[Tulsa Law Review](https://digitalcommons.law.utulsa.edu/tlr)

Volume 28
Number 4 *International Agriculture Symposium* Volume 28 | Number 4

Summer 1993

Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach

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PIERCING THE CORPORATE VEIL: A NEED FOR CLARIFICATION OF OKLAHOMA'S APPROACH

I. INTRODUCTION

One of the most fundamental reasons for incorporating a business is to achieve limited liability.[1] Limited liability offers a great advantage, for it offers the corporate investor or owner a "cap" on his liability, typically in the amount of his investment.[2] Without such limited liability, firms could not attract the amounts of capital needed to operate efficiently, or at all.[3] Limited liability is especially important today because our society is extremely litigious, and an investor's personal assets would otherwise be subject to seizure if not for the corporation being an artificial entity which is distinct and separate from the investor.

However, with the privilege of limited liability comes the responsibility of operating the corporation so as to not wrongfully injure third parties with whom it deals. When recognizing corporations as distinct entities from their owners would be inconsistent with public policy, courts will consider disregarding the corporate entity.[4] This is known as "piercing the corporate veil."[5] Courts consistently agree that, in some

1. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 146 (3d ed. 1983). "Incorporation for the purpose of achieving limited liability is usually recognized on the theory that limited liability is one of the principal objectives of incorporation." *Id.* "Whether there are many, few, or but one shareholder, the principle that a corporation is a legal unit separate from its shareholders . . . is one of convenience which dictates that corporate rights and liabilities are not to be confused with those of even its sole shareholder." NORMAN D. LATTIN, THE LAW OF CORPORATIONS § 11, at 65 (2d ed. 1971); *see also* FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS § 1 (1931) (stating the fundamental concept that the corporation is a separate legal entity from its shareholders); 1 CHARLES R. P. KEATING & GAIL O'GRADNEY, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43, at 733 (rev. perm. ed. 1990) (stating that corporate insulation is not against public policy).

2. Hanson v. Bradley, 10 N.E.2d 259, 263-64 (Mass. 1937).

3. Anderson v. Abbot, 321 U.S. 349, 362 (1944).

4. HENN & ALEXANDER, *supra* note 1, § 146, at 346.

5. Piercing the corporate veil is defined as a

> [j]udicial process whereby [the] court will disregard usual immunity of corporate officers or entities from liability for wrongful corporate activities; *e.g.* when incorporation exists for the sole purpose of perpetrating fraud. The doctrine which holds that the corporate structure with its attendant limited liability of stockholders may be disregarded and personal liability imposed on stockholders, officers and directors in the case of fraud or other wrongful acts done in the name of [the] corporation.

BLACK'S LAW DICTIONARY 1147-48 (6th ed. 1990).

situations, the corporate entity may be removed as a technical barrier between its owner(s) and the parties with whom it deals.[6] Although jurisdictions have differing standards, it is generally agreed that upon a showing of some improper purpose, the veil may be pierced.[7] If the corporate veil is pierced, the plaintiff will be able to obtain a judgment against both the corporation and its owner(s), and the judgment will be enforceable against each separately.[8]

Despite litigation in the area of veil-piercing, Oklahoma has achieved little uniformity in the application of the doctrine. Perhaps the lack of uniformity is the result of a fact-intensive analysis. However, the standards and their application should be more clearly defined in order to lend stability to the future of the doctrine.

II. General Application of the Doctrine

A. *General Policy and the Typical Corporation in a Veil-Piercing Case*

Courts pierce the corporate veil in order to protect third party plaintiffs[9] from unjust injury by the corporation, and most jurisdictions recognize the doctrine as an equitable concept.[10] In order to pierce the corporate veil, it is necessary to show that some injustice will occur if the veil is not pierced.[11] This is usually the case when a shareholder of a corporation is aware of a plaintiff's valid claim against the corporation's property, and the corporation intentionally acts in disregard of that claim.[12] To put it another way, the corporate veil is pierced when the corporation has, in some way, abused its privilege of doing business in the corporate form.[13]

The general principles for disregarding the corporate entity are applicable to all types of corporations.[14] The situations which arise most

6. Keating & O'Gradney, *supra* note 1, § 41, at 602-03.

7. *Id.* § 41, at 603.

8. *Id.* § 43, at 732.

9. The aim of the doctrine is to protect third party plaintiffs who have dealt with the corporation and have been wrongfully injured in some way by it. The doctrine is generally not intended to be used by the shareholders themselves. DeBoer Constr., Inc. v. Reliance Ins. Co., 540 F.2d 486, 496 (10th Cir. 1976); *see* Mainford v. Sharp, 569 P.2d 546, 548 (Okla. Ct. App. 1977).

10. Keating & O'Gradney, *supra* note 1, § 41.25, at 652. Therefore, if there is an adequate remedy at law (i.e. money damages), the court will not pierce the veil even where all the necessary elements have been shown. *Id.* at 653. Furthermore, the corporate entity cannot be disregarded for one purpose and claimed for another inconsistent one. *Id.* § 41.20, at 639.

11. *Id.* § 41.25, at 652.

12. *Id.*

13. Powell, *supra* note 1, § 2, at 2.

14. Henn & Alexander, *supra* note 1, § 146, at 347.

frequently involve two general categories: (1) close corporations, including solely-owned and family-owned, and (2) parent-subsidiary arrangements.[15] There is generally no personal liability on the part of a shareholder, whether it is an individual, small group of individuals, or another corporation. If a shareholder, however, exploits the corporation by placing his own interests above the corporation's, then the shareholder may be held liable under the general principles relating to piercing the corporate veil.[16]

Some commentators have suggested that policy should favor a different standard when considering the liability of an individual shareholder in contrast to that of a corporate shareholder.[17] The reasons justifying this conclusion center around the amount of potential liability ultimately attaching to an individual shareholder. In the case of an individual shareholder, liability is potentially unlimited, whereas in the case of a corporate shareholder, liability is limited to that corporation-shareholder's assets and does not reach the personal assets of the stockholder of the corporation.[18]

Some authorities appear to take a stricter look at small corporations in piercing the corporate veil since the shareholders are usually the officers, directors, and employees of the corporation.[19] In these situations, an injured third party stands a greater chance of not being able to recover on his or her claim since the corporation with which he or she has dealt is usually severely undercapitalized, or even insolvent.[20]

Conversely, some commentators believe that parent-subsidiary arrangements should be more closely scrutinized.[21] Many times, a subsidiary will be set up to operate merely as a "shell"[22] to allow the parent corporation to escape potential tort or contract liability, including the avoidance of debts and other obligations. This frequently occurs in the

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15. *Id.*

16. 13A CORA M. THOMPSON, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 6213, at 17 (rev. perm. ed. 1984).

17. *See* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 511-12 (1976); Commentary, *Piercing the Corporate Veil in Alabama: In Search of a Standard*, 35 ALA. L. REV. 311, 313 (1984).

18. Posner, *supra* note 17, at 512.

19. KEATING & O'GRADNEY, *supra* note 1, § 41.72, at 709.

20. *Id.*; *see* Consumer's Co-op v. Olsen, 419 N.W.2d 211 (Wis. 1988).

21. LATTIN, *supra* note 1, § 11, at 65-66.

22. For a listing of the many various terms that are used interchangeably by the courts to describe corporations that are not legitimate, see HENN & ALEXANDER, *supra* note 1, § 146, at 344 n.2. "However, . . . we need not indulge in mere semantics, for the circumstances of each case must justify application of the rule." National Bond Finance Co. v. General Motors Corp., 238 F. Supp. 248, 256 (W.D. Mo. 1964) (quoting Francis O. Day Co. v. Shapiro, 267 F.2d 669, 674 (D.C. Cir. 1959)).

context of environmental cleanups. For example, since the enactment of CERCLA,[23] parties who clean up hazardous waste sites often incur expenses far exceeding the value of the assets of subsidiaries which dumped the wastes.[24] When these parties seek indemnification, they usually have to look to the parent corporation.[25] This presents problems from the standpoint of interpretation of the CERCLA statutes. The complaining party is not sure whether he can pursue his claim against the parent on a direct liability theory, or whether he must first pierce the corporate veil in order to reach the parent's assets.[26] This situation illustrates that piercing the corporate veil inherently generates competing policies: the well-settled concept of limited liability to stimulate investment and economy versus the critical and immediate need for environmental maintenance.[27]

B. *Tort Versus Contract Actions*[28]

The standard for piercing the corporate veil may depend upon whether the underlying cause of action against the corporation sounds in contract or in tort. Typically, in contract claims, a party knows the other party to the contract.[29] Many authorities, therefore, assert that the plaintiff must prove a higher degree of culpability in a contract case than in a tort case for the court to pierce the corporate veil[30] because the plaintiff has sufficient information to make an informed choice as to whether to deal with the corporation before entering the transaction.[31]

On the other hand, in tort cases courts sometimes relax the requirements to pierce the veil.[32] The plaintiff typically has not ascertained the

23. The Comprehensive Environmental Response, Compensation, and Liability Act provides for the emergency cleanup of hazardous waste sites with subsequent reimbursement from the "responsible parties" who put the wastes there. *See* Mark R. McPhail, Note, *CERCLA Liability of Corporate Parents for Their Dissolved or Undercapitalized Subsidiaries*, 44 OKLA. L. REV. 345, 345-46 (1991).

24. *Id.* at 351.

25. *Id.* at 352.

26. *Id.* at 351. Piercing the corporate veil is often difficult since each state's corporation laws are different, and cases in which the doctrine would be applied are very fact-specific. *Id.* at 352-53. Furthermore, some courts circumvent the doctrine and assess direct liability on the parent corporation as an "operator". *Id.* at 356, 358-59. McPhail suggests a set of uniform standards which would make it easier to pierce the corporate veil regardless of the jurisdiction involved. *See id.* at 361-63.

27. *Id.* at 354.

28. These are not the only types of actions that involve piercing the corporate veil. *See infra* part IV.C-D (bankruptcy and tax cases in Oklahoma).

29. *See* United States v. VanDiviner, 822 F.2d 960 (10th Cir. 1987); United States v. Jon-T Chems., Inc., 768 F.2d 686 (5th Cir. 1985); Miles v. American Tel. & Tel. Co., 703 F.2d 193 (5th Cir. 1983).

30. *Jon-T Chems., Inc.*, 768 F.2d at 693.

31. *Id.*; *VanDiviner*, 822 F.2d at 963-64.

32. *Jon-T Chems., Inc.*, 768 F.2d at 693.

financial condition of a corporation before, for example, buying a defective product and thus has no reason to believe the corporation is undercapitalized or insolvent.[33] Therefore, when the plaintiff has been tortiously injured, out of fairness and equity the courts will consider piercing the corporate veil to allow a recovery when the corporation cannot satisfy the plaintiff's claim.[34]

C. *Different Approaches to the Doctrine*

The doctrine first developed as a means to uphold equity. Generally, a corporation will not be able to retain its distinct and separate identity when doing so will conflict with the policy that created it.[35] While this provides a general premise for shareholder personal liability, the standard proved too vague and inadequate, by itself, for the already hesitant courts[36] to apply with any consistency.[37]

Realizing the inadequacy of this standard, courts formulated supplementary theories which focus upon the relationship between the shareholder/owner and the corporation and offer a more concrete method of analysis than vague equitable considerations.[38] Courts generally have been less reluctant to pierce the veil where they have found a high degree of unity between the shareholder and the corporation.[39] Confusion, however, has also occurred since courts have employed different terms to

33. *Id.*

34. *Cf.* Vaughn v. Chrysler Corp., 442 F.2d 619 (10th Cir. 1971) (parent company was directly and strictly liable for defective work done by a subsidiary on a truck manufactured by the parent). Although it did not need to pierce the corporate veil to reach the parent's assets, the court used an analysis similar to that used in veil-piercing cases. The court stated the subsidiary was not set up as a sham (i.e. instrumentality), citing adequate capitalization and sufficient independence from the parent. *Id.* at 621. Furthermore, the court did not find fraud. Yet, the court stated there was no reason to defeat the liability of the parent when the parent *controlled* the subsidiary. *Id.* at 622.

35. D.N. & E. Walter & Co. v. Zuckerman, 6 P.2d 251 (Cal. 1931); *see* Kwick Set Components, Inc. v. Davidson Indus., Inc., 411 So. 2d 134 (Ala. 1982).

36. Denise L. Speer, Comment, *"Piercing the Corporate Veil" in Maryland: An Analysis and Suggested Approach*, 14 BALT. L. REV. 311, 313 (1985).

> Conflicting policy considerations have made courts hesitant to pierce the corporate veil. On one hand, there is the strong policy of allowing limited liability for shareholders in order to promote capital growth and investment. On the other hand, there is the competing interest of serving justice in a particular situation where upholding the theory of limited liability would be inequitable.

Id. (footnotes omitted).

37. *Id.*

38. John F. Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 KAN. L. REV. 185, 186-88 (1971). Dobbyn provides a useful framework for analyzing situations to determine whether piercing the corporate veil is necessary. The main concept is a two-level analysis, focusing upon the relationship between the shareholder and the plaintiff, and also focusing upon the relationship between the shareholder and the corporation. *Id.*

39. *Id.*

describe the same relationship between the corporation and its shareholders.[40] Although these terms are interchangeable and the underlying theories contain fine shades of distinction among them, the theories have the same basic aim: to expand the inquiry to include the relationship between the corporation and its shareholder.[41]

Two main concepts underlie these theories: identity and control.[42] The identity theories are premised upon a unity of interest between the corporation and its shareholder.[43] The most popular identity theory is known as the "alter ego" rule.[44] The elements of the alter ego rule are: (1) unity of interest to the degree that the separateness of the corporation from the shareholder ceases, and (2) allowing separateness to continue would promote fraud or injustice.[45]

To find an alter ego, courts examine various factors, including the shareholder transacting business for himself in the name of the corporation, participation on the board of directors, right to corporate property, claiming personal ownership of corporate property donated by the shareholder, and unfettered control of corporate property.[46] Critics have argued that some factors used in the alter ego rule have no relevance to the injury of the plaintiff.[47] For example, failure to issue stock, use of the same business office and same attorney, and disregard of legal formalities tend to show a lack of corporate individuality; nevertheless, they usually do not have an impact upon the injury sustained by the plaintiff.[48] These factors are not an exact science, and they tend to overlap with the control theories.

40. One particularly troubling term is *agency*. Under the agency theory, agency principles are applied to hold the principal (i.e. individual or corporate shareholder) liable for the acts of its agent (i.e. small corporation or subsidiary). The problem with this theory, note some commentators, is the corporation can almost always be found to be the agent of the shareholder. Speer, *supra* note 37, at 314. Therefore, shareholders would constantly lose their protection, and the policy supporting limited liability would be contradicted. *Id.*; *see* POWELL, *supra* note 1, § 22, at 94; Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 271-72 (D. Del. 1989); *see also* CCMS Pub. Co. v. Dooley-Maloof, Inc., 645 F.2d 33, 37 (10th Cir. 1981) (owner-shareholders were agents of corporation and owed it a duty of not acting in conflict with corporation).

41. For a concise discussion of different theories employed by courts, see Speer, *supra* note 36, at 313-23.

42. *See* Dobbyn, *supra* note 38, at 186-87.

43. *Id.* at 186.

44. Another theory which is very similar to the alter ego rule is termed the identity rule. 18 AM. JUR. 2D *Corporations* § 56 (1985). Courts have also equated the terms *alter ego* and *business conduit* in their application of the rule. Warner Bros. Theatres, Inc. v. Cooper Foundation, 189 F.2d 825, 830 (10th Cir. 1951).

45. Marr v. Postal Union Life Ins. Co., 105 P.2d 649, 654 (1940).

46. *Id.* at 831.

47. Dobbyn, *supra* note 38, at 188.

48. *Id.*

The "instrumentality"[49] theory, one of the most widely recognized theories, centers around the element of shareholder control.[50] Once again, courts swap terms, making it unclear as to which theory they are employing. Under the instrumentality theory, courts look for control, not merely in the sense of stock ownership,[51] but in complete domination[52] over the corporation. As with the alter ego rule, courts use several factors to determine evidence of this requisite control needed to find an "instrumentality." These factors, while often stated in terms of a parent-subsidiary relationship, also apply to the other types of corporations such as close corporations. -

Typical factors courts employ when applying the instrumentality theory, either in their totality or in some mystical combination, include whether: (1) the parent owns most or all of the stock of the subsidiary; (2) the parent and subsidiary have common directors; (3) the parent finances the subsidiary; (4) the parent subscribes to the stock of the subsidiary or otherwise causes its incorporation; (5) the subsidiary is severely undercapitalized; (6) the parent pays the salaries and other expenses of the subsidiary; (7) the subsidiary conducts business with no one other than its parent, and its only assets were conveyed to it by its parent; (8) the parent describes the subsidiary as a department or division; (9) the parent uses the property of the subsidiary as its own; (10) the directors and officers of the subsidiary take their orders directly from the parent with only the parent's interest in mind; and (11) legal formalities are not observed.[53]

The adoption of different theories in each jurisdiction has resulted in a doctrine which combines equitable considerations with a set of additional factors derived from one of the enumerated theories. In other words, courts examine the plaintiff's relationship with the shareholder as

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49. "Use of the term 'instrumentality' is unfortunate because all corporations are in one sense 'instrumentalities' of their stockholders." KEATING & O'GRADNEY, *supra* note 1, § 43.10, at 759.

50. Dobbyn, *supra* note 38, at 186; Speer, *supra* note 36, at 315; National Bond Finance Co. v. General Motors Corp., 238 F. Supp. 248, 255 (W.D. Mo. 1964), *aff'd*, 341 F.2d 1022 (8th Cir. 1965).

51. If courts only looked for evidence of control in stock ownership, all sole-shareholder and other close corporations would automatically become instrumentalities. However, courts usually apply the instrumentality theory to both parent-subsidiary arrangements and individual owners. *See* Messick v. Moring, 514 So. 2d 892, 894 (Ala. 1987) (another corporation or individual may be dominating party).

52. "[A]n analysis of domination may be properly limited to control over the *particular transaction attacked*." KEATING & O'GRADNEY, *supra* note 1, § 43, at 732 (emphasis added).

53. *See* POWELL, *supra* note 1, § 6.

well as the shareholder's relationship with the corporation.[54] For example, a jurisdiction might examine the requisite elements of (1) instrumentality, through control or complete domination; (2) use of control for fraud or other improper purposes; and 3) proximate cause, in considering whether or not to pierce the corporate veil.[55]

III. Analysis of the Oklahoma Doctrine

A. *Oklahoma's General Policy*

Oklahoma has long recognized the doctrine of limited liability of shareholders of corporations[56] as well as the doctrine of piercing the corporate veil.[57] When Oklahoma courts pierce the corporate veil, it is not a total and permanent disregard for the corporate entity; rather, it is a disregard for a limited purpose, namely to redress the injured plaintiff.[58] In applying Oklahoma's standards, piercing the corporate veil involves questions of fact such as whether a corporation is an instrumentality[59] and/or the determination of fraud or injustice.[60] Oklahoma also follows the general policy that the corporate entity will not be disregarded for the benefit, either substantive[61] or procedural,[62] of a shareholder.[63] However, there are instances where Oklahoma will "quasi-pierce" the corporate veil for the purpose of giving the injured plaintiff personal

54. Dobbyn, *supra* note 38, at 187.

55. *See* National Bond Finance Co. v. General Motors Corp., 238 F. Supp. 248, 255 (W.D. Mo. 1964); Scott v. AZL Resources, Inc., 753 P.2d 897, 900 (N.M. 1988). Unlike Oklahoma, some jurisdictions have embodied the veil-pericing concept into their corporate statutory framework. *See, e.g.*, TEX. BUS. CORP. ACT ANN. art. 2.21, § A(2)-(3) (West Supp. 1993).

56. Sautbine v. Keller, 423 P.2d 447, 451 (Okla. 1967); Buckner v. Dillard, 89 P.2d 326, 329 (Okla. 1939); Garrett v. Downing, 90 P.2d 636, 638 (Okla. 1939); Hearn v. Petra Int'l Corp., 710 P.2d 769, 770 (Okla. Ct. App. 1985). *See generally* Oklahoma General Corp. Act, OKLA. STAT. tit. 18, § 1001 et. seq. (1991).

57. Robertson v. Roy L. Morgan, Prod. Co., 411 F.2d 1041 (10th Cir. 1969); *Buckner*, 80 P.2d at 329.

"The privilege of doing business in corporate form is granted by statute. This privilege carries many benefits including the limits on personal liability to the stockholders [sic] investment. One cannot simultaneously claim the benefits of corporate form and escape the liabilities of that insulation." Mainford v. Sharp, 569 P.2d 546, 548 (Okla. Ct. App. 1977).

58. *Mainford*, 569 P.2d at 548 n.2.

59. Edgar v. Fred Jones Lincoln-Mercury of Okla. City, 524 F.2d 162, 166 (10th Cir. 1975).

60. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1379 (10th Cir. 1980); *Edgar*, 524 F.2d at 166.

61. Love v. Flour Mills of America, 647 F.2d 1058, 1061-62 (10th Cir. 1981) (worker's compensation case where defendant/parent attempted to disregard its separateness from its subsidiary in order to gain immunity from tort claims); DeBoer Const., Inc. v. Reliance Ins. Co., 540 F.2d 486, 496 (10th Cir. 1976) (plaintiff/shareholder trying to disregard separateness of its affiliate corporation in order to recover affiliate's damages).

62. *Mainford*, 569 P.2d at 548 (plaintiff/shareholder attempted to pierce corporate veil so that it could maintain action as real party in interest against defendant/customer for monies due).

63. However, Oklahoma has pierced the corporate veil of a plaintiff corporation, on its own

jurisdiction over all of the defendants.[64]

B. *Oklahoma's Adoption of the Doctrine*

Oklahoma initially applied the doctrine of piercing the corporate veil by solely relying upon equitable considerations. The Supreme Court of Oklahoma first recognized the doctrine in *Bluejacket State Bank v. First National Bank of Bluejacket*.[65] The court stated that "[w]henever necessary for the *interests of the public* . . . courts will disregard this legal fiction. . . ."[66] The Court of Appeals for the Tenth Circuit, in applying Oklahoma law, specifically recognized Oklahoma's doctrine in *Dunnett v. Arn*.[67] In *Dunnett*, the court articulated the justifications that would be used thereafter in piercing the corporate veil: "the [c]orporate entity may be disregarded where not to do so will *defeat public convenience, justify wrong, protect fraud, or defend crime.*"[68]

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initiative, to the detriment of the plaintiff. *See* Oklahoma Retail Grocers Assoc. v. Wal-Mart Stores, Inc., 605 F.2d 1155, 1158-59 (10th Cir. 1979) (court applying clean-hands doctrine to plaintiff corporation where its shareholders were guilty of same acts charged against defendant).

64. *See* Home-Stake Prod. Co. v. Talon Petroleum, C.A., 907 F.2d 1012, 1017-18 (10th Cir. 1990) (court considered relationship of shareholder and corporation and validity of separateness in granting personal jurisdiction over foreign shareholder/defendant); Rea v. An-Son Corp., 79 F.R.D. 25, 29-31 (W.D. Okla. 1978) (court applied same factors as those used to determine "instrumentality," or relationship between shareholder and corporation, in granting personal jurisdiction over a foreign subsidiary where parent's acts, doing business in Oklahoma, were imputed to foreign subsidiary). *But see* Glenny v. American Metal Climax, Inc., 494 F.2d 651, 655 (10th Cir. 1974) (court refused to pierce corporate veil for plaintiffs for sole reason of satisfying diversity requirement for federal court jurisdiction); KEATING & O'GRADNEY, *supra* note 1, § 41.90, at 715.

65. 9 P.2d 2 (Okla. 1932).

66. *Id.* at 4 (citation omitted) (emphasis added). A vague recognition of the equitable considerations was also stated by the Court of Appeals for the Tenth Circuit one year earlier in Maloney Tank Manuf. Co. v. Mid-Continent Petroleum, 49 F.2d 146 (10th Cir. 1931). The court of appeals stated that "[t]he doctrine of corporate entity may be disregarded if it is apparent that a wrongdoer is undertaking to use it to play hide and seek with an injured party." *Id.* at 150.

67. 71 F.2d 912 (10th Cir. 1934).

68. *Id.* at 918 (emphasis added). Note: the *Dunnett* court incorrectly cites *Maloney Tank Manuf. Co.* on this proposition. *E.g.,* Robertson v. Roy L. Morgan, Prod. Co., 411 F.2d 1041, 1043 (10th Cir. 1969); Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940) (applying Colorado law); Palmer v. Stokely, 255 F. Supp. 674, 681 (W.D. Okla. 1978); Buckner v. Dillard, 89 P.2d 326, 329 (Okla. 1939); *In re* Estate of Rahill, 827 P.2d 896, 897 (Okla. Ct. App. 1991).

Many cases subsequent to *Dunnett* state the same idea in a slightly different fashion. *See* Key v. Liquid Energy Corp., 906 F.2d 500, 504 (10th Cir. 1990) ("detrimental to the public good, justifies wrong, or protects fraud"); *In re* Gulfco Inv. Corp., 593 F.2d 921, 928 (10th Cir. 1979) ("fraud or injustice"); Edgar v. Fred Jones Lincoln-Mercury of Okla. City, Inc., 524 F.2d 162, 166 (10th Cir. 1975) ("fraud or illegal or inequitable conduct"); *Robertson,* 411 F.2d at 1043 ("defeat public convenience, . . . justify wrong . . . to perpetrate fraud whether actual or implied, or . . . to defend crime"); Selected Invs. Corp. v. Duncan, 260 F.2d 918, 920 (10th Cir. 1958) ("prevent fraud, injustice, or wrong"); Warner Bros. Theatres, Inc. v. Cooper Foundation, 189 F.2d 825, 830 (10th Cir. 1951) ("bring about a fraud upon third parties"); Continental Oil v. Jones, 113 F.2d 557, 562 (10th Cir. 1940) ("work fraud or injustice"); Stoltz, Wagner & Brown v. Cimarron Exploration Co., 564 F. Supp. 840, 853 (W.D. Okla. 1981) ("do wrong, perpetrate fraud, or commit a crime"); Rea v. An-Son Corp., 79 F.R.D. 25, 29 (W.D. Okla. 1978) ("promote fraud or illegality or injustice"); Miller & Miller Auctioneers, Inc. v. Mersch, 442 F. Supp. 570, 577 (W.D. Okla. 1977) ("fraud and illegal

Due to Oklahoma's initial reliance on equitable concepts, the doctrine was vague. This pervasive ambiguity is illustrated in *Sautbine v. Keller*,[69] where the plaintiffs claimed that the defendants and their wholly owned "family" corporation were one and the same and, therefore, the corporate veil should be pierced.[70] The plaintiffs argued that application of the doctrine should be expanded beyond the situation of doing wrong, perpetrating a fraud, or committing a crime,[71] and urged the doctrine should also apply in cases where it is necessary to "protect rights of third persons and accomplish justice."[72]

The court did not find the plaintiffs' claim persuasive based on the evidence they presented but, by implication, the court stated that the veil could be pierced without a showing of fraud.[73] In other words, the corporate entity could be disregarded merely to protect third party rights and accomplish justice. However, it appears that the court would only do so where the relationship between the shareholder and the corporation was close enough to be practically identical or controlling. It is not clear what the court's requirements were to successfully prove these general equitable standards, although the court did state that the plaintiffs' allegedly injured rights must be vested.[74] The court was apparently trying to weed out speculative claims by equating the protection of a vested right with the protection of third party rights and the accomplishment of justice.

C. *Evolution of the Doctrine in Oklahoma*

The equitable standards that developed during the first half of this century proved to be inadequate. Courts could not uniformly apply these ambiguous standards to each type of case and obtain consistent and fair results.[75] Therefore, courts applying Oklahoma law adopted the instrumentality theory to help clarify and bolster the doctrine.

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action and in the interest of justice and to do equity"); Tulsa Tribune Co. v. Oklahoma Tax Comm'n, 768 P.2d 891, 892 (Okla. 1989) ("fraud or injustice"); Mid-Continent Life Ins. Co. v. Goforth, 143 P.2d 154, 157 (Okla. 1943) ("Both law and equity, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard the distinct existence and treat them as identical"); Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 61 P.2d 645, 648 (Okla. 1936) ("design or scheme to perpetrate a fraud"); Mainford v. Sharp, 569 P.2d 546, 548 (Okla. Ct. App. 1977) ("defeat public interests by protecting fraud, defending crime, or perpetration of other wrong").

69. 423 P.2d 447 (Okla. 1967).
70. *Id.* at 450.
71. *Id.* at 451.
72. *Id.*
73. *Id.* at 453.
74. *Id.*
75. *See generally* Dobbyn, *supra* note 38.

1. The Instrumentality Theory

The Supreme Court of Oklahoma first recognized the instrumentality theory with equitable considerations[76] in *Wallace v. Tulsa Yellow Cab Taxi & Baggage*.[77] The court stated where "the separate corporate existence is a design or scheme to perpetrate a fraud, *or* . . . that one corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality or adjunct of another corporation" the corporate veil would be pierced.[78] The concept underlying the instrumentality theory is control, and although other courts in other cases have varied the language in their opinions, the concept and the objectives remain the same.[79] In applying the instrumentality theory, courts consider several

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76. It appears that Oklahoma has wavered back and forth among theories in the past. For example, in *Warner Bros. Theatres* the court applied the alter ego rule and accompanying factors to the defendant corporation. Also, courts are constantly interchanging terms. *E.g.*, *In re* Estate of Rahill, 827 P.2d 896, 898 (Okla. Ct. App. 1991) (the court discusses domination and control to find an *alter ego* in the same sentence). However, it is clear today that in Oklahoma the instrumentality theory is consistently used.

77. 61 P.2d 645 (Okla. 1936). The first hint at the concept of control, which underlies the instrumentality theory, was gleaned from the court in St. Louis & S.F.R. Co. v. Sanford, 153 P. 650 (Okla. 1915). The Supreme Court of Oklahoma stated that one company does not automatically become liable for the negligence of another by mere reason of stock ownership. *Id.* However, where one company also *controls* the other company in its daily operations and treats itself and the other company as one, then the corporate entity may be disregarded. *Id.* (emphasis added).

78. *Wallace*, 61 P.2d at 648 (emphasis added). In *Wallace*, the plaintiff sustained personal injuries after she was run over by a cab. *Id.* at 646. She sued the cab company only to find out that it had no assets; rather, it was owned and controlled by another cab company. *Id.* The court pierced the veil to allow her to proceed on her tort claim against the second corporation. *Id.* at 649. In determining that the corporation was an instrumentality, the court examined several factors very similar to the *Fish* factors. *See infra* part III.C.2 (discussing *Fish* factors). For example, the court ascertained the identity of the stockholders, directors, employees, and corporate property to determine who was in control. *Id.* at 647.

The instrumentality theory with equitable considerations stated in *Wallace* has been consistently used by both the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit. *See* Edgar v. Fred Jones Lincoln-Mercury of Okla. City, Inc., 524 F.2d 162, 166 (10th Cir. 1975); Frazier v. Bryan Memorial Hosp. Auth., 775 P.2d 281, 288 (Okla. 1989); Tara Petroleum Corp. v. Hughey, 630 P.2d 1269, 1275 (Okla. 1981); Gulf Oil Corp. v. State, 360 P.2d 933 (Okla. 1961); Gibson Products Co. v. Murphy, 100 P.2d 453, 458 (Okla. 1940).

79. For cases that have a slight variation on the *Wallace* rule, see *In re* Gulfco Inv. Corp., 593 F.2d 921, 928 (10th Cir. 1979) ("mere instrumentality or alter ego of the bankrupt corporation, with no independent existence of its own"); Continental Oil Co. v. Jones, 113 F.2d 557, 562 (10th Cir. 1940) ("dominating and controlling it [the corporation] in such manner and to such extent that it becomes the mere agency or instrumentality of the parent"); *In re* Sooner Oil & Gas, 24 B.R. 479, 483 (W.D. Okla. 1982) ("one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct, or alter ego of another corporation"); Stoltz, Wagner & Brown v. Cimarron Exploration Co., 564 F. Supp. 840, 853 (W.D. Okla. 1981) (court says it's applying alter ego theory but cites cases that apply instrumentality rule); Rea v. An-Son Corp., 79 F.R.D. 25, 29 (W.D. Okla. 1978) ("one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct, or alter ego of another corporation"); Tulsa Tribune Co. v. Oklahoma Tax Comm'n, 768 P.2d 891, 892 (Okla. 1989) ("subsidiary or affiliate companies function entirely as instrumentalities or adjuncts of the parent"); *In re* Estate of Rahill, 827 P.2d 896, 898 (Okla. Ct. App. 1991) ("so dominated the corporation as to be liable for its acts as an alter ego").

factors. Unfortunately, many times the court does not actually state whether these factors are directly related to a determination of instrumentality,[80] or if they are equitable considerations,[81] or both.[82]

2. The *Fish v. East* Factors

Courts applying Oklahoma law in piercing the corporate veil have consistently applied factors enumerated in *Fish v. East.*[83] The factors that the Court of Appeals for the Tenth Circuit used in *Fish*, as adopted by the Supreme Court of Oklahoma, were:

> (1) The parent corporation owns all or a majority of the capital stock of the subsidiary. (2) The parent and subsidiary corporations have common directors or officers. (3) The parent corporation finances the subsidiary. (4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation. (5) The subsidiary has grossly inadequate capital. (6) The parent corporation pays the salaries or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.[84]

While Oklahoma courts do not decide cases on certain combinations

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80. *See* Harry D. Chambers, Note, *Piercing the Corporate Veil in New Mexico:* Scott v. AZL Resources, Inc., 21 N.M. L. REV. 429, 433-38 (1991). "Instrumentality has been recognized as the most difficult element of the equitable remedy of piercing the corporate veil." *Id.* at 433.

81. *Id.* at 433-38.

82. *See* CCMS Pub. Co. v. Dooley-Maloof, Inc., 645 F.2d 33, 37 (10th Cir. 1981); Oklahoma Retail Grocers Assocs. v. Wal-Mart Stores, 605 F.2d 1155, 1157-59 (10th Cir. 1979); Robertson v. Roy L. Morgan, Prod. Co., 411 F.2d 1041 (10th Cir. 1969); Selected Invs. Corp. v. Duncan, 260 F.2d 918, 920-21 (10th Cir. 1958); *In re* Estate of Rahill, 827 P.2d 896, 897-98 (Okla. Ct. App. 1991); Hearn v. Petra Int'l Corp., 710 P.2d 769, 770-71 (Okla. Ct. App. 1985).

83. 114 F.2d 177 (10th Cir. 1940). *Fish* involved a bankrupt parent corporation which diverted assets to its subsidiary in an attempt to hinder and delay creditors. The Oklahoma Supreme Court expressly adopted *Fish* in Frazier v. Bryan Memorial Hosp. Auth., 775 P.2d 281, 288 (Okla. 1989).

For federal cases that apply the *Fish* factors, see, for example, Key v. Liquid Energy Corp., 906 F.2d 500, 503 (10th Cir. 1990); Home-Stake Prod. Co. v. Talon Petroleum, C.A., 907 F.2d 1012, 1018 (10th Cir. 1990); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1378 (10th Cir. 1980); Gulfco Inv. Corp. v. Hogan, 593 F.2d 921, 928 (10th Cir. 1979); *In re* Tureaud, 45 B.R. 658, 662 (N.D. Okla. 1985); Palmer v. Stokely, 255 F. Supp. 674 (W.D. Okla. 1966).

It is important to note that courts in several Oklahoma cases have not cited *Fish*, but they have nevertheless implicitly used one or more factors from the exhaustive list in justifying piercing the veil. These cases typically cite the more vague rule in Wallace v. Tulsa Yellow Cab Taxi & Baggage, 61 P.2d 645 (Okla. 1936). The ultimate objectives of both the *Fish* rule and the *Wallace* rule, however, appear to be the same.

84. *Fish*, 114 F.2d at 191.

of factors with regularity, courts have stated which factors will not, by themselves, constitute an instrumentality. For example, stock ownership, even one hundred percent, is not enough to deem a corporation an instrumentality.[85] In addition, in the case of parent-subsidiary arrangements and affiliated corporations, the commonality of directors and officers of the two or more entities is not, alone, enough to create an instrumentality.[86] On the other hand, courts will take a close look at the capitalization of a corporation; if the corporation is intentionally undercapitalized, personal liability is likely to be imposed.[87]

The reason for some of these policies is obvious. In the case of a small corporation, almost invariably the stockholder(s) own all the stock and are directors, officers, and employees. In the case of a parent-subsidiary arrangement, many times there will be common directors, officers, and employees. Therefore, these corporations would always be deemed instrumentalities in the absence of such rules. It can also be readily seen that a shareholder, whether it be an individual or another corporation, who inadequately capitalizes a corporation is creating a grossly unfair situation for an injured plaintiff who had no knowledge of the value of the company but relied upon an assumption that he or she was dealing with a legitimate entity.[88]

D. *The Current Oklahoma Doctrine: The Piercing Rule*

The equitable considerations and the instrumentality theory are the

85. *Key*, 906 F.2d at 504; Edgar v. Fred Jones Lincoln-Mercury of Okla. City, Inc., 524 F.2d 162, 166 (10th Cir. 1975); Robertson v. Roy L. Morgan, Prod. Co., 411 F.2d 1041, 1043 (10th Cir. 1969); Continental Oil Co. v. Jones, 113 F.2d 557, 562 (10th Cir. 1940); Taylor v. Standard Gas & Electric Co., 96 F.2d 693, 705 (10th Cir. 1938); Rea v. An-Son Corp., 79 F.R.D. 25, 29 (W.D. Okla. 1978); St. Louis & S.F.R. Co. v. Sanford, 153 P. 650, 653 (Okla. 1915).

However, Oklahoma courts have pierced the veil where sole ownership (instrumentality factor) was coupled with a wrongful purpose (equitable consideration). Although other factors are also technically satisfied such as same owner, director, officer, and employee, this will usually be the case where a corporation is closely held. *Compare* Stoltz, Wagner & Brown v. Cimarron Exploration Co., 564 F. Supp. 840, 853-54 (W.D. Okla. 1981) (court found sole owner who was also sole officer, director, and employee liable where he had wrongfully diverted funds) *with* Robertson v. Roy L. Morgan, Prod. Co., 411 F.2d 1041, 1043 (10th Cir. 1969) (court found sole owner of corporation not liable where he did no wrong).

86. *Key*, 906 F.2d at 504; *Taylor*, 96 F.2d at 705; *Rea*, 79 F.R.D. at 29; Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 61 P.2d 645, 648 (Okla. 1936).

87. *See Wallace*, 61 P.2d at 647. Other jurisdictions agree with this, including the Tenth Circuit. Undercapitalization may also imply improper or wrongful purpose; *see also* Chambers, *supra* note 80, at 436-37. But, some jurisdictions will not use this against the corporation if the plaintiff was not injured by the corporation's undercapitalization. Hanson v. Bradley, 10 N.E.2d 259, 264 (Mass. 1937).

88. One can see, from this example, the persistent overlap of the instrumentality theory with equitable considerations: an instrumentality factor, undercapitalization, equated with an equitable consideration, gross unfairness.

components comprising the current Oklahoma doctrine, the "piercing" rule.[89] The first component examines whether there is control amounting to complete domination not only of finances, but also of business policy and operations.[90] The second component examines whether the corporation was used for an improper purpose[91] or to commit fraud or other wrong.[92]

Oklahoma conducts this two-part test on a case-by-case basis.[93] First, the court focuses upon the relationship between the shareholder and the corporation[94] and tries to determine whether the corporation is a mere instrumentality of the shareholder, applying at least one of the *Fish* factors.[95] Next, the court analyzes the relationship between the plaintiff and the corporation.[96] When focusing upon this relationship, the court looks for evidence of fraud, unfairness, other wrong, or the need to protect a vested right in the plaintiff.[97] These are equitable considerations. The application of the two-part test is illustrated in *Key v. Liquid Energy Corp.*[98] In considering whether to pierce the corporate veil of the subsidiary to reach the parent corporation, the court first determined whether the subsidiary was an instrumentality of the parent.[99] The court affirmed that *Fish v. East* was the rule used by the Tenth Circuit in applying Oklahoma law and was consistent with Oklahoma Supreme Court decisions as well.[100] The plaintiffs could not produce evidence to show any

89. Identification of the two components involves questions of fact. *See* Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1379 (10th Cir. 1980); Edgar v. Fred Jones Lincoln-Mercury of Okla. City, Inc., 524 F.2d 162, 166 (10th Cir. 1975); Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940).

90. This is the instrumentality theory. *See supra* part III.C.

91. These are the equitable considerations. *See supra* part III.B.

92. National Bond Finance Co. v. General Motors Corp., 238 F. Supp. 248, 253 (W.D. Mo. 1964), *aff'd*, 341 F.2d 1022 (8th Cir. 1965).

93. *See generally* Dobbyn, *supra* note 38.

94. For example, the corporation (of the shareholder) is an instrumentality, alter ego, adjunct, etc. While the courts loosely use these terms, the court is looking for evidence of control, or of unity of interest by virtue of control.

95. The *Fish* factors are used whether the shareholder is an individual or another corporation although the courts are usually not very clear about application of the instrumentality theory to individual shareholders.

96. *See generally* Dobbyn, *supra* note 38.

97. Fraud does not always have to be proven. If an instrumentality can be shown, the application of the equitable standards may only require a showing of a need for equity to protect the rights of third persons and accomplish justice. *See* Sautbine v. Keller, 423 P.2d 447, 452 (Okla. 1967) (by implication); Mid-Continent Life Ins. Co. v. Goforth, 143 P.2d 154, 157 (Okla. 1943) (no fraud shown).

98. 906 F.2d 500 (10th Cir. 1990). In *Key*, the plaintiffs were employees who were negligently injured by their employer, Liquid Energy, which was a subsidiary. *Id.* at 502. The plaintiffs sought to hold the parent liable for the negligence of its subsidiary by piercing the corporate veil of the subsidiary. *Id.*

99. *Id.* at 503.

100. *Id.*

factors beyond stock ownership and commonality of directors, and this was not enough to prove an instrumentality.[101] Finding also that the plaintiffs could offer no evidence showing detriment to the public good, fraud, or other wrong, the court refused to pierce the veil.[102]

IV. OKLAHOMA SCENARIOS

Four major types of veil-piercing scenarios have arisen in Oklahoma: (1) the third party plaintiff versus the closely-held corporation in a contract or tort action, including a sole owner, a family corporation, and affiliated corporations commonly owned by a few or a single individual; (2) the third party plaintiff versus the parent-subsidiary arrangement in a contract or tort action; (3) a corporation in bankruptcy; and (4) a corporation attempting to escape tax liability.

A. *Close Corporations*

In Oklahoma, the most prevalent type of piercing involves the close corporation. Oklahoma clearly grants limited liability to this type of corporation without regard to its number of shareholders.[103] Typically, in the context of a close corporation Oklahoma pierces the veil because owner(s) are either freely commingling assets[104] or avoiding debt by using the corporation as a shield.[105] Oklahoma will pierce the veil where necessary, as illustrated in *Home-Stake Production Co. v. Talon Petroleum, C.A.*[106]

Home-Stake illustrates the application of the piercing rule, particularly the instrumentality theory, to an individual owner whose corporations were liable for several debts.[107] The court examined several factors

101. *Id.* at 504. The only evidence produced was a sign at the plant indicating that Liquid Energy was a subsidiary and a common mailing address for the parent and subsidiary. *Id.*

102. *Id.* The court stated that it would not decide whether both components must be met (instrumentality and equitable considerations); rather, the court stated it was not necessary to determine the necessity of proving both components in this case since the plaintiffs could satisfy neither test. *Id.* at 504 n.1.

103. *See, e.g.,* Sautbine v. Keller, 423 P.2d 447, 451 (Okla. 1967); Garrett v. Downing, 90 P.2d 636, 637-38 (Okla. 1939).

104. *See* Stoltz, Wagner & Brown v. Cimarron Exploration Co., 564 F. Supp. 840 (W.D. Okla. 1981).

105. *See* Mid-Continent Life Ins. Co. v. Goforth, 143 P.2d 154 (Okla. 1943).

106. 907 F.2d 1012 (10th Cir. 1990).

107. Although the individual owner, Tudela, was not actually held personally liable through the use of the piercing rule in this case, the court did pierce the veil for the purpose of gaining personal jurisdiction over Tudela. The court stated that a finding of instrumentality alone was enough to pierce the veil (i.e. impute the corporations' contacts with the state to their owner, Tudela). *Id.* at 1018 (quoting Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 903 (2d Cir. 1981)). The court stated, however, that it would be necessary to find *both* an instrumentality and a design or scheme to

to determine if these corporations were mere instrumentalities of the individual defendant.[108] Although the court did not elaborate upon the equitable considerations, it did mention that "a design or scheme to perpetrate a fraud" must also be shown.[109] Unfortunately, the court misstated the Oklahoma doctrine as it had previously been interpreted by the Oklahoma Supreme Court.[110] However, the *Home-Stake* rule is consistent with a recent Oklahoma Supreme Court decision.[111]

It is clear that in the situation of a close corporation, courts are more apt to focus on equitable considerations than the instrumentality theory. This is clearly illustrated in *Stoltz, Wagner & Brown v. Cimarron Exploration Co.*,[112] wherein the owner of a corporation wrongfully diverted funds received by it for personal gain.[113] In its analysis, the court merely glossed over the instrumentality theory[114] and stated that "if the corporate existence is used to do wrong, perpetrate fraud, or commit a crime . . . the individual shareholder may be held personally liable."[115] The court further stated that wrongfully diverting funds for personal gain satisfies this rule.[116] However, the only support the court gave for its rationale — alluding to *Fish* factors — was that such activity was wrong, and that the sole shareholder was also the sole officer, director, and employee of the corporation.[117] Nevertheless, *Stoltz* demonstrates that in the situation of a close corporation, courts tend to place more importance upon equitable considerations than they do the instrumentality theory. Perhaps, this is because courts believe that control by a sole shareholder practically implies instrumentality and, therefore, courts

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perpetrate a fraud to pierce the veil for the purpose of imposing personal liability on Tudela. *Id.* (emphasis added).

108. *Id.* While the court did not expressly use the *Fish* factors, it considered five factors which were similar to those used in *Fish*, and it cited *Fish. Id.*

109. *Id.*

110. The court in *Home-Stake* stated that both instrumentality *and* fraud must be shown to pierce the veil. *Id.* The court supported its statement by citing Hulme v. Springfield Life Ins. Co. (which cites Gulf Oil Corp. v. Oklahoma). In *Gulf Oil Corp.*, however, the court stated the two-component test with an *or*, not an *and*. Gulf Oil Corp. v. Oklahoma, 360 P.2d 933, 936 (Okla. 1961).

111. *See* Tulsa Tribune Co. v. Oklahoma Tax Comm'n, 768 P.2d 891, 892 (Okla. 1989) (*both* components of the piercing rule must be met).

112. 564 F. Supp. 840 (W.D. Okla. 1981). In *Stoltz, Wagner & Brown*, a corporation was formed by its sole owner for the purpose of entering into certain oil and gas agreements. *Id.* at 854. The corporation was supposed to forward funds in the amount of $225,000 from one party to another in connection with these agreements. *Id.* at 843.

113. *Id.* at 853.

114. Actually, the court termed it the alter ego theory.

115. *Stoltz, Wagner & Brown*, 564 F. Supp. at 853.

116. *Id.*

117. *Id.*

should expressly focus upon whether the plaintiff was wrongfully injured by the defendant.

B. *Parent-Subsidiary Arrangements*

Frequently, situations arise in Oklahoma wherein a third party, such as a customer or an employee, has been injured by the acts of a subsidiary. In these cases, the plaintiff will sometimes look toward the parent corporation to pay its judgment, particularly if the parent corporation set up the subsidiary with few assets available to pay a judgment.

In *Luckett v. Bethlehem Steel Corp.*,[118] for example, the plaintiffs sued both Bethlehem Singapore and its parent, Bethlehem Steel Corporation.[119] The plaintiffs argued that the subsidiary was merely an instrumentality of the parent, as evidenced by the management, technical services, and sales agreements between the two entities.[120] The plaintiffs further argued that these agreements indicated a "maximum degree of control" over the subsidiary.[121] In applying the instrumentality theory, the court acknowledged the legitimacy of the *Fish* factors and examined the evidence presented in light of these factors.[122] The evidence indicated that the parent indirectly owned seventy percent of the stock of the subsidiary and that the parent supplied ten managers to its subsidiary, many of whom were also employed by the parent.[123] Furthermore, the contracts and negotiations between the plaintiff's employer and the subsidiary were all carried on through the parent office, and the parent dominated the decision-making.[124] Even with this seemingly strong evidence against the defendant, the court found most of the *Fish* factors had not been met and, therefore, the subsidiary was not an instrumentality of the parent.[125]

The court next considered equitable justifications for piercing the veil, stating that it would disregard the corporate entity where fraud or inequitable conduct results from the use of corporate structures.[126] The plaintiffs argued that injustice would occur since a judgment would be

118. 618 F.2d 1373 (10th Cir. 1980).
119. The injured plaintiff was supervising the loading of drilling equipment onto a drilling rig when a crane cable snapped, seriously injuring him. *Id.* at 1376. The plaintiffs sued on a theory of negligence. *Id.*
120. *Id.* at 1377.
121. *Id.*
122. *Id.* at 1378.
123. *Id.*
124. *Id.*
125. *Id.* at 1378-79.
126. *Id.* at 1379.

difficult to enforce against the subsidiary, and the plaintiffs would have to sue the subsidiary in Singapore.[127] The court responded by stating that it had not found any evidence of fraud or inequitable conduct.[128] It did not believe the difficulty of enforcing a judgment or the inconvenience of maintaining a suit in a foreign country would amount to inequity to the plaintiff.[129]

C. *Bankruptcy Cases*

In a bankruptcy proceeding, it is sometimes necessary to disregard corporate entities for the benefit of creditors.[130] A typical case involves a corporation formed by an individual, or a subsidiary formed by a parent, for the sole purpose of raising funds and hindering and delaying creditors.[131] However, sometimes it is detrimental to the creditors of a corporation to have a court pierce the corporate veil.[132] At any rate, when a court decides to pierce the corporate veil in a bankruptcy proceeding, it consults state law.[133] Thus, Oklahoma's piercing rule is used in the appropriate situations.[134]

In bankruptcy situations, courts applying Oklahoma law have consistently followed Oklahoma's piercing rule, using the same instrumentality factors as those used in *Fish*.[135] In applying the equitable

127. *Id.* at 1378.
128. *Id.* at 1379.
129. *Id.* The court applied the two-component test, but it did not explain which component might have been more important. The court merely looked at the applicability of the two components to the facts and concluded that the parent could not be liable on the theory that its subsidiary was its instrumentality. *Id.* This illustrates the lack of precision inherent in court opinions which leaves a trail of confusion for plaintiffs and corporate counsel.
130. *See, e.g.,* Selected Invs. Corp. v. Duncan, 260 F.2d 918 (10th Cir. 1958) (injustice to investor creditors if veil not pierced between corporation and its trust fund in a reorganization plan where funds siphoned out of trust for personal use of corporate owners); *In re* Sooner Oil & Gas Corp., 24 B.R. 479 (Bankr. W.D. Okla. 1982) (injustice to creditor if veil not pierced where defendant would defeat security interest with creditor, having assigned collateral to another corporation solely owned by him); *see also* Fish v. East, 114 F.2d 177 (10th Cir. 1940); *In re* Tureaud, 45 B.R. 658 (Bankr. N.D. Okla. 1985).
131. *In re* Tureaud, 45 B.R. 658 (Bankr. N.D. Okla. 1985) (individual organized affiliates); *Fish,* 114 F.2d 177 (parent formed subsidiary). For an example of another type of situation, see *In re* Fitzgerald, De Arman & Roberts, Inc., 129 B.R. 652 (Bankr. N.D. Okla. 1991).
132. *See, e.g., In re* Gulfco Inv. Corp., 593 F.2d 921 (10th Cir. 1979) (injustice to creditors if corporate entities disregarded as result of increased competition of claims against estate).
133. *Selected Invs. Corp.,* 260 F.2d at 920.
134. It is important to note that a bankruptcy court does not automatically obtain jurisdiction over a subsidiary's assets in an attempt to enlarge the parent debtor's estate. The court has jurisdiction over the parent's assets, including its stock in the subsidiary. However, the court does obtain the requisite jurisdiction over the subsidiary's assets once it has pierced the corporate veil under state law. *See In re* Tonkawa Refining Co., 502 F.2d 1341, 1343 (10th Cir. 1974).
135. *See, e.g., In re* Gulfco Inv. Corp., 593 F.2d at 928-29; *Selected Invs. Corp.,* 260 F.2d at 921; *Fish* 114 F.2d at 191.

considerations in a consolidation proceeding, courts consider injustice that could result to creditors if a consolidation were ordered in a reorganization plan.[136] In other words, courts weigh the equities to see if ordering a consolidation of entities would do more harm to the creditors than allowing the corporate entity to remain separate, keeping potential assets out of creditors' reach.[137] Thus, it appears the equitable justifications, here, are modified since the court is weighing the harm resulting from the defendant's actions against the harm resulting from the court's actions to consolidate.

D. *Tax Cases*

"Taxes cannot be escaped 'by anticipatory arrangements and contracts however skillfully devised . . . by which the fruits are attributed to a different tree from that on which they grew.' "[138] Piercing the corporate veil has been a useful tool for collecting tax revenues due in Oklahoma cases. This has proven true whether the taxes involved are Oklahoma franchise taxes,[139] Oklahoma unemployment taxes,[140] excise taxes,[141] or federal income taxes.[142]

Once again, in applying the piercing rule, courts apply Oklahoma law,[143] including the instrumentality theory and the equitable considerations. For example, in *Continental Oil Co. v. Jones,*[144] the court acknowledged the limited liability rule in relation to tax matters as well the doctrine of piercing the corporate veil.[145] The court recognized the instrumentality theory and the equitable considerations, and it proceeded to apply numerous factors similar to those enumerated in *Fish.*[146] In

136. A bankruptcy court may, under 11 U.S.C. § 105(a), consolidate corporations when assets and liabilities are treated as owned and incurred by one entity. When a court consolidates two or more entities, it disregards the corporate entity under state-law principles. *See, e.g., In re* Gulfco Inv. Corp., 593 F.2d 921, 923 (10th Cir. 1979); *In re* Tureaud, 45 B.R. 658 (Bankr. N.D. Okla. 1985); *see also In re* Moran Pipe & Supply Co., Inc., 130 B.R. 588 (Bankr. E.D. Okla. 1991).

137. *Compare In re* Tureaud, 45 B.R. at 663 (court found prejudice to creditors far outweighed by greater potential prejudice if consolidation not ordered) *with In re* Gulfco Inv. Corp., 593 F.2d at 928-30 (reluctance to consolidate for fear of creating unfair situation for creditors who dealt with debtor not knowing of relationship with others, versus general equitable principle that a parent cannot dominate a subsidiary to escape liability to its creditors).

138. Continental Oil Co. v. Jones, 113 F.2d 557, 563 (10th Cir. 1940) (citation omitted).

139. Tulsa Tribune Co. v. Oklahoma Tax Comm'n, 768 P.2d 891 (Okla. 1989).

140. Gibson Products Co. v. Murphy, 100 P.2d 453, 455 (Okla. 1940).

141. *Continental Oil Co.,* 113 F.2d at 558.

142. Dolese v. United States, 605 F.2d 1146, 1148 (10th Cir. 1979).

143. *See, e.g., Tulsa Tribune Co.,* 768 P.2d at 894 (court referred to piercing rule used in an earlier decision not involving tax issues).

144. 113 F.2d 557 (10th Cir. 1940).

145. *Id.* at 561-62. In *Continental Oil Co.,* the parent was transferring most of its inventory, subject to federal excise taxes, to its subsidiaries who were not subject to the tax. *Id.* at 558-59.

146. *Id.* at 562.

stating the instrumentality theory, the court referred to stock ownership in that ownership alone in a normal manner would not trigger the rule; however, ownership used "for the purpose of dominating and controlling it [the subsidiary] in such a manner . . . that it becomes the mere . . . instrumentality of the parent" would fulfill the requirements of the instrumentality theory.[147] In recognizing the equitable justifications, the court made it clear that fraud or illegality were not necessary to invoke the rule; a showing that the configuration or transaction was done in consideration of tax consequences was all that was required.[148]

Similarly, in federal income tax cases the doctrine of limited liability, even in the case of a single shareholder, and the contrasting doctrine of piercing the corporate veil have been acknowledged in cases such as *Dolese v. United States*.[149] In *Dolese*, the taxpayer was the sole owner of a corporation that was paying his personal expenses.[150] The court impliedly applied the instrumentality theory, focusing on the issue of corporate formalities, stating that "gross abuse of the formal distinction . . . by ignoring formalities and commingling personal and corporate funds, will require allocation of income and taxation as if there were no corporation."[151] The court applied the equitable considerations by implication: "[i]f a sole owner could have his living expenses paid by the corporation as a loan, using his *control* of the entity to postpone repayment indefinitely, a *loophole* would be created."[152] Courts, then, loosely apply the equitable considerations since it is not difficult to show that the defendant was considering tax consequences or creating a loophole. Tax cases, therefore, appear to recognize an easier standard for piercing the corporate veil than do non-tax cases.

V. Problems with Oklahoma's Approach

Oklahoma's failure to uniformly apply the piercing rule has led to uncertainty and confusion concerning the doctrine of piercing the corporate veil.[153] Oklahoma courts apparently do not apply both components

147. *Id.*; *see also Tulsa Tribune Co.*, 768 P.2d at 895 (Okla. 1989) (quoting *Continental Oil Co.*).
148. *Continental Oil Co.*, 113 F.2d at 564.
149. 605 F.2d 1146, 1154 (10th Cir. 1979).
150. *Id.* at 1147.
151. *Id.* at 1154.
152. *Id.* (emphasis added). The words *control* and *loophole* refer to an instrumentality and an unfair or inequitable advantage, respectively.
153. Oklahoma's adoption in 1986 of most of the General Corporation Law of the State of Delaware may have sparked some uncertainty regarding Oklahoma's future approach to veil piercing. Commentators have noted that Oklahoma's absence of case law interpreting the new statutory framework will encourage Oklahoma courts to apply Delaware law in their interpretation of the new provisions. *See* New Okla. General Corp. Act, Oklahoma Bar Ass'n, Pub. No. 224 (Fall 1986) at A-

of the piercing rule equally or consistently to parent-subsidiary arrangements and close corporations. For example, in close corporation cases the courts might sometimes mention the word *instrumentality*, but then appear to only utilize the vague equitable considerations.[154] Courts apparently view close corporations as inherent instrumentalities by virtue of their closeness.[155]

Courts have also held that fraud is not a necessary finding under the equitable considerations; rather, finding a defeat of public convenience or some kind of inequity is sufficient to meet the equitable standards. Courts have even implied that equitable standards could be met merely by showing a need to protect the rights of third parties and accomplish justice. Effectively, then, the corporate veil of a close corporation is much easier to pierce. Almost any claim, therefore, could potentially impose unlimited liability on an investor of a close corporation.

Furthermore, parent-subsidiary cases also lack uniformity. In *Frazier v. Bryan Memorial Hospital Authority*,[156] the Supreme Court of Oklahoma implied that application of equitable standards was unnecessary; rather, the instrumentality theory was, alone, sufficient to pierce the veil.[157] However, in *Tulsa Tribune Co. v. Oklahoma*,[158] the court required a showing of both an instrumentality and fraud or injustice.[159] To further muddy the waters, in *Key v. Liquid Energy Corp.*,[160] the Court of Appeals for the Tenth Circuit stated that it was not even necessary to

6, E-1, G-2 to G-3. However, it is unclear whether Oklahoma courts will apply Delaware's veil-piercing doctrine. As an equitable doctrine, the piercing rules are not (and never have been) embodied in Oklahoma's statutory framework, and Oklahoma already maintains a body of case law addressing the doctrine. While the Oklahoma Supreme Court cited a Delaware case in one of its recent decisions, it gave no explanation for its use of the case, nor did it imply the application of Delaware law. *See* Frazier v. Bryan Memorial Hosp. Auth., 775 P.2d 282, 288 n.35 (Okla. 1989).

A Delaware federal court has stated that there is effectively no difference between Oklahoma and Delaware veil-piercing law. Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 268 (D. Del. 1989).

154. *See In re* Estate of Rahill, 827 P.2d 896, 897 (Okla. Ct. App. 1991); Sautbine v. Keller, 423 P.2d 447, 452 (Okla. 1967). This is also true for federal courts' application of Oklahoma law. *See* Robertson v. Roy L. Morgan, Prod. Co., 411 F.2d 1041, 1043 (10th Cir. 1969).

155. *But see* Home-Stake Prod. Co. v. Talon Petroleum, C.A., 907 F.2d 1012, 1018 (10th Cir. 1990) (court did not take instrumentality for granted in close corporation setting; rather, it applied factors in determining validity of instrumentality theory). *Home-Stake* illustrates the inconsistency in the category of close corporations since, here, the court stated that both components of the piercing rule must be met.

156. 775 P.2d 282 (Okla. 1989).

157. *Id.* at 288.

158. 768 P.2d 891 (Okla. 1989).

159. *Id.* at 892. Even more perplexing is the fact that the Oklahoma Supreme Court misstated its own interpretation of the piercing rule, referring to its decision in *Gulf Oil*. It should be noted that the holding in *Tulsa Tribune* applied to the imposition of franchise taxes and may not necessarily apply to other types of situations.

160. 906 F.2d 500 (10th Cir. 1989).

show whether one or both components of the piercing rule had to be met.[161] Clearly, the inconsistent use of the doctrine has left both practitioners and courts bewildered.

Another problem inherent in the courts' decisions is that, when applying the instrumentality rule, courts still use terms such as *instrumentality* and *alter ego* interchangeably, further increasing the confusion. Courts have also not clarified which combinations of or how many instrumentality factors are necessary to consistently find an instrumentality. It seems that the courts merely use the factors to "bootstrap" their decisions of whether to pierce the corporate veil.

Perhaps the most reasonable explanation for the lack of clarity in Oklahoma's piercing rule is that the rule's origins are in equity. As such, it is difficult to compose a framework or model that may be applied to every type of situation. Therefore, when courts articulate factors and label theories differently, they really do not add much to the law of veil-piercing. Ultimately, courts will do as they see fit to maintain equity, depending upon the facts of each case.

VI. CONCLUSION

Unfortunately, Oklahoma has not been able to maintain uniformity in its decisions regarding whether or not to pierce the corporate veil. This has resulted in a loose doctrine which undermines the concept of corporate existence and separateness. Investors and incorporators will be very hesitant to incorporate in Oklahoma for fear of potentially unlimited personal liability. This may also result in Oklahoma corporations relocating where the doctrine is more favorable to small business.[162]

If Oklahoma would define its equitable considerations more clearly or make the rule require a single showing such as fraud, practitioners would have a much better feel for how the courts will rule in each situation. It would also be helpful if courts would attempt to more clearly delineate the most significant and relevant instrumentality factors to be relied upon in veil-piercing analyses. Most importantly, Oklahoma should attempt to clarify whether it is applying the piercing rule equally to each type of situation and whether application of the test varies according to the underlying cause of action. By clarifying the doctrine,

161. *Id.* at 504.

162. A newly emerging choice of business format in Oklahoma is the limited liability company ("LLC"). *See* Oklahoma Limited Liability Co. Act, OKLA. STAT. ANN. tit. 18, § 2000 (West Supp. 1993). Some legislatures have addressed veil-piercing in their LLC statutes. *See, e.g.*, COLO. REV. STAT. § 7-80-107 (1992).

Oklahoma will stand a much better chance of attracting new investment, fresh capital, and diverse business interests.

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