Human life and relations in regard to corporate development are far too complex to permit of any such formulation. The law is a growth and must not be shackled. Corporate law, in particular, develops so rapidly that such a formation would be stale even before the date of its publication.").

[49] *Peacock v. Thomas*, 516 U.S. 349, 354, 116 S. Ct. 862 (1996) ("Piercing the veil is not itself an independent…cause of action, but rather is a means of imposing liability on an underlying cause of action."); *Casini v. Graustein*, 307 B.R. 800, 811 (Bankr. N.J. 2004) ("Before invoking the doctrine [of piercing the corporate veil], a plaintiff must first establish an independent basis to hold the corporation liable.").

[50] *Casini v. Graustein*, supra note 49, at 811 ("Having established corporate liability for a tort or breach of contract, if the corporate defendant has insufficient assets to satisfy a prospective judgment, the plaintiff may then seek to pierce the veil.").

[51] *Id*.

[52] Thompson, supra note 7, at 1048.

[53] *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 346 (W.Va. 1986) citing David H. Barber, *Piercing the Corporate Veil*, 17 Williamette L. Rev. 371, 373 (1981) ("Given the purpose of promoting commerce by providing limited liability for shareholders in state corporation laws, courts have been reluctant to pierce the corporate veil, even when the express purpose of incorporation was to limit the liability of the incorporators.").

[54] Thompson, supra note 7, at 1068.

[55] See David C. Cummings, *Disregarding the Corporate Entity: Contract Claims*, 28 Ohio St. L.J. 441, 450 (1967).

[56] Thompson, supra note 7, at 1068-69.

[57] *Id*. at 1069.

[58] *Id*.

[59] *Id*.

[60] Presser, supra note 4, at Chapter 1 §1:1, page 1-8 (Piercing the corporate veil "is a doctrine applied by courts in an extremely discretionary manner, in accordance with the individual consciences of the judges."); See Thompson, supra note 7.

[61] Presser, supra note 4, at Chapter 3 §3:5, page 3-56, points to this case which takes a very rigorous attitude toward piercing the corporate veil: *Kaplan v. First Options of Chicago, Inc.*, 19 F.3[d] 1503, 1521-1523 (3[d] Cir. 1994), judgment aff'd, 514 U.S. 938, 115 S. Ct. 1920 ("[T]he corporate veil is pierced only when the corporation was an article and a sham to execute illegitimate purposes and [an] abuse of the corporate fiction and immunity that it carries." "Not every disregard of corporate formalities or failure to maintain corporate records justifies piercing the corporate veil…[piercing the corporate veil] is available only if it is shown that a corporation's affairs and personnel were manipulated to such an extent that it became nothing more than a sham used to disguise the alter ego's use of its assets for his own benefit in fraud of its creditors."); *Industrias Magromer Cueros Y Pieles S.A. v. La. Bayou Furs*, 293 F.3[d] 912, 920 (5[th] Cir. 2002) ("Under Louisiana law, only exceptional circumstances warrant the radical remedy of piercing the corporate veil."); *Gurry v. Cumberland Farms, Inc*., 406 Mass. 615, 550 N.E.2[d] 127, 133 (Mass. 1990) ("Massachusetts law is clear that the corporate veil should only rarely be pierced to prevent "gross inequity…").

[62] See Henn, supra note 42; *Roberts' Fish Farm v. Spencer*, 153 So.2[d] 718, 721 (Fla.1963) ("Florida jurisprudence indicates a reluctance to "pierce the corporate veil" unless disregard of the corporate entity is necessary to prevent injustice."); *McDarren v. Marvel Entertainment Group, Inc.*, 1995 WL 214482 (S.D.N.Y. 1995) ("It is well settled that the New York courts are reluctant to pierce the corporate veil…"); *U.S. v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3[d] 96, 109 (2[d] Cir. 2000) ("under New York law, courts must be extremely reluctant to pierce the corporate veil…"); *DeWitt Truck Brokers, Inc.*, supra note 22, at 683 ("This power to pierce the corporate veil…is to be exercised 'reluctantly' and 'cautiously' and the burden of establishing a basis for the disregard of the corporate fiction rests on the party asserting such claim.").

[63] See Presser, supra note 4, at Chapter 1 §1:1, page 1-7 citing Ballantine, *Parent and Subsidiary Corporations*, 14 Cal. L. Rev., at 15 (1925) ("[T]he jurisprudence of veil-piercing is a 'legal quagmire'.").

[64] *DeWitt Truck Brokers, Inc.*, supra note 22, at 687 ("The conclusion to disregard the corporate entity may not…rest on a single factor…but must involve a number of such factors."); See generally, Thompson, supra note 7; *Clark v. B.H. Holland Co.*, 852 F. Supp. 1268, 1277 (E.D.N.C. 1994) ("The conclusion to disregard the corporate entity may not, however, rest on a single factor, whether under-capitalization, disregard of corporation's formalities, or whatnot, but must involve a number of such factors; in addition, it must present an element of injustice or fundamental unfairness.") citing *DeWitt Truck Brokers, Inc.*, 540 F.2d at 684.

[65] *DeWitt Truck Brokers, Inc.*, supra note 22, at 687 ("The conclusion to disregard the corporate entity may not…rest on a single factor…but must involve a number of such factors…[I]n addition, [there must be] present an element of injustice or fundamental unfairness."); *Clark v. B.H. Holland Co., Inc*., 852 F. Supp. 1268, 1276 (E.D.N.C. 1994) ("It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors, which, taken together with an element of injustice or abuse of corporate privilege, suggests that the corporate entity attacked had 'no separate mind, will or existence of its own' and was therefore the 'mere instrumentality or tool' of the dominant [shareholder].").

[66] *Id*. supra note 7, at 1065-69; See *DeWitt Truck Brokers, Inc.*, supra note 22, at 687 ("undercapitalization, coupled with disregard of corporate formalities…"); *Brunswick Corp. v. Waxman*, 459 F. Supp. 1222 (E.D.N.Y. 1978), *affirmed*, 599 F.2d 34 (2[d] Cir. 1979) ("[A] failure to observe corporate formalities coupled with inadequate capitalization has frequently been cited as a basis for disregarding the corporate entity…").

[67] Clark, supra note 45, *Corporate Law* at 88; However, see Thompson, supra note 7, at 1067 ("[U]ndercapitalization is not among the factors most frequently cited by the courts in piercing the veil, nor is it among the factors associated with the greatest likelihood of piercing. The relative infrequency with which courts cite undercapitalization in tort-related piercing cases suggests it is an issue that appeals to commentators for reasons other than its predictive significance.").

[68] *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 351 (W.Va. 1986) ("The obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter during the corporation's operations. With respect to determining the adequacy of the corporation's capital, in light of the nature and magnitude of the corporate undertaking, there are several tests and factors which can be utilized to analyze the financial data of the corporation. The capitalization of the corporation in question could be compared with the average industry-wide ratios obtained from published sources. These average ratios could be buttressed by expert testimony from certified public accountants, securities analysts, investment counselors or other qualified financial analysts. Grossly inadequate capitalization for the purpose of piercing the corporate veil would generally be reflected by a substantial deficiency of capital compared with that level of capitalization deemed adequate in the case by the financial analyst experts.") citing *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 686 (4[th] Cir. 1976). Also citing Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 392-94 (1981) ("Grossly inadequate capitalization" for the purpose of piercing the corporate veil would generally be reflected by a substantial deficiency of capital compared with that level of capitalization deemed adequate in the case by the financial analyst experts).

[69] *U.S. v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988) judgment aff'd, 879 F.2[d] 860 (3[d] Cir. 1989) ("[T]he obligation to provide sufficient capitalization is an ongoing one, which begins at the time of incorporation and continues throughout the corporation's existence…"); *Laya v. Erin Homes, Inc.*, supra note 57, at 351; *J. L. Brock Builders, Inc. v. Dahlbeck*, 223 Neb. 493, 499 (Neb. 1986) ("Inadequate capitalization means capitalization very small in relation to the nature of the business of the corporation and the risks the business necessarily entails. Inadequate capitalization is measured at the time of formation. A corporation that is adequately capitalized when formed but has suffered losses is not undercapitalized. Undercapitalization presents a question of fact that turns on the nature of the business of the particular corporation. The general rule is that inadequate capitalization is a factor to be considered in determining whether to disregard the corporate entity.") citing *J-R Grain Co. v. FAC, Inc.*, 627 F.2d 129, 135 (8th Cir. 1980); *DeWitt Truck Brokers, Inc.*, supra note 21, at 685-686 ("[T]he obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter…during the corporation's operations.") citing Gillespie, Dix, *Adequate Risk Capital*, 52 NW. U. L. Rev. 478, 494 (1958).

[70] H. Ballantine, *Ballantine on Corporations*, 303 (rev. ed. 1946).

[71] *Id*.; A "transitional period of time" meaning at least from incorporation until the corporation becomes profitable (or should become profitable if it becomes profitable at all). Robert Clark in *Corporate Law*, supra note 42, page 90, suggests that once a corporation is set-up, failure to replenish the capital is not an adequate reason to pierce the corporate veil. Clark states "there is no affirmative duty on [the shareholders'] part to supply an additional investment to a dying corporation. Such a duty would be in fundamental contradiction to the policy of permitting limited liability."

[72] *Baatz v. Arrow Bar*, 452 N.W.2[d] 138, 142 (S.D. 1990) ("…questions relating to individual shareholder liability resulting from corporate undercapitalization should not be reached until the primary question of corporate liability is determined.").

[73] Presser, supra note 4, at Chapter 1 §1:9, page 1-51 ("“The basic idea behind the “undercapitalization” or “inadequate capitalization” theory is that if the shareholder or shareholders deliberately incorporate with initial capital they know to be inadequate to meet the expected liabilities of the business they intend to be doing, they are engaging in an abuse of the corporate form, and ought to be individually liable when those liabilities actually occur.”).

[74] Ballantine, supra note 70, at 303.

[75] Black's Law Dictionary 164 (7th ed. 2000) (Capital – “Money or assets invested, or available for investment, in a business.”).

[76] Pinto & Branson, *Understanding Corporate Law*, 45 (Bender & Co., Inc. 2004); See *Doyle v. Hoyle*, 1995 U.S. Dist. LEXIS 10347, 4 (D.N.H. 1995) (“Inadequate capitalization means capitalization very small in relation to the nature of the business of the corporation and the risks the business necessarily entails. In regard to that amount of capital that constitutes sufficient capitalization, the following standard emphasizing economic viability rather than an inflexible computation of minimal capitalization should be used: a corporation is undercapitalized when there is an obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking.”).

[77] Pinto & Branson, supra note 76, at 45. Pinto & Branson point out that all owner contributions, including equity and loans, are considered capital.

[78] If a corporation procures adequate insurance, this will make a finding of undercapitalization less likely, even if the insurer later goes bankrupt. See Pinto & Branson, supra note 76, at 45, who cite to *Radaszweski v. Telecom Corp*., 981 F.2d 305 (8th Cir. 1992) (“This distinction [between capital and insurance coverage] escapes us. The whole purpose of asking whether a subsidiary [or other corporation] is "properly capitalized," is precisely to determine its "financial responsibility." If the subsidiary is financially responsible, whether by means of insurance or otherwise, the policy behind the [case law] is met. Insurance meets this policy just as well, perhaps even better, than a healthy balance sheet.”).

[79] *Id*.

[80] Professor Arthur R. Pinto is a professor of law at Brooklyn Law School in New York; Professor Douglas M. Branson is a professor of business law at the University of Pittsburgh in Pennsylvania.

[81] Pinto & Branson, supra note 76, at 46.

[82] *Id*.; See Ballantine, supra note 70.

[83] Pinto & Branson, supra note 76, at 46.

[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] *Minton v. Cavaney*, 364 P.2d 473, 475 (Cal. 1961) (Justice Taynor lists three separate grounds for invoking the doctrine of piercing the corporate veil in the opinion: “The equitable owners of a corporation…are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will; when they hold themselves out as being personally liable for the debts of the corporation; or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs.”); *Slottow v. American Casualty Co.*, 1 F.3d 912, 917 (9th Cir. 1993) (“Under California law, inadequate capitalization of a subsidiary may alone be a basis for holding the parent corporation liable for acts of the subsidiary.”).

[88] *Id*.

[89] *Id*. at 475. See note 74.

[90] *Id*. at 475 ("[T]he evidence is undisputed that there was no attempt to provide adequate capitalization. Seminole never had any substantial assets. It leased the pool that it operated, and the lease was forfeited for failure to pay the rent. Its capital was 'trifling compared with the business to be done and the risks of loss…'.").

[91] Clark, infra note 92.

[92] See Robert Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 Harv. L. Rev. 505, n.10 (1977) ("It should be noted that, at least in recent years, inadequate capitalization per se does not trigger veil piercing in California, and the courts apply the principles [set forth in the leading 'inadequate capitalization' cases] in a fairly strict fashion.") citing *Walker v. Signal Companies*, Inc. 84 Cal. App. 3d 982 (4th Dist. 1978), and *U.S. v. Healthwin-Midtown Convalescent Hospital and Rehabilitation Center, Inc.*, 511 F. Supp. 416 (C.D. Cal. 1981), aff'd, 685 F.2d 448 (9th Cir. 1982) as the authoritative 'inadequate capitalization' cases in California; See Hackney & Benson, *Shareholder Liability for Inadequate Capital*, 43 U. Pitt. L. Rev. 885 (1982) ("[N]o decision has been found which squarely and unambiguously announces a per se rule" that grossly inadequate capitalization alone will support piercing the corporate veil.); However, the *Slottow* case, supra note 74, seems to contradict these Californian cases, but has received negative analysis from other courts; *J. L. Brock Builders, Inc. v. Dahlbeck*, 223 Neb. 493, 499 (Neb. 1986) ("Inadequate capitalization, by itself, is insufficient to prove fraud.").

[93] *Id*.; *J-R Grain Co. v. FAC, Inc.*, 627 F.2d 129, 135 (8th Cir. 1980) ("Inadequate capitalization is a factor for consideration in determining whether to disregard the corporate entity."); Pinto & Branson, supra note 76, at 47, point out that Judge Easterbrook stated in *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 416 (7th Cir. 1988) ("[W]e are unaware of any decision relying on undercapitalization alone as grounds for disregarding the corporate entity in a contract case.").

[94] See *Consumer's Co-op v. Olsen*, 142 Wis. 2d 465, 483 (Wis. 1988) ("In order for the corporate veil to be pierced, in addition to undercapitalization, additional evidence of failure to follow corporate formalities or other evidence of pervasive control must be shown."); *Hickman v. Hyzer*, 261 Ga. 38, 39-40 (Ga. 1991) ("The Supreme Court of Georgia holds that for undercapitalization of a corporation to justify piercing the corporate veil, it must be coupled with evidence of an intent at the time of the capitalization to improperly avoid future debts of the corporation."); *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 520 (7th Cir. 1991) ("A corporate entity will be disregarded and the veil of limited liability pierced when two requirements are met: First, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual or other corporation no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.") citing *Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565 (7th Cir. 1985).

[95] See Berle, *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343, 348 (1947).

[96] *Id*.

[97] *Id*.

[98] *Walkovszky v. Carlton*, 18 N.Y.2d 414 (N.Y. 1966).

[99] *Id*. at 422.

[100] *Id*. at 419.

[101] See *Walkovszky v. Carlton*, 23 N.Y.2[d] 714 (N.Y. 1968) holding that Walkovszky's amended complaint was sufficient and his case was able to be continued.

[102] *Fletcher v. Atex, Inc.*, 68 F.3d 1451 (2d Cir. 1995).

[103] *Id*. at 1459 ("Courts have generally declined to find alter ego liability based on a parent corporation's use of a cash management system.") citing *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 34 (D. Mass. 1987) (Without "considerably more," "a centralized cash management system . . . where the accounting records always reflect the indebtedness of one entity to another, is not the equivalent of intermingling funds" and is insufficient to justify disregarding the corporate form.); *United States v. Bliss*, 108 F.R.D. 127, 132 (E.D. Mo. 1985) (cash management system indicative of the "usual parent-subsidiary relationship"); *Japan Petrol.*, 456 F. Supp. at 846 (finding that segregation of subsidiary's accounts within parent's cash management system was "a function of administrative convenience and economy, rather than a manifestation of control"); See Pinto & Branson, supra note 76, at 48.

[104] See supra note 80.

[105] Pinto & Branson, supra note 76, at 48.

[106] *Id*.

[107] See supra note 103.

[108] *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 213 (4th Cir. 1991) ("When nothing is invested in the corporation, the corporation provides no limited liability protection to its owner. Nothing in, nothing out, no protection.").

[109] *Id*.; See *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2[d] 1538 (9[th] Cir. 1988); See Hackney & Benson, *Shareholder Liability for Inadequate Capital*, 43 U. Pitt. L. Rev. 837 (1982).

[110] *Kinney Shoe Corp. v. Polan*, 939 F.2d 209 (4th Cir. 1991).

[111] *Id*. at 213.

[112] Pinto & Branson, supra note 76, at 48.

[113] *Arnold v. Phillips*, 117 F.2[d] 497 (5[th] Cir.), *cert. denied*, 313 U.S. 583 (1941).

[114] *Id*. at 502; See Pinto & Branson, supra note 76, at 48-49 for their analysis of *Arnold v. Phillips*.

[115] *Id*. at 502-503; Pinto & Branson, supra note 76, at 49.

[116] Clark, supra note 45, *Corporate Law* at 90.

[117] See *DeWitt Truck Brokers, Inc.*, supra note 22, at 687 ("It is thus clear that corporate formalities, even rudimentary formalities, were not observed by the defendant…"); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2[d] 634, 638 (8[th] Cir. 1975) ("[C]orporate formalities [were] not followed…").

[118] *Id*.

[119] All these examples can be found in the case of *DeWitt Truck Brothers, Inc.*, supra note 22: ("[T]he corporation never had a stockholders' meeting." at 687); ("At the times involved here [the defendant]

owned approximately 90 percent of the corporation's outstanding stock, according to his own testimony, though this was not verified by any stock records. [The defendant] was obscure on who the other stockholders were and how much stock these other stockholders owned, giving at different times conflicting statements as to who owned stock and how much." at 687); ("[I]ssued [stock] for a consideration of one dollar [per share]." at 687); ("[The defendant] was receiving from $15,000 to $25,000 each year from a corporation, which, during most of the time, was showing no profit and apparently had no working capital." at 687); (There was no record that any director or officer had "received any fee or reimbursement of expenses or salary of any kind from the corporation…" at 687); ("[N]o corporate records of a real directors' meeting in all the years of the corporation's existence…" at 687); See *Mackey v. Burke*, 751 F.2d 322 (10th Cir. 1984); See *Gentry v. Credit Plan Corp*., 528 S.W.2d 571 (Tex. 1975); See *Doe v. Unocal Corp*., 248 F.3d 915 (9th Cir. 2001).

120 Pinto & Branson, supra note 76, at 43.

121 *Id*.

122 *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir. 1972).

123 *Id*. at 66.

124 *Id*. at 67.

125 *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976).

126 See Presser, supra note 4, at Chapter 3 §3:6, p. 3-70.

127 *DeWitt Truck Brokers, Inc.*, supra note 125, at 687.

128 Presser, supra note 4, at 3-79; *DeWitt Truck Brokers, Inc.*, supra note 125, at 687.

129 See Pinto & Branson, supra note 76, at 44, where they discuss their belief that the lack of corporate formalities alone may not be enough to warrant piercing the veil; *Harris v. Wagshal*, 343 A.2d 283, 287 (D.C. 1975) ("While disregard of corporate formalities is a circumstance to be considered, it is generally held to be insufficient in itself, without some other facts, to support a piercing of the corporate veil."); *Clark v. B.H. Holland Co.*, 852 F. Supp. 1268, 1277 (E.D.N.C. 1994) ("The conclusion to disregard the corporate entity may not, however, rest on a single factor, whether under-capitalization, disregard of corporation's formalities, or whatnot, but must involve a number of such factors; in addition, it must present an element of injustice or fundamental unfairness.") citing *DeWitt Truck Brokers, Inc.*, 540 F.2d at 684; *Clark* is followed in *Bradson Mercantile, Inc. v. Vanderbilt Indust. Contracting Corp*., 833 F. Supp. 37 (W.D.N.C. 1995); Cox & Hazen, infra note 163, at 283 ("Disregard of corporate formalities…does not appear sufficient by itself to pierce the corporate veil," citing *Solomon v. Western Hills Dev. Co*., 312 N.W.2d 428, 434 (Mich. Ct. App. 1981).

130 See Pinto & Branson, supra note 76, at 43-44, citing MBCA Close Corporation Supplement § 25.

131 *Id*.

132 *Tannahill v. Aunspach*, 538 N.W.2d 871 (Iowa Ct. App. 1995).

133 *Scott Graphics, Inc. v. Mahaney*, 549 P.2d 623 (N.M. Ct. App. 1976).

134 *Id*. at 627 ("There was disregard of corporate formality in the operation of this corporation and there was considerable ignorance on the part of the directors and officers as to its operation. These things in and of themselves are not enough to warrant disregarding the corporate entity. However, should mismanagement

occur for fraudulent purposes or result in injustice, then the corporate entity will be disregarded. We find no evidence of fraud or injustice here.”).

[135] Clark, supra note 45, at 85.

[136] This example is exemplified in the *DeWitt Truck Brokers, Inc.* case, supra note 125.

[137] See *In re Haugen Constr. Services, Inc.*, 104 B.R. 1013 (D.N.D. 1989) for an example of this.

[138] Clark, supra note 45, at 85; also see *DeWitt Truck Brokers, Inc.*, supra note 64.

[139] Clark, supra note 45, at 85; *Solomon v. Betras Plastics, Inc.*, 550 So. 2d 1182, 1185 (Fla. 5th DCA 1989) (“A failure to follow corporate formalities (i.e., properly issuing stock or keeping records) is not, by itself, a sufficient ground upon which to base individual shareholder liability. This is because a loss is normally not caused by the failure to follow corporate formalities.”) citing *Riley v. Fatt*, 47 So.2d 769 (Fla. 1950); *Eagle v. Benefield-Chappell, Inc.*, 476 So.2d 716, 719 (Fla. 4th DCA 1985); Cox & Hazen, infra note 160, at 283; *Transamerica Cash Reserve, Inc. v. Dixie Power & Water*, 789 P.2d 24 (Utah 1990).

[140] See *DeWitt Truck Brokers, Inc*., supra note 124, for an example of this. In *DeWitt*, there were no corporate records of directors’ or stockholders’ meetings held by Fruit Co. However, this caused no direct injury to DeWitt. Yet, it was still considered a factor in determining whether corporate formalities had been followed to determine whether to pierce the corporate veil.

[141] See *Scott v. McKay*, 2003 Tex. App. LEXIS 7221 (Tex. App. 2003) (“[F]ailure to comply with corporate formalities is no longer a factor in considering whether alter ego exists.”) citing *Hinkle v. Adams*, 74 S.W.3d 189, 194 (Tex. App.-Texarkana 2002, no pet.).

[142] *Id*.

[143] *Id*.

[144] See Robert Hamilton, *The Law of Corporations in a Nutshell* at 90 (5th ed.; St. Paul: West 2000).

[145] *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 213 (4th Cir. 1991).

[146] See supra note 80.

[147] Pinto & Branson, supra note 76, at 42.

[148] *Id*.

[149] See *Flynn v. Greg Anthony Constr. Co*., 95 Fed. Appx. 726 (6th Cir. 2003) for examples of intertwined activities.

[150] Pinto & Branson, supra note 76, at 43.

[151] *American Trading and Production Corp. v. Fischback & Moore*, 311 F. Supp. 412 (N.D. Ill. 1970).

[152] *Id*. at 416.

[153] *Id*. at 414 (“At the time of the fire, all four of the Subsidiary's directors were also directors of the Parent, and four of the Subsidiary's eight officers were also officers of the Parent. However, the corporations maintain separate offices and conduct separate directors' meetings. The financial books and records of the Subsidiary are maintained by its employees in Chicago, and contain only entries related to its own operations. The Subsidiary has its own bank accounts and negotiates its own loans from third parties;

however, these loans are reviewed and guaranteed by the Parent. On occasion, the Subsidiary has borrowed money from the Parent; these loans are evidenced by notes and call for interest at the prime rate.").

154 *Kramer v. Keys*, 643 F.2d 382 (5th Cir. 1981); See Cox & Hazen, infra note 160, at 284 for a brief discussion of the *Kramer* case.

155 *Id*. at 385-386.

156 *Id*. at 385.

157 Pinto & Branson, supra note 76, at 42.

158 *Id*; This must especially be done in "one-man corporations" where the corporation is owned by one person who is the sole shareholder, director, etc. Lack of corporate formalities and intermixture of affairs have proven to be unique hazards for one-man corporations because they are inherently characteristic of one-man corporations. For example, there is no need to have one-man shareholders' and directors' meetings, the sole shareholder will more than likely invest his personal funds to keep the corporation capitalized, the sole shareholder will also often intermingle his funds with that of the corporation's funds, and one-man corporations are almost always controlled exclusively by the sole shareholder. These are seemingly necessities in running a one-man corporation but will still be considered factors in determining whether to pierce the corporate veil. That is why it is of key importance that the sole shareholder keep scrupulous records in his dealings with his corporation.

159 See Harry G. Henn and John R. Alexander, *Law of Corporations*, at 352-354 (West 1983) for a discussion of the various problems which may arise in one-person corporations.

160 See Patricia A. Carteaux, Corporations – Shareholder Liability – Louisiana Adopts a Balancing Test for Piercing the Corporate Veil, 58 Tul. L. Rev. 1089 (March 1984); Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations*, 18 Law & Contemp. Prob. 473, 497-98 (1953).

161 Carteaux, supra note 160, at 1100; However, see Henn and Alexander, supra note 159, at 353 ("It is a well-settled rule that ownership of all or almost all the shares by one individual or a few individuals does not afford sufficient grounds for disregarding corporateness.").

162 *DeWitt Truck Brokers, Inc*., supra note 125, at 681, "[E]qually as well settled is the principle that plain fraud is not a necessary prerequisite for piercing the corporate veil, is the rule that the mere fact that all or almost all of the corporate stock is owned by one individual or a few individuals, will not afford sufficient grounds for disregarding corporateness…[However,] when substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of fundamental equity and fairness, courts have experienced 'little difficulty' and have shown no hesitancy in applying what is described as the 'alter ego' or 'instrumentality' theory in order to cast aside the corporate shield and to fasten liability on the individual stockholder."

163 James D. Cox and Thomas Lee Hazen, *Cox & Hazen on Corporations*, at 282 (2d Ed. Aspen).

164 *Id*.

165 James D. Cox is a professor of law at Duke University. Thomas Lee Hazen is a professor of law at the University of North Carolina.

166 Cox & Hazen, supra note 163, at 282.

167 *United States v. Milwaukee Refrigerator Transit Co*., 142 Fed. 247, 255 (E.D. Wis. 1905) ("It is not unusual for a court in this country to disregard the corporate entity, or in synonymous terms "pierce the corporate veil," when corporate form has been used to "defeat public convenience, justify wrong, protect

fraud, or defend crime."); *C.F. Trust, Inc. v. First Flight Ltd. P'Ship*, 306 F.3d 126, 135 (4th Cir. 2002) ("Virginia courts require a party seeking to pierce a corporate veil to prove that (i) the corporation is 'the alter ego, alias, stooge, or dummy' of the individual, and (ii) the individual used the corporation to 'evade a personal obligation, to perpetrate fraud or a crime, to commit an injustice, or to gain an unfair advantage.'").

[168] See *Industrias Magromer Cueros Y Pieles S.A. v. La. Bayou Furs*, 293 F.3d 912, 920 (5th Cir. 2002) citing LA. CIV. CODE. ANN. art. 1953 (West 1987).

[169] *Gulfstream, Inc. v. Palm Yacht Sales*, 1999 U.S. App. LEXIS 7208 (4th Cir. 1999) ("Under Florida law, wrongdoing must be shown before a corporate veil may be pierced. Florida law considers wrongdoing to be using the corporation as a device or sham to accomplish some ulterior purpose such as fraud or some illegal purpose.").

[170] *U.S. v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876 (1998) ("The corporate veil may be pierced and the shareholder held liable for the corporation's conduct when…the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholders' behalf."); *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 520 (7th Cir. 1991) ("A corporate entity will be disregarded and the veil of limited liability pierced when…the fiction of separate corporate existence would sanction a fraud or promote injustice."); See Pinto & Branson, supra note 74, at 49 ("If a court finds that a corporation had no reason to exist other than evasion of a contract or a statute, the court may disregard the corporation."); *Institut Pasteur v. Cambridge Biotech Corp*., 186 F.3d 1356, 1376 (D.C. Cir. 1999) ("The concept of "piercing the corporate veil" is equitable in nature and courts will pierce the corporate veil to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability.").

[171] See Pinto & Branson, supra note 76, at 49-50 ("Courts may disregard the corporation if the sole purpose of forming the corporation was to perpetrate the fraud.").

[172] The first example can be found in the case of *Sea-Land Services, Inc. v. Pepper Source*, 993 F.2d 1309 (7th Cir. 1993). The second example can be found in the case of *Sundaco, Inc. v. State*, 463 S.W.2d 528 (Tex. Civ. App. 1970).

[173] See Undercapitalization section and note 67.

[174] See supra note 67; Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991) (An empirical study analyzing 1600 cases involving piercing the corporate veil).

[175] See supra note 169.

[176] *Linn & Lane Timber Co. v. United States*, 236 U.S. 574 (1915).

[177] *Id*. at 577.

[178] *Id*. at 577-78.

[179] *Trs. of the Nat'l Elevator Indus. Pension…v. Lutyk*, 332 F.3d 188, 194 (3rd Cir. 2003) ("In determining whether to pierce the corporate veil, the United States Court of Appeals for the Third Circuit has considered the following factors…siphoning of funds from the debtor corporation by the dominant stockholder…"); *Craig v. Lake Asbestos of Quebec, Ltd*., 843 F.2d 145, 150 (3rd Cir. 1988) ("Some of the factors that must be considered to determine if the corporate veil should be pierced include…siphoning of funds of the corporation by the dominant stockholder…").

[180] *Sea-Land Services, Inc. v. Pepper Source*, 993 F.2d 1309 (7th Cir. 1993).

[181] *Id*. at 1312.

[182] *Id*. at 1311.

[183] Cox & Hazen, supra note 163, at 276 ("If the separate corporate capacity is used dishonestly, such as to evade obligations or statutory restrictions, the courts will intervene to prevent the abuse.") citing *Attorney General v. M.C.K., Inc.*, 736 N.E.2[d] 373, 380 (Mass. 2000) ("[D]octrine of corporate disregard may be used to carry out legislative intent and thereby avoid evasion of statutes.").

[184] *Sundaco, Inc. v. State*, 463 S.W.2[d] 528 (Tex. Civ. App. 1970).

[185] *Id*. at 532 ("It is held that courts will look through the form to the substance of the relations between corporations and will disregard the fiction of corporate identity if it is used to circumvent the statute or as a mere tool or business conduit") citing *Wilson Finance Co. v. State*, 342 S.W. 2[d] 117.

[186] See *Nebraska Engineering Co. v. Gerstner*, 323 N.W.2[d] 84 (Neb. 1982); *KwickSet Components, Inc*., 411 So. 2[d] at 136 ("[T]he theory of separate existence can be disregarded, even in the absence of fraud, to prevent injustice or inequitable results.").

[187] *Colman v. Colman*, 743 P.2[d] 782, 786 (Utah Ct. App. 1987) ("The plaintiff need not prove actual fraud, but must show that failure to pierce the corporate veil would result in an injustice."); See *Morris v. New York State Department of Taxation and Finance*, 623 N.E.2[d] 1157, 1161 (N.Y. 1993) ("While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.").

[188] *DeWitt Truck Brokers, Inc*., supra note 125, at 684 ("Contrary to the basic contention of the defendant…proof of plain fraud is not a necessary element in a finding to disregard the corporate entity."; "Although there is no doubt that fraud is a proper matter of concern in suits to disregard corporate fictions, it is not a prerequisite to such a result, especially when there is gross undercapitalization or complete domination of the corporate entity under scrutiny."; "[T]he theory of liability under the 'instrumentality' doctrine does not rest upon intent to defraud. It is an equitable doctrine that places the burden of the loss upon the party who should be responsible.").

[189] *Trs. of the Nat'l Elevator Indus. Pension…v. Lutyk*, 332 F.3[d] 188, 194 (3[rd] Cir. 2003) ("The court's test does not require proof of actual fraud as a prerequisite for piercing the corporate veil. However, where the conduct alleged to justify piercing the corporate veil is that the corporation as a whole is a "sham" or "facade," a finding akin to fraud is necessary.").

[190] See *Rimade Ltd. v. Hubbard Enters*., 388 F.3[d] 138 (5[th] Cir. 2004), and *Kaplan v. First Options*, 19 F.3[d] 1503 (3[d] Cir. 1994), which suggest that fraud is not a necessary requirement to pierce the corporate veil unless there are allegations that the corporation is a sham, façade, or the alter ego of the defendant.

[191] See *Intl Union, UAW v. Aguirre*, 410 F.3[d] 297, 302-03 (6[th] Cir. 2005); *D. Klein & Son, Inc. v. Good Decision, Inc*., 56 U.C.C. Rep. Serv. 2[d] (Callaghan) 583 (2[d] Cir. 2005).

[192] Cox & Hazen, supra note 163, at 276 citing *Pepper v. Litton*, 308 U.S. 295, 310 (1939) and *66, Inc. v. Crestwood Commons Redevelopment Corp*., 998 S.W.2[d] 32, 41 (Mo. 1999) (en banc) ("[A]ctual fraud is not necessary; other conduct may justify veil piercing."); Also see *Fletcher v. Atex, Inc*., 68 F.3[d] 1451, 1461 (2[d] Cir. 1995); However, Cox & Hazen point out at 300 that *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3[d] 773, 777 (2[d] Cir. 1995) suggests that domination and control can substitute for a showing of unfairness.

[193] There are three principal variants within the doctrine of piercing the corporate veil: (1) the "instrumentality" doctrine, (2) the "alter ego" doctrine, and (3) the "identity" doctrine. These variants state somewhat different rules which control when the corporate veil may be pierced. However, upon close consideration, none of the variants present a characteristic that distinguishes itself from the other. They are, in fact, practically identical to each other, and courts rarely differentiate among the three. I have, therefore, labeled this section simply "The Instrumentality Doctrine" to avoid any confusion which may arise from trying to differentiate between the three variants. For a more substantial discussion of this see Cox & Hazen, supra note 163, at 277-79, and Phillip I. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporation* 111 (1987).

[194] *Baatz v. Arrow Bar*, 452 N.W.2d 138, 141 (S.D. 1990) ("When an individual treats a corporation "as an instrumentality through which he [is] conducting his personal business," a court may disregard the corporate entity."); *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co*., 61 P.2d 645, 647-48 (Okla. 1936) ("Where one corporation is a mere instrumentality or adjunct of a dominant corporation, the court conceives it as its duty to look beyond the form to the substance of the transactions involved; the fiction of a separate legal entity must be disregarded and the two corporations held to constitute but a single entity."); *Frazier v. Bryan Memorial Hosp. Authority*, 775 P.2d 281, 288 (Okla. 1989) ("If one corporation is but an instrumentality or agent of another, corporate distinctions must be disregarded and the two separate entities must be treated as one.").

[195] Pinto & Branson, supra note 76, at 50; *Zaist v. Olson*, 227 A.2d 552, 573 (Conn. 1967) ("Courts will disregard the fiction of separate legal entity when a corporation is a mere instrumentality or agent of another corporation or individual owning all or most of its stock. Under such circumstances the general rule, which recognizes the individuality of corporate entities and the independent character of each in respect to their corporate transactions, and the obligations incurred by each in the course of such transactions, will be disregarded, where, as here, the interests of justice and righteous dealing so demand. The circumstance that control is exercised merely through dominating stock ownership, of course, is not enough. There must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.").

[196] *Zaist v. Olson*, supra note 193, ("The instrumentality doctrine requires proof of three elements: (1) complete domination and control, not only of finances but also of policy and business practices with respect to the transaction which caused the damages that at the time of the transaction the corporation had no will or existence of its own; (2) the control must have been used to commit fraud, perpetrate a violation of statute or legal duty, or a dishonest or unjust act; and (3) the control and breach of duty must have proximately caused the injury and unjust loss of the plaintiff."); See *Krivo Industrial Supply Co. v. Nat'l Distillers and Chemical Corp*., 483 F.2d 1098, 1103 (5th Cir. 1973).

[197] Cox & Hazen, supra note 163, at 302.

[198] *Id*. at 302-03 citing *Certain-Teed Prod. Corp. v. Wallinger*, 89 F.2d 427, 434, 435 (4th Cir. 1937), *cert denied*, 302 U.S. 707 (1937).

[199] Pinto & Branson, supra note 76, at 50 citing 1 *Fletcher's Encyclopedia of Corporations* 205. This is also expressed in *Lowendahl v. Baltimore & Ohio Railroad*, 247 A.D. 144, 157 (N.Y. App. Div.), *aff'd*, 6 N.E.2d 56 (N.Y. 1936) and see *Zaist v. Olsen*, see supra note 193.

[200] See *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221 (Ala. 1990), *Texas Indus. v. Lucas*, 634 S.W.2d 748 (Tex. Ct. App. 1982), and *Larrimore v. Hospital Corp*., 514 So.2d 840 (Ala. 1987) for examples of this.

[201] *Zaist v. Olson*, 227 A.2d 552 (Conn. 1967).

[202] *Id*. at 553.

[203] *Id*. at 574-75.

[204] *OTR Associates v. IBC Services, Inc*., 801 A.2[d] 407 (N.J. App. 2002).

[205] See *OTR Associates* at 409, 411; also see Pinto & Branson, supra note 75, at 51 for a brief discussion of the *OTR Associates* case.

[206] *OTR Associates* at 410.

[207] *Id*. at 409.

[208] See Pinto & Branson, supra note 76, at 51. The main factors discussed earlier being: undercapitalization, lack of corporate formalities, intermixture of affairs, and fraud / misrepresentation.

[209] Quoting *Zaist v. Olson*, supra note 201, at 553.

[210] Pinto & Branson, supra note 76, at 51.

[211] *Id*.

[212] Cox & Hazen, supra note 163, at 277.

[213] *Id*. citing *Fletcher v. Atex, Inc.*, 68 F.3d 1451 (2d Cir. 1995).

[214] *Id*. at 277.

[215] See 1 William M. Fletcher Cyclopedia of Corporations § 41.30 at 664 (1983).

[216] Cox & Hazen, supra note 163, at 281.