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INTRODUCTION

During this survey period,[1] the United States Court of Appeals for the Tenth Circuit twice addressed the issue of piercing the corporate veil. In the first of these cases, *Floyd v. Internal Revenue Service*,[2] the court addressed a reverse piercing argument presented by the IRS, in which the IRS sought to liquidate corporate assets to satisfy the tax obligations of an underlying owner. The second case, *National Labor Relations Board v. I.W.G., Inc.*,[3] presented the court with the issue of veil piercing in the context of an administrative agency holding a shareholder liable for the corporation's evasion of specific legal obligations. Part I of this survey examines the general theory of veil piercing. Part II provides a similar background on reverse piercing and focuses on the Tenth Circuit's judicial interpretations of this doctrine. Part III examines the specific scenario where the corporate veil is reverse pierced on the grounds that an entity used the corporate form to evade specific legal obligations.

I. PIERCING THE CORPORATE VEIL: BACKGROUND AND THEORY

One of the most fundamental features of the corporate form is limited liability.[4] Recognizing that a corporation is a "distinct legal entity," separate from the persons comprising it,[5] limited liability provides that shareholder liability shall be limited to the shareholder's investment in the corporation.[6] Thus, limited liability effectively encourages investment in high-risk ventures which otherwise might endanger the personal wealth of those providing capital.[7]

Limited liability, by its very operation, restricts the assets from which creditors may seek repayment when the corporation is in bankruptcy, default, or must subsequently satisfy legal judgement.[8] When the available assets are inadequate to satisfy the claims of creditors, those creditors often seek to pierce the corporate veil—asserting the theory of inappropriate use of the corporate form to recover directly from share-

1. This survey period is from September 1, 1997 to August 31, 1998.

2. 151 F.3d 1295 (10th Cir. 1998).

3. 144 F.3d 685 (10th Cir. 1998).

4. *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 130 (3d ed. 1983).

5. Huard v. Shreveport Pirates, Inc., 147 F.3d 406, 409 (5th Cir. 1998) (noting, further, that piercing is a radical remedy warranted only in exceptional circumstances such as fraud or deceit).

6. *See* LEWIS D. SOLOMON ET AL., CORPORATIONS: LAW AND POLICY 241 (2d ed. 1988).

7. *See Huard*, 147 F.3d at 409; *see also* LEWIS D. SOLOMON & ALAN R. PALMITER, CORPORATIONS 70 (2d ed. 1994) (stating that limited liability exists because it facilitates (1) capital formation, (2) desirable management risk-taking, (3) broad based investment diversification, and (4) public stock trading markets).

8. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039–40 (1991).

holders or officers.[9] Unsurprisingly, veil piercing claims have become the most litigated area in corporate law.[10] Nevertheless, the legal standard for determining when to set aside "the corporate veil is notably imprecise and fact-intensive."[11]

Courts typically require a showing of two elements before piercing the veil.[12] The first element looks at excessive unity of interest[13]—whether the shareholders exert excessive control over the corporation.[14]

Courts applying this first element often utilize concepts such as "alter ego" or "mere instrumentality," to support piercing the veil.[15] The

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9. *See generally* 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (perm. ed. rev. vol. 1990) (explaining that practically all authorities agree that under certain circumstances the corporate form should be disregarded "in the interest of justice in such cases as fraud, contravention of law or contract, public wrong, or to work out the equities among members of the corporation internally and involving no rights of the public or third persons").

10. *See* Thompson, *supra* note 8, at 1036.

11. Crane v. Green & Freedman Baking Co., 134 F.3d 17, 21 (1st Cir. 1998) (stating also that "no hard and fast rule as to the conditions under which the [corporate] entity may be disregarded can be stated as they vary according to the circumstances of each case"). The Louisiana Court of Appeals presented the quandary succinctly when it noted that as a balancing test, the same factual scenario may lead to differing results depending upon the competing policies behind recognizing the corporate form and the policies justifying piercing. *See* Middleton v. Parish of Jefferson, 707 So.2d 454, 457 (La. Ct. App. 1998) (citing Glenn G. Morris, *Piercing the Corporate Veil in Louisiana*, 52 LA. L. REV. 271, 276 (1991)).

12. *See, e.g.*, NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1054 (10th Cir. 1993) (examining the District of Columbia Circuit Court's approach which analyzes the degree of adherence to corporate formalities and whether recognition of the corporate structure would be inequitable) (citing Labadie Coal Co. v. Black, 672 F.2d 92, 96 (D.C. Cir. 1982)); *see also* Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854–55 (1982).

13. *See* Note, *supra* note 12, at 854.

14. *See, e.g.*, Huard v. Shreveport Pirates, Inc., 147 F.3d 406, 414 (5th Cir. 1998) (stating that "the corporate veil should only be pierced with respect to contract claims when compelling equitable considerations favor this remedy; otherwise, courts are not to disturb the allocation of risks established by the parties"); *see also* Floyd v. IRS, 151 F.3d 1295, 1296 (10th Cir. 1998); 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, 854–55 (1997). In its analysis, a court will likely ask whether an excessive degree of unity exists among the entities. *See* BLUMBERG, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW §§ 6.02–.06, 10.03 (1987) (addressing "instrumentality," "alter ego" and "identity" doctrines); *see also* Bergesen v. Lindholm, 760 F. Supp. 976, 987–88 (D. Conn. 1991) (comparing the instrumentality and identity rules).

15. *See* ROBERT W. HAMILTON, CORPORATIONS 195 (3d ed. 1992). Whether the "alter ego" and "mere instrumentality" concepts are subdivisions within the veil piercing doctrine, or provide independent grounds for liability is disputed. *See id.*; *cf., e.g.*, Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp., 139 F.3d 304, 308 (1st Cir. 1998) (stating that to exercise personal jurisdiction over a foreign company through veil piercing required fraud, while in contrast, wrongful motives were not required in this ERISA action which utilized the alter ego doctrine). Additionally, the court stated that "the policies generally served by various corporate veil piercing approaches, address different interests than does the alter ego doctrine." *Id.* at 308 (citation omitted); *cf. Crane*, 134 F.3d at 22 (utilizing a different, less rigid test, the federal common law standard adopted by the First Circuit, to evaluate an ERISA plaintiff's veil piercing claim); Futura Dev. of Puerto Rico, Inc. v. Estado Libre Asociado De Puerto Rico, 144 F.3d 7, 11 (1st Cir. 1998)

second element looks at inequitable injury to creditors as a result of the unity between corporation and shareholder.[16] This examination may require consideration of fraudulent intent and the degree of injustice imposed through recognition of the corporate form.[17]

Generally, the term "alter ego" indicates that the corporation is indistinguishable from the shareholder.[18] As the Seventh Circuit Court of Appeals stated, "[t]o call corporations alter egos is to say that they are one—that a single business uses a variety of corporate names and charters but is still just one entity."[19] In 1931, Frederick J. Powell formulated a checklist for use in determining whether a subsidiary corporation constitutes the "alter ego" of its parent.[20] Today, courts commonly rely on numerous factors derived from Powell's list in the veil piercing analysis.[21]

(refusing to expand jurisdiction to include an alter ego claim, the court held the alter ego claim was not merely a factual determination that identifies an original judgment debtor). These cases distinguish between generic veil piercing claims and alter ego claims, but find both are part of the same doctrine, involving a substantive rule of liability.

16. *See, e.g.*, Bufco Corp. v. NLRB, 147 F.3d 964, 969 (D.C. Cir. 1998); *Greater Kansas City Roofing*, 2 F.3d at 1052; Sea-Land Servs., Inc. v. Pepper Source, 993 F.2d 1309, 1311–12 (7th Cir. 1993); White Oak Coal Co., 318 N.L.R.B. 732, 732 (1995). Jurisdictions using the three-prong test require proof that *both* fraud and injustice would result from recognition of the corporate form. *See Greater Kansas City Roofing*, 2 F.3d at 1054. In contrast, courts utilizing the two-prong test require proof that *either* fraud or injustice would result from recognition of the corporate form. *See id.* at 1052. The former, at least theoretically, leads to a more difficult burden of proof to sustain. *But cf. id.* (minimizing the significance of this difference).

17. *See Greater Kansas City Roofing*, 2 F.3d at 1052; *cf., e.g., Crane*, 134 F.3d at 22 (quoting Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986)). Under both tests, variations exist on the enumeration of such elements. For example, in *Middleton v. Parish of Jefferson*, 707 So.2d 454, (La. Ct. App. 1998), the court stated that the two-part test is met if

> (1) the corporation is an alter ego and has been used by the shareholder to carry out some sort of fraud or (2) even in the absence of fraud, the shareholder has failed to conduct business on a "corporate footing" to such an extent that the corporation has become indistinguishable from the shareholder.

Id. at 456–57. On the other hand, the Second Circuit, in *Thrift Drug, Inc., v. Universal Prescription Administrators*, 131 F.3d 95, (2d Cir. 1997), held that piercing the corporate veil under New York law requires a showing "(i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *Id.* at 97.

18. *See Greater Kansas City Roofing*, 2 F.3d at 1052.

19. United States v. Vitek Supply Corp., 151 F.3d 580, 585 (7th Cir. 1998).

20. FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY 9 (1931). The factors included:

> (a) The parent corporation owns all or most of the capital stock of the subsidiary.
> (b) The parent and subsidiary corporations have common directors or officers.
> (c) The parent corporation finances the subsidiary.
> (d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
> (e) The subsidiary has grossly inadequate capital.
> (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
> (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed by the parent corporation.
> (h) In the papers of the parent corporation or the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
> (i) The parent corporation uses the property of the subsidiary as its own.

The "mere instrumentality" concept is similar.[22] Courts may disregard the corporate form when a corporation's structure, or its manner of conducting affairs, indicates that the corporation acted as an adjunct, or mere instrumentality, of the other.[23] The doctrine often arises in the parent-subsidiary context. A court may hold a subsidiary entity a mere instrumentality when the parent corporation exercises a requisite level of control. Such control is "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."[24]

The inequitable injury redressed through piercing will typically consist of one or more of the following situations:

> (1) The creditors' reliance on the collective credit of the entities; (2) The misappropriation of the assets of one entity by another or the incurrence of liabilities by one entity for the benefit of another; (3) The failure to maintain proper corporate formalities; (4) The operation of the entities as one enterprise; (5) The intentional evasion of specific legal obligations; or (6) The undercapitalization of an entity.[25]

(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.
(k) The formal legal requirements of the subsidiary are not observed.

Id.

21. *See, e.g., Middleton*, 707 So. 2d at 456 (listing five primary factors to consider to determine the appropriateness of veil piercing: "1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and booking records; and 5) failure to hold regular shareholder and director meetings") (quoting Riggins v. Dixie Shoring Co., 590 So.2d 1164, 1168 (La. 1991)); Glenn v. Wagner, 329 S.E.2d 326, 330–31 (N.C. 1985) (listing the four primary factors for deciding whether to disregard the corporate entity under the instrumentality rule as: "(1) inadequate capitalization; (2) noncompliance with corporate formalities; (3) complete domination and control of the corporation so that it has no independent identity; and (4) excessive fragmentation of a single enterprise into separate corporations." (citations omitted)).

22. *See* Smith v. Washington Sheraton Corp., 135 F.3d 779, 786 (D.C. Cir. 1998); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 349 (4th Cir. 1998). The two doctrines are distinguished by the controlling figure of the corporation in question, "alter ego" refers to one which is controlled by an actual person, whereas "mere instrumentality" refers to a corporation controlled by another corporation. *Cf.* Boyce L. Graham, Comment, *Navigating the Mists of Metaphor: An Examination of the Doctrine of Piercing the Corporate Veil*, 56 J. AIR L. & COM. 1135, 1140–42 (1991).

23. *See Broussard*, 155 F.3d at 349.

24. *See id.* (citing *Glenn*, 329 S.E.2d at 330 (stating three elements of the "instrumentality rule" for determining whether to pierce the corporate veil: (1) the domination and control of the corporate entity; (2) the use of that domination and control to perpetuate a fraud or wrong; and (3) the proximate causation of the wrong complained of by the domination or control)); *see also Smith*, 135 F.3d at 786.

25. Mary Elisabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381, 426 (1998). The third and fourth elements require classification. Some note that the failure to maintain corporate formalities typically does not result in injury to any particular individual. *See id.* at 432. Rather than focusing on the direct injury, courts may use a retributive rationale,

The veil piercing cases heard by the Tenth Circuit during the survey period dealt with evasion of specific obligations through the manipulative use of the corporate form.[26] Creation of a corporation solely to avoid the effects of applicable laws or regulation may lead the courts to pierce the veil.[27]

Other courts have previously found, under circumstances resembling those encountered in *Floyd* and *I.W.G.*, such manipulative use of the corporate form to evade legal obligations. For example, under facts similar to those alleged in *Floyd*,[28] the Ninth Circuit held transferring assets between a corporation and an individual to evade the individual's tax liability constituted an inappropriate use of the corporate form.[29] Under facts similar to those alleged in *I.W.G.*,[30] the Ninth Circuit held the formation of a successor corporation, which continued the same business as the original corporation for the purpose of evading obligations of the original corporation, was also an inappropriate manipulation of the corporate form.[31]

A choice of law issue may arise in veil piercing cases due to the state's ability to adopt "widely divergent and sometimes contradictory"

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based on the "concept that a corporate charter is a privilege granted by the state and that such privilege should be revoked when the rules are not followed and the corporate form abused." *Id.* at 433. The fourth element refers to enterprise theory, which justifies piercing based solely on a high degree of unity, without requiring additional proof of unfair injury arising from such unity. *See id.* at 435. The inequity may be implied through "the failure to attach the consequences of the enterprise's action to the enterprise as a whole." *Id.*

26. *See* Floyd v. IRS, 151 F.3d 1295 (10th Cir. 1998); NLRB v. I.W.G., Inc., 144 F.3d 685 (10th Cir. 1998).

27. *See, e.g.*, United States v. Vitek Supply Corp., 151 F.3d 580, 585 (7th Cir. 1998); NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993); White Oak Coal Co., Inc., 318 NLRB 732 (1995).

28. *See Floyd*, 151 F.3d at 1296–97.

29. *See, e.g.*, Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1393 (9th Cir. 1993) (stating that a corporate entity may be pierced when used to evade taxes); Century Hotels v. United States, 952 F.2d 107, 112 (5th Cir. 1992) (noting that the shareholders "used the corporate form for illegitimate ends. They did so to enjoy the material benefits of the world without having to bear its tax burden.").

30. *See I.W.G.*, 144 F.3d at 687.

31. *See, e.g.*, NRLB v. O'Neill, 965 F.2d 1522, 1531 (9th Cir. 1992) (involving the creation of several corporations to avoid labor obligations while continuing operation of the corporations); Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc., 757 F.2d 1256, 1265 (Fed. Cir. 1985) (involving situation where controlling shareholder dissolved corporation in anticipation of patent infringement liability); Culinary Workers & Bartenders Union v. Gateway Café, Inc., 588 P.2d 1334, 1343 (Wash. 1979) (involving situation where corporation dissolved and transferred assets to affiliate to avoid obligations under settlement agreement). Other examples include the formation of a separate corporation to undertake a high-risk enterprise to isolate liability and the participation in otherwise prohibited activities (i.e., barred by statute, regulation or order). *Cf., e.g., In re* Phillips Petroleum Secs. Litig., 738 F. Supp. 825, 839 (D. Del. 1990) (stating subsidiary was merely an alter ego for parent, created to insulate the parent corporation from possible securities fraud liability); Parker v. Bell Asbestos Mines, Ltd., 607 F. Supp. 1397, 1403 (E.D. Pa. 1985) (involving the creation of a separate entity to maximize the limitation of liability for asbestos litigation); United States v. Thomas, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981) (involving attempted evasion of medicare recoupment statute).

corporate law standards[32] and disparate doctrinal application (between federal and state law) by federal courts.[33] Generally, the federal government, and in turn, the federal courts, defer to state regulation of corporate law.[34] In the case of interpreting federal statutes, however, the federal courts have underscored that veil piercing may require reference to federal common law.[35] Regardless, federal courts will often use state law for guidance.[36] These circumstances have led to controversy over whether a uniform federal common law test for piercing the corporate veil should apply.[37]

The remainder of this survey, although frequently revisiting these traditional components of standard veil piercing, focuses more on non-traditional veil piercing circumstances. In *Floyd v. Internal Revenue Service*[38] the Tenth Circuit addressed reverse piercing in an alter ego

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32. *See* ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 283 (6th ed. 1997); Note, *supra* note 12, at 855. Some states have more liberal requirements than others for piercing the corporate veil. For example, some jurisdictions require fraud or inequitable result, while other jurisdictions will disregard the corporate entity based only on a finding of excessive unity of interest alone. *Cf., e.g.*, Huard v. Shreveport Pirates, Inc., 147 F.3d 406, 410 (5th Cir. 1998) (waiving limited liability if the corporate form is disregarded by shareholders *or* used for fraud). *But cf.* Thrift Drug, Inc. v. Universal Prescription Adm'rs., 131 F.3d 95, 97–98 (2d Cir. 1997) (applying New York law, the court required demonstration of complete domination used to commit fraud or wrong that caused the injury which was the subject of the compliant); *see also* Daniel G. Brown, Comment, *Jurisdiction over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 601 (1992).

33. *See* Note, *supra* note 12, at 857–61.

34. *See id.* at 855–59, 861–62. State law may not control the veil piercing analysis when federal law applies. *See* Pension Benefit Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1093 (1st Cir. 1983) ("The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it . . . . These limitations, however, do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies."); *see also* Sebastopol Meat Co. v. Secretary of Agric., 440 F.2d 983, 985 (9th Cir. 1971) (noting the inadequacy of the corporate form to prohibit compliance with a federal regulatory agency, and that state limitations on the alter ego doctrine may be inapplicable); Corn Prods. Ref. Co. v. Benson, 232 F.2d 554, 565 (2d Cir. 1956) (noting the corporate form may be disregarded to further a federal regulatory statute's purpose).

35. *See* NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 335 (6th Cir. 1990) (stating veil piercing is subject to federal law when it arises from a federal labor dispute); *see also* Bufco Corp. v. NLRB, 147 F.3d 964, 969 (D.C. Cir. 1998) (noting the NLRB typically applies a federal common law test). Application of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is another situation in which this question arises, however, the Supreme Court has not yet addressed whether federal or state law should apply in such circumstances. *See* United States v. Bestfoods, 118 S. Ct. 1876, 1886 n.9 (1998) (noting that, because the parties did not raise that issue, the Court would not decide it).

36. *See Bestfoods*, 118 S. Ct. at 1886 n.9.

37. *See id.* (noting the significant disagreement among courts and commentators over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing).

38. 151 F.3d 1295 (10th Cir. 1998) (involving creditors who sought personal liability of the founder of three corporations).

context. In *National Labor Relations Board v. I.W.G., Inc.*[39] the court addressed the alter ego doctrine in a case involving evasion of obligations for unfair labor practices.

II. REVERSE PIERCING

A. *Background*

Reverse piercing occurs when either a corporate insider or a person suing a corporate insider attempts to merge the separate legal identities of the corporation and the corporate insider.[40] In contrast, standard veil piercing typically involves a creditor of the corporation who seeks payment from shareholders.[41] Courts may distinguish reverse piercing claims as either "inside" or "outside" cases, depending on the position of the person arguing for disregard of the corporate form.[42]

Most reverse piercing cases involve inside reverse piercing.[43] Inside reverse piercing occurs when a dominant shareholder or corporate insider argues for the disregard of the corporate form in the process of seeking, for example, access to corporate claims against third parties, or protection of corporate assets from third party claims against the insider.[44] In inside cases, the third party (often a corporate creditor or debtor) would object to the merger of the corporation and the individual.[45] Accordingly, the third party's wrongful act may justify the reverse pierce.[46]

Bitar v. Wakim[47] illustrates inside reverse piercing. Bitar suffered injuries from a slip and fall accident while on the job.[48] Wakim was the president and sole shareholder of Beirut Bakery, Inc., the corporation that employed Bitar.[49] The corporation leased the property from Wakim, who owned and maintained the property in his own name.[50] Wakim sought inside reverse piercing to hold himself and the corporation as the same entity.[51] If considered one entity, he could rely upon the exclusive

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39. 144 F.3d 685 (10th Cir. 1998).

40. *See* Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 36 (1990); *see, e.g.*, Hovis v. United Screen Printers Inc. (*In re* Elkay Industries Inc.), 167 B.R. 404, 410 (D. S.C. 1994) (stating that debtor's estate wanted debts of subsidiary included as a debt of parent to avoid preferential payment utilizing reverse piercing).

41. *See* Gevurtz, *supra* note 14, at 905.

42. *See* Crespi, *supra* note 40, at 36–37.

43. *See id.* at 37.

44. *Cf. id.*

45. *See id.*

46. *See id.* at 51.

47. 572 N.W.2d 191 (Mich. 1998).

48. *See Bitar*, 572 N.W.2d at 191.

49. *See id.*

50. *See id.* at 191–92.

51. *See id.* at 192.

remedy provision of worker's disability compensation to shield him from personal liability.[52]

The Michigan Supreme Court refused to reverse pierce, leaving Wakim with possible personal liability.[53] Noting that the president "chose to maintain the property in his own name and to lease it to the corporation" to gain the advantages offered by the corporate form, the court found no equitable basis for a reverse piercing of the corporate veil.[54] The court stated, "those who create, and take advantage of, a corporate structure should not be allowed to disregard that structure when it suits their purposes."[55] This notion that the owners should not "have it both ways" often provides grounds for dismissal of reverse piercing claims brought by corporation owners.[56]

Outside reverse piercing, which occurs less often than inside reverse piercing, typically involves a third party suing a corporate insider and attempting to disregard the corporate form to gain access to a corporation's assets.[57] Here, the insider and the corporation object to the merger of the two entities.[58] Courts look to the wrongful conduct of the corporate insider or the corporation to justify the piercing.[59] Courts often reject outside reverse piercing, however, upon a showing that not all of the shareholders were involved in the conduct. Courts reason that allowing a reverse pierce in such a circumstance results in unfair prejudice to those parties not involved in the wrongful conduct.[60]

Perhaps due to the fact that reverse piercing seems to contradict traditional corporate law notions of limited liability, courts are often reluctant to apply the reverse piercing doctrine.[61] This hesitancy can be traced back to *Kingston Dry Dock Co. v. Lake Champlin Transportation Co.*,[62]

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52. *See id.*

53. *See id.*

54. *Id.* at 193.

55. *Id.*

56. Michael J. Gaertner, Note, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WM. & MARY L. REV. 667, 668 (1989) (quoting *In re* Beck Indus., 479 F.2d 410, 418 (2d Cir. 1974)).

57. *See* Crespi, *supra* note 40, at 37.

58. *See id.* at 36.

59. *See id.* at 51.

60. *See id.* at 65.

61. A court's willingness to accept a reverse piercing claim may depend on the nature of the underlying cause of action. *See* David M. Grimes, *Reverse Piercing of the Corporate Veil*, 13 NO. 5 BANKR. STRATEGIST 1, 2–3 (1996). The majority of receivership and bankruptcy decisions, for example, hold that reverse veil piercing "is a valid cause of action." *Id.* at 2. Other courts recognize reverse piercing only in limited circumstances. *See, e.g.*, Stoebner v. Lingenfelter, 115 F.3d 576, 580 n.4 (8th Cir. 1997) (applying Minnesota law); Flight Servs. Group, Inc. v. Patten Corp., 963 F. Supp. 158, 160 (D. Conn. 1997). A number of courts have rejected the doctrine outright. *See* Grimes, *supra*, at 3.

62. 31 F.2d 265 (2d Cir. 1929).

the first case to address outside reverse piercing. In rejecting the doctrine, Judge Learned Hand stated:

> Perhaps it would be too much to say that a subsidiary can never be liable for a transaction done in the name of the parent, the situation at bar. Any person may use another as a screen, and one may conceive cases where such an arrangement might exist. But such instances, if possible at all, must be extremely rare, and there is not the slightest evidence of the sort here. Although it is quite true that the two companies were very intimately related, the [subsidiary] never intended in fact to make the [parent] its agent, nor did it interpose in any way in the conduct of its affairs. Rather their relations were reversed, so that the [subsidiary] could not have interposed, whatever might be the liability of the [parent] for the transactions formally undertaken by the [subsidiary].[63]

No court re-addressed outside reverse piercing until 1957.[64] This time, however, the court in question was more receptive, allowing outside reverse piercing to occur in a marital property case.[65] Over the next forty years litigators used the doctrine intermittently with varying degrees of success, however, Judge Learned Hand's notion of proceeding cautiously consistently endured.[66]

Prior to the survey period, the Tenth Circuit addressed reverse piercing on two occasions—both times rejecting the doctrine.[67] The matter first arose in *Cascade Energy & Metals Corp. v. Banks*,[68] a dispute over financial responsibility for the expenditures related to a joint venture for the development of a gold mine.[69] Weston was the mine's principle promoter and Cascade was the managing agent for the joint venture.[70] Weston, Cascade, and numerous entities affiliated with Weston were responsible for the mine's development and production operations.[71] In 1980, the investors purchased working interests in the gold mine.[72] The

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63. *Kingston*, 31 F.2d at 267.

64. *See* Crespi, *supra* note 40, at 57.

65. *See* W.G. Platts, Inc. v. Platts, 298 P.2d 1107, 1111 (Wash. 1956) (holding in favor of the wife in a marital property case, the court found that the husband and corporation acted as alter egos and upheld a lien attached to a corporation's property where corporation was controlled by the husband).

66. *See* Crespi, *supra* note 40, at 57–64 (giving a detailed description of the cases dealing with outside reverse piercing).

67. *Cf.* Floyd v. IRS, 151 F.3d 1295, 1299–1300 (10th Cir. 1998); Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1579 (10th Cir. 1990).

68. 896 F.2d 1557 (10th Cir. 1990) (involving a dispute over a gold mine between the mine's principle promoters and a group of investors). During the survey period, the Tenth Circuit heavily relied upon *Cascade* in its reverse veil piercing analysis employed in *Floyd*.

69. *See Cascade*, 896 F.2d at 1561.

70. *See id.* at 1562.

71. *See id.* at 1564.

72. *See id.*

venture was initially funded with promissory notes and a development loan.[73]

By 1982, the money from the development loan was depleted, and Weston assessed investors to pay additional costs.[74] Some investors, concerned by the lack of gold production, drew from the mine.[75] The results indicated the mine contained little gold, and the material Cascade had mined was a low quality ore.[76] Ultimately, Weston, Cascade, and the other Weston affiliated entities sued the investors for the additional development costs, and the investors counter-claimed for fraud, breach of fiduciary duty, and securities violations.[77]

The trial court applied Utah law,[78] and reverse pierced the veils of four entities deemed alter egos of Weston and Cascade.[79] It held them jointly and severally liable for the damages, which included the wrongfully collected assessments for the additional development costs, misappropriated funds from the joint venture, and the investors' attorney's fees.[80] The court primarily based its decision on the fact that Weston had almost total control of the four entities, particularly with respect to their finances.[81]

On appeal, however, the Tenth Circuit reversed, denying the outside reverse piercing claim.[82] First, the court defined the purpose of allowing incorporation as an isolation of liabilities.[83] Consequently, veil piercing should only occur when done "reluctantly and cautiously."[84] Second, the Utah Supreme Court had not clearly adopted the reverse piercing doctrine, much less outside reverse piercing.[85] Third, noting that contract

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73. *See id.* at 1564–65. The income and cash flow projections put forth in the offering memorandum for the working interests forecasted that the mine's operating profits would satisfy the promissory notes and a development loan, thus additional cash contributions from the investors would not be required for repayment. The mine, however, immediately had problems, and Weston changed the mining techniques, which also were not fruitful. *See id.*

74. *See id.* at 1565.

75. *See id.*

76. *See id.*

77. *See id.* at 1566.

78. *See id.* at 1575 n.18.

79. *See id.* at 1576.

80. *See id.* at 1566–67.

81. *See id.* at 1576. The court noted:

> (1) Weston dominated the boards of directors and the management of the four entities; (2) Weston was "single-handedly" able to transfer assets among the various entities and did so; and (3) Weston commingled the funds of the various entities in the sense that when he transferred funds from one entity to another, the funds were deposited in the receiving entity's general bank account and were mixed with other funds there.

Id.

82. *See id.*

83. *See id.*

84. *Id.*

85. *See id.* at 1576–77. The court stated this was a special "variant" of the reverse pierce in that an outsider, rather than an insider, was asserting the claim, and special problems resulted. *Id.* at

creditors and tort creditors differed in their consensual nature, the court expressed reservation against piercing in voluntary contract situations.[86] Fourth, although Weston used the entities for personal objectives, he still maintained and held the entities out as separate organizations.[87] Fifth, under Utah law, veil piercing requires more than just unity of interest alone;[88] instead, the claimants must show the relationship between the injury and either the unity of interest or their reliance on the corporation's lack of separateness.[89] The claimants failed to demonstrate either of these scenarios.[90]

Subsequent to *Cascade*, both state and federal courts expressed hesitancy to apply the reverse piercing doctrine.[91] During the survey period, the Tenth Circuit confronted reverse piercing in *Floyd v. Internal Revenue Service*,[92] and consistent with earlier pronouncements, rejected the doctrine.[93]

B. *Tenth Circuit Decision:* Floyd v. Internal Revenue Service[94]

1. Facts

In *Floyd*, a group of creditors sought to use corporate assets to satisfy a corporate shareholder's debt. The debtor, Thomas Bridges, had founded and exercised complete control over three companies, Network Billing Centers, Inc. (NBC), Med-Net Technologies, Inc. (Med-Net), and Thomas Marketing, Inc. (TMI).[95] Bridges acted as the sole shareholder and director of all three companies.[96] Three creditors (the IRS, the State of Kansas, and the "Floyd plaintiffs") obtained judgments against Bridges.[97] All three fought for priority over two groups of assets: the pro-

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1575 n.17, 1576–77. The traditional theories listed were "conversion, fraudulent conveyance of assets, respondeat superior and agency law." *Id.* at 1577.

86. *See id.*

87. *See id.* at 1578.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See, e.g.*, Zahra Spiritual Trust v. United States, 910 F.2d 240 (5th Cir. 1990) (declining to apply outside reverse piercing in a case seeking to seize corporate assets to satisfy the tax liability of the beneficial owners); Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 26–27 (Utah 1990) (declining to apply outside reverse piercing, the Utah Supreme Court imposed a special limitation on the alter ego theory when used to allow creditors of controlling insiders to attach the corporation's asset and required the claimant to show that the "corporation itself played a role in the inequitable conduct at issue").

92. 151 F.3d 1295 (10th Cir. 1998).

93. *See Floyd*, 151 F.3d at 1300 (stating that "in the absence of a clear statement of Kansas law by the Kansas courts, we will not assume that such a potentially problematic doctrine already has application in that state") (citing Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1577 (10th Cir. 1990)).

94. 151 F.3d 1295 (10th Cir. 1998).

95. *Floyd*, 151 F.3d at 1296.

96. *See id.*

97. *See id.* at 1296–97.

ceeds from the sale of a house[98] and the attached accounts of the companies.[99]

The IRS sought to establish that Med-Net acted as an alter ego of Bridges in order to hold Med-Net liable for Bridges' personal debt, and thereby allow utilization of corporate assets to satisfy Bridges' debt.[100] The district court engaged in outside reverse piercing when it found that Med-Net acted as Bridges' alter ego and subsequently granted the IRS priority over the two other creditors, entitling the IRS to the corporation's assets.[101] On appeal, the Tenth Circuit considered, in the context of an alter ego theory, whether the IRS could pierce Med-Net's veil and use corporate assets to satisfy Bridges' tax obligations.[102]

2. Decision

The Tenth Circuit Court of Appeals held that the district court erred in accepting the IRS's alter ego argument.[103] The court noted that for the purposes of outside reverse veil piercing, Kansas state law (as opposed to federal law) should determine whether Med-Net acted as Bridges alter ego.[104] Kansas courts, however, had not yet spoken on the issue,[105] and the Tenth Circuit found significant reasons to resist the claim.[106] While the court recognized precedent authorizing piercing of the corporate veil, it distinguished standard and reverse veil piercing.[107] The court established that reverse piercing deserved different treatment because reverse piercing holds the corporation liable for the debts or torts of its controlling shareholders.[108] In the instant case, because a party outside the corpora-

98. *See id.* The house had been purchased primarily with Med-Net funds in 1992, the legal title was to pass from the construction company to Bridges's daughter, Brook Bridges McBride, upon full payment under a contract for deed. *See id.* at 1297. Both Bridges and McBride lived in the house. *See id.*

99. *See id.* at 1296.

100. *See id.*

101. *See id.* at 1297–98. The lower court based its determination that Med-Net was the alter ego of Bridges on *Pemco Inc. v. Kansas Department of Revenue*, 907 P.2d 863, 867 (Kan. 1995). *See Floyd*, 151 F.3d at 1298 (citing *Pemco*).

102. *See id.* at 1298.

103. *See id.* at 1300 (deciding not to apply a doctrine which the Kansas courts had not expressly adopted). Additionally, the court stated that the taxation context of the government's claim did not dictate the outcome in terms of priority of claims, but rather, the IRS as any other creditor seeking veil piercing. *See id.* at 1299.

104. *See id.* at 1298 (citing Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1391 (9th Cir. 1993)).

105. *See id.* at 1298–99.

106. *See id.* at 1299.

107. *See id.* at 1298 (holding that the facts of *Pemco* involved "standard" veil piercing and thus did not govern the case at hand which involves reverse piercing by an outside party).

108. *See id.*

tion, the IRS, wanted to treat the shareholder and the corporation as one, additional complications arose.[109]

As the court delineated, the theory posed several problems as applied to the facts of this case. First, it by-passed "normal judgment-collection procedures."[110] Second, unfair prejudice may result to third parties if a creditor (in this instance, the IRS) was able to directly attach a corporation's assets.[111] Such a scenario, the court argued, could ultimately lead to greater culpability for third party corporate creditors harmed by reverse piercing.[112] Third, reverse piercing could unsettle corporate creditors' expectations regarding securing loans with corporate assets.[113] Fourth, it could reduce the corporate forms' effectiveness in raising credit.[114] This would result from corporate creditors demand for compensation for the increased risk of default from outside reverse-piercing claims.[115] Fifth, the case did not involve the situation for outside reverse piercing.[116] The court stated that, only where a subsidiary dominated its parent, should courts find outside reverse piercing appropriate.[117] Sixth, as an equitable remedy, disregarding the corporate form required the unavailability of adequate remedies at law.[118] Possible alternative remedies to consider included: (1) an agency or aiding and abetting theory, (2) standard judgment collection procedures, and (3) in taxation cases, the transfer of an economic benefit to a shareholder may be reachable for tax purposes as a constructive dividend.[119] The court concluded by holding that the district court inappropriately applied the reverse piercing doctrine to attach liability.[120]

C. *Other Circuits*

During the survey period one other circuit dealt with reverse veil piercing. The Third Circuit, in *Kaplan v. First Options of Chicago, Inc.*,[121] effectively used the derivative injury rule, which prevents a shareholder from suing for personal injuries that result directly from injuries to the corporation, to reject an inside-piercing claim.[122] Kaplan, the corpo-

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109. *See id.* Thus this case represents a classic example of outside reverse piercing of the corporate veil. *See id.*

110. *Id.* at 1299 (quoting Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1577 (10th Cir. 1990)).

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.* at 1299–1300 (citing Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265, 267 (2d Cir. 1929) (Hand, J.)).

117. *See id.*

118. *See id.* at 1300.

119. *See id.*

120. *See id.*

121. 143 F.3d 807 (3d Cir. 1998).

122. *See Kaplan*, 143 F.3d at 811–12.

ration's sole shareholder, sought reverse veil piercing to recover individually for losses the corporation suffered as a result of the actions of First Options of Chicago.[123] The court noted the sole shareholder chose to receive the benefits of structuring his business in the corporate form.[124] As the court determined that Kaplan and the corporation in question were separate entities, the derivative injury rule prevented Kaplan, the sole shareholder, from reverse piercing the corporate veil to recover individually for the corporation's losses.[125] The rule would not, however, bar Kaplan's claims if he sought to recover for injuries inflicted on him individually rather than on the corporation.[126]

D. *Analysis*

The Tenth Circuit, in *Floyd*, added to the concerns addressed in *Cascade*. *Floyd* also clarified the issues that require attention before courts should adopt reverse veil piercing. The court seemed to balance the potential negative effects of using this theory with the alternatives available to resolve the issue. *Floyd* noted the existence of numerous other theories available to hold the shareholder liable.

In one sense, the Tenth Circuit decision in *Floyd* adhered to Judge Learned Hand's admonition to proceed cautiously. On closer inspection, however, the decision went much further: it effectively rejected the doctrine until directed otherwise by the Kansas State Supreme Court. The court extensively discussed the litany of potential problems with reverse piercing, but primarily emphasized that, as a federal court, it declined to dictate or influence Kansas corporate law. Nevertheless, while the court's stated purpose in effect only lent more weight to *Cascade*'s conclusion, the decision effectively precluded utilization of a doctrine accepted by many other jurisdictions.[127]

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123. *See id.* at 811.

124. *See id.* at 812.

125. *See id.* (citing Kagan v. Edison Bros. Stores, Inc., 907 F.2d 690 (7th Cir. 1990) (holding that the plaintiffs could not obtain both "limited liability for debts incurred in the corporate name, and direct compensation for its losses")).

126. *See id.*

127. *See id.* The traditional notions of limited liability within corporate law also provide insight to the courts' resistance to piercing. *See* Gaertner, *supra* note 56, at 667. The objective in reverse piercing aims to make the "corporation owner and the corporation become one legal entity when the legal line of demarcation between the entities becomes virtually nonexistent," essentially holding the corporation liable for the owner's actions. *Id.*; *see supra* Part I (stating that reverse piercing conflicts with the fundamental principle of separateness of entities and limited liability).

III. PIERCING JUSTIFIED BY EVASION OF LEGAL OBLIGATION OR BY WRONGFUL ACTS

A. *Background*

Not all veil piercing cases involve judgment proof corporations.[128] Courts sometimes utilize the piercing doctrine when owners intentionally use the corporate form to evade a specific obligation.[129] It is firmly established that a court may disregard the corporate form to "prevent fraud, illegality or injustice or when the recognition of the corporate entity would defeat public policy or shield someone from liability for a crime."[130] Courts may also disregard the separateness of a corporate entity when an owner used the corporate form to defeat legislative policies or circumvent provisions of a statute.[131]

As discussed in Part I, the choice of law issue potentially could effect the outcome of a case. When the veil piercing claim stems from an area of federal preeminence, the courts may apply the federal common law test for piercing, rather than a particular state's.[132] Recently courts have encountered this issue involving violations under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[133] They have also done so in cases involving violations of federal labor laws. The National Labor Relations Board (NLRB or Board) has the power to "hold a corporation's officers or owners personally liable for violations of the [National Labor Relations] Act when the corporate form is used to perpetuate fraud, evade existing obligations, or circumvent a statute."[134]

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128. The Louisiana Court of Appeals stated that although veil piercing is usually used to "impose personal liability on corporate shareholders for corporate debts, this is a flexible doctrine that can be used in any situation in which the separate personality of the corporation appears to be blocking a just result." *Middleton*, 707 So. 2d at 456; *see* Gevurtz, *supra* note 14, at 905–07.

129. *See supra* notes 23–31 and accompanying text.

130. *See* FLETCHER, *supra* note 9, § 45; *see also* Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 n.2 (10th Cir. 1993) (quoting Zubick v. Zubick, 348 F.2d 267, 272 (3d Cir. 1967)); *cf.* John E. Tobin, *Responsibility of the Corporate Parent for Activities of a Subsidiary: Advising the Corporate Parent Before Litigation*, 520 PRACT. L. INST. 129, 129 (1986).

131. *See* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630 (1983) (refusing to give the corporate form effect where it has been used to defeat legislative policies); Casanova Guns, Inc. v. Connally, 454 F.2d 1320, 1322 (7th Cir. 1972) (citing *Anderson v. Abbot*, 321 U.S. 349, 362–63 (1944), in stating that "it is well settled that the fiction of a corporate entity must be disregarded whenever it has been adopted or used to circumvent the provisions of a statute").

132. *See* NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 335 (6th Cir. 1990); *supra* note 35 and accompanying text.

133. 42 U.S.C. §§ 9601–9675 (1994); *see* United States v. Bestfoods, 118 S. Ct. 1876 (1998) (involving CERCLA case seeking to hold shareholder personally liable as operator); *see also infra* notes 196–98 and accompanying text (discussing *Bestfoods*).

134. Schmitz Meat, Inc., 313 N.L.R.B. 554 (1993) (referring to violations of the National Labor Relations Act (NLRA)); *see* Bufco Corp. v. NLRB, 147 F.3d 964, 966 (D.C. Cir. 1998) (upholding the National Labor Relations Board's piercing of the corporate veil).

Numerous cases illustrate a willingness to pierce the corporate veil to impose personal liability for unfair labor practices and other unlawful employment practices, such as employment discrimination.[135] Where an owner creates a corporation solely to avoid the effects of applicable laws or regulations regarding unfair labor practices, courts may employ the alter ego theory to justify disregarding of the corporate form.[136] The court may engage in veil piercing and hold the individual shareholders liable for the corporation's unfair labor practices if (1) the shareholder did not maintain separate identities; (2) the shareholder personally participated in the fraud, injustice, or inequity; and (3) failure to pierce sanctioned fraud, promoted injustice, or allowed evasion of legal obligations.[137] Similarly, where a parent corporation exercises a substantial degree of control and the parent attempts to make the subsidiary nonunion, the parent company and its insolvent subsidiary act as a single employer.[138] Thus the parent faces liability for backpay owed by the subsidiary for unfair labor practices.[139]

The willingness to pierce the corporate form when an entity uses that form to evade legal obligations almost always comports with the "inequitable" or "unjust result" requirement of the veil piercing doctrine. Appropriately, however, each prong of the unity/inequity test plays an important role, and neither unity of interest nor the evasion of legal obligation alone is sufficient to pierce in such a situation.[140] Two Tenth Circuit cases, *NLRB v. Greater Kansas City Roofing*[141] and *NLRB v. I.W.G., Inc.*,[142] illustrate this reality.

In *NLRB v. Greater Kansas City Roofing*,[143] the Tenth Circuit applied the federal common law test and refused to pierce the corporate veil unless both prongs of the test were met.[144] Greater Kansas City Roofing (GKC), a sole proprietorship, committed unfair labor practices, and the

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135. *See, e.g.*, NLRB v. O'Neill, 965 F.2d 1522, 1524, 1529 (9th Cir. 1992) (piercing appropriate where an owner closed operations, then later resumed them under new corporations, in order to evade labor obligations); Keffer v. H.K. Porter Co., 872 F.2d 60, 61 (4th Cir. 1989) (imposing liability on parent for subsidiary's liability for employment discrimination).

136. *See* United States v. Vitek Supply Corp., 151 F.3d 580, 582–83 (7th Cir. 1998) (involving liability for fines imposed for criminal violations); NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993) (holding NLRB could not pierce veil without evidence that the corporate form was used to promote fraud or that the owner's disregard of the separate corporate existence led to injustice or the evasion of a legal obligation); White Oak Coal Co., 318 N.L.R.B. 732 (1995) (finding the owners personally liable for corporate violations).

137. *See White Oak Coal Co.*, 318 N.L.R.B. at 732.

138. Package Serv. Co. v. NLRB, 113 F.3d 845, 845–46, 848 (8th Cir. 1997).

139. *See Package Serv. Co.*, 113 F.3d at 845-46.

140. *See Greater Kansas City Roofing*, 2 F.3d at 1054–55.

141. 2 F.3d 1047 (10th Cir. 1993).

142. NLRB v. I.W.G., Inc., 144 F.3d 685 (10th Cir. 1998).

143. 2 F.3d 1047 (10th Cir. 1993) (holding that the NLRB could not pierce the veil without evidence that the corporate form was used to promote fraud or that the owner's disregard of the separate corporate existence led to injustice or the evasion of a legal obligation).

144. *See Greater Kansas City Roofing*, 2 F.3d at 1055.

NLRB ordered it to make payments.[145] The proprietor's sister-in-law, Tina Clarke, loaned money to GKC to pay its debts.[146] Later, Clarke formed New Greater Kansas City Roofing (New GKC) unaware of GKC's liability for the unfair labor practices.[147] Clarke acted as New GKC's sole shareholder, officer, and director and failed to adhere to corporate formalities.[148] In many ways New GKC carried on aspects of GKCs business.[149] Alleging that New GKC and GKC were alter egos, the NLRB sought to hold New GKC liable for the payments, attempting to pierce New GKC's corporate veil to hold Clarke personally liable.[150] An administrative law judge found New GKC liable, but refused to attach personal liability to Clarke through the operation of the veil piercing doctrine.[151]

On administrative appeal, the NLRB disagreed and held Clarke personally liable for the judgment.[152] The Board declined to limit its ability to pierce the corporate veil only to those cases that involved fraud.[153] The Board accepted that Clarke "was not acting fraudulently or with any intent to violate the labor laws or to avoid payment of the preexisting backpay order."[154] Nevertheless, it found her liable "solely because of the intermingling of her affairs with those of New GKC and her failure to observe corporate formalities."[155]

On appeal, the Tenth Circuit, however, denied enforcement against Clarke.[156] The court stated that federal law applied to the question of "whether a company or individual is responsible for the financial obligations of another company or individual" when the question arose in the federal labor dispute context.[157] Further, as an equitable action, piercing the veil applied only in circumstances involving obvious impropriety or injustice.[158]

The court characterized the alter ego theory as a two-part test.[159] First, "was there such unity of interest and lack of respect given to the separate

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145. *See id.* at 1049.
146. *See id.* at 1050.
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*
151. *See id.* The ALJ found that Clarke "did not so intermingle her affairs with that of New GKC to justify ignoring the corporate boundaries," and that "Clarke did not use the corporate status of New GKC 'to perpetrate fraud, evade existing obligations, or circumvent a statute.'" *Id.* (quoting the ALJ's supplemental decision).
152. *See id.* at 1051.
153. *See id.*
154. *Id.*
155. *Id.*
156. *See id.*
157. *Id.*
158. *See id.*
159. *See id.* at 1052.

identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct."[160] Second, "would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations."[161] The court further underscored that the inequity justifying the pierce must result from the corporate form's misuse.[162]

The court found no evidence of fraud with respect to Clarke's failure to follow corporate formalities.[163] Nor did the court find that the NLRB adequately proved Clarke used New GKC to work an injustice.[164] The court noted that Clarke formed New GKC "long after the unfair labor practices had occurred."[165] Further, the NLRB did not link Clarke's style of conducting business to "any fraud, injury or injustice to the former employees of GKC or their union with regard to the unfair labor practices that gave rise to this backpay order."[166] Thus, the court held the piercing constituted clear error and denied enforcement of the NLRB order.[167]

During the survey period the Tenth Circuit also addressed the application of the alter ego doctrine to an attempt to evade legal obligations in *National Labor Relations Board v. I.W.G., Inc.*[168] This case evidences the courts' continued opposition to veil piercing absent facts clearly satisfying both prongs of the federal common law test.[169]

B. *Tenth Circuit Case:* National Labor Relations Board v. I.W.G., Inc.[170]

1. Facts

The Road Sprinkler Fitters Local Union filed charges which spurred an investigation by the NLRB.[171] Based on the investigation, the Board filed a complaint alleging that two corporations (I.W.G and Con-Bru) and the owner (Gordon) acted as a single employer or alter egos.[172] The Board alleged that a third corporation (Arlene), was the successor to

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160. *Id.* To determine the degree to which the personalities and assets merged, the court should consider to what extent the parties (1) complied with corporate legal formalities, and (2) commingled the assets and affairs of the individual and the corporation. *See id.*

161. *Id.* Under this prong, the court should consider whether adequate justification to invoke the court's equitable power. *See id.*

162. *See id.* at 1053.

163. *See id.* at 1055.

164. *See id.*

165. *Id.*

166. *Id.*

167. *See id.*

168. 144 F.3d 685, 686 (10th Cir. 1998).

169. *Cf. I.W.G.*, 144 F.3d at 689.

170. 144 F.3d 685, 686 (10th Cir. 1998).

171. *See id.* at 687.

172. *See id.*

I.W.G./Con-Bru.[173] An administrative law judge heard and decided the case, which the Board adopted with slight modification.[174] The NLRB found that Gordon created, then subsequently abandoned in succession, three corporations (I.W.G., Con-Bru, and Arlene), "primarily to avoid paying his employees pursuant to an extant collective-bargaining agreement and to evade a statutory obligation to bargain with the Union over the terms and conditions of employment."[175] The Board held Gordon personally liable for Arlene's unfair labor practices and pierced the veils of all three corporations.[176]

Gordon claimed the unfair labor practice complaint did not allege an alter ego claim against Arlene.[177] Insufficient notice, therefore, created a procedural impediment to the Board's finding that Arlene constituted an alter ego of I.W.G. and Con-Bru.[178] The NLRB contended that regardless of whether it specifically pled the alter ego claim, the parties fully and fairly litigated the claim, thereby making the decision proper.[179] When the case came before the Tenth Circuit, the NRLB sought enforcement of the order and Gordon sought review of the portion of the NLRB order holding him liable for the unfair labor practices of the corporations.[180]

2. Decision

The court found that the NLRB alter ego claim against Arlene was neither sufficiently charged nor litigated at the hearing.[181] The court emphasized that the respondent must have understood the issue and had the opportunity to justify its position.[182] Therefore, the court held that the Board's decision regarding notice of the claim violated Gordon's due process rights.[183]

The court reiterated that the decision to pierce a corporate veil was a question of law.[184] The court would give "great weight" to the Board's determination that the facts justified piercing and would uphold that de-

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173. *See id.* at 685. Arlene had notice of the potential liability for unfair labor practices thus qualified as a Golden State successor potentially liable for the predecessor's liability. *See* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184–85 (1973).

174. *See I.W.G.*, 144 F.3d at 687.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.* at 689–90.

182. *See id.* at 688. It was not necessary for Gordon to identify specific unconsidered evidence to contravene the Arlene alter ego theory because the complete lack of notice rendered Gordon's counsel unable to defend against the unannounced claim through steps at the evidentiary hearing. *See id.* at 689.

183. *See id.* at 687.

184. *See id.* at 689.

termination when made within "reasonable bounds."[185] The court noted that the Board's findings were conclusive when the record, considered as a whole, offered substantial evidence to support the finding.[186]

In this case, however, because the "unlitigated conclusion that Arlene is a single employer alter ego of I.W.G. and Con-Bru" provided a substantial part of the basis for piercing, the court of appeals determined that it could not accurately review the Board's veil piercing analysis.[187] The Tenth Circuit stated that the lower court erred by not applying the two-prong *Greater Kansas City Roofing* analysis to each corporation *individually*, rather than combining evidence of all three corporations' operations to justify the piercing.[188] Accordingly, the court remanded the issue of Gordon's personal liability to the Board for analysis consistent with the court's opinion.[189]

C. *Other Circuits*

Three other circuits have dealt with non-traditional veil piercing in the context of imposition of liability for evasion of legal obligations. In *Donahey v. Bogle*,[190] the Sixth Circuit refused to pierce the veil in a CERCLA case, holding that a lessee's shareholder was not liable as an operator under CERCLA absent circumstances justifying piercing of the corporate veil.[191] The court applied Michigan veil piercing doctrine, stating that Michigan follows the "general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil."[192] Notably, the dissent argued that by using state law the court afforded the savvy polluter the opportunity to protect himself from veil piercing unless the claimant proved fraud, a difficult evidentiary standard to meet.[193] Thus, the savvy polluter could play state law against the federal policy of CERCLA, choosing to incorporate in a state with more difficult requirements for piercing of the corporate veil.[194] The U.S. Su-

185. *Id.* (quoting NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1051 (10th Cir. 1993)).

186. *See id.* (citing 29 U.S.C. § 160(e) (1994)).

187. *Id.*

188. *See id.*

189. *See id.*

190. 129 F.3d 838, 843 (6th Cir. 1997), *judgment vacated by* Donahey v. Livingstone, 118 S. Ct. 2317 (1998) (involving CERCLA case seeking to hold sole shareholder personally liable as operator).

191. *See Donahey*, 129 F.3d at 843.

192. *Id.* (citing United States v. Cordova Chemical Co., 113 F.3d 572, 580 (6th Cir. 1997)). The test applied requires that "such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Id.*

193. *See id.* at 845 (Martin, J., dissenting).

194. *See id.*

preme Court vacated the judgment and remanded the case for further consideration in light of *United States v. Bestfoods*.[195]

In an opinion delivered a week before the *Donahey* ruling, the Supreme Court, in *Bestfoods*, essentially agreed with a Sixth Circuit decision to refuse to impose direct liability upon a parent corporation and to require circumstances that justified veil piercing in order to impose derivative CERCLA liability; however, the Court disagreed with the Sixth Circuit's method of analysis.[196] In vacating and remanding, the Court underscored that rather than focusing on the parent's relationship with the subsidiary, the lower court should have focused on the parent's relationship with the facility.[197] The Court noted it would not address the issue of whether state law or federal common law should dictate veil piercing because the parties did not raise the issue.[198]

In *Bufco Corp. v. NLRB*,[199] the D.C. Circuit upheld the NLRB's decision to pierce the corporate veil, holding three individuals jointly and severally liable for the wrongdoing of two corporations.[200] The court noted that when veil piercing arose in the context of a federal labor dispute context, "the Board typically applies a test derived from the federal common law" to determine whether to pierce.[201] This two-part test consists of the following inquires: "(1) have the shareholder and the corporation failed to maintain separate identities? and (2) would adherence to the corporate structure sanction a fraud, promote injustice, or lead to an evasion of legal obligations?"[202]

In *United States v. Vitek Supply Corp.*,[203] the Seventh Circuit utilized the alter ego theory to justify disregard of the corporate form in a criminal case.[204] The court demonstrated its willingness to pierce the corporate veil to impose personal liability for criminal fines where an owner cre-

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195. Donahey v. Livingstone, 118 S. Ct. 2317 (1998), *vacated*, United States v. Bestfoods, 118 S. Ct. 1876 (1998). In *Bestfoods*, the Supreme Court vacated the court of appeal's judgment and remanded the case for proceedings consistent with its decision. *See Bestfoods*, 118 S. Ct. at 1890.

196. *See Bestfoods*, 118 S. Ct. at 1885–86.

197. *See id.* at 1885. The court held:

> (1) when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions; (2) a participation-and-control test looking to the parent's supervision over the subsidiary, especially one that assumes that dual officers always act on behalf of the parent, cannot be used to identify operation of a facility resulting in direct parental liability; and (3) direct parental liability under CERCLA's operator provision is not limited to a corporate parent's sole or joint venture operation with subsidiary.

Id. at 1889.

198. *See id.* at 1886 n.9.

199. 147 F.3d 964 (D.C. Cir. 1998).

200. *See Bufco*, 147 F.3d at 969.

201. *Id.*

202. *Id.* (citing White Oak Coal Co., 318 N.L.R.B. 732 (1995)).

203. 151 F.3d 580 (7th Cir. 1998).

204. *See Vitek Supply*, 151 F.3d at 585.

ated a corporation solely to avoid the effects of applicable laws or regulations.[205]

D. *Analysis*

The Tenth Circuit's decision in *National Labor Relations Board v. I.W.G., Inc*, is consistent with *Greater Kansas City Roofing*. The court made a clear statement that, while the Board's decision to pierce deserves "great weight" if within "reasonable bounds,"[206] the Board *must* apply the two-prong *Greater Kansas City Roofing* analysis to each corporation individually.[207] The decision reinforces the strict adherence to the fundamental notions of the separateness of entities and limited liability.[208] Injustice will not outweigh correct application of the doctrine.

Although the court has consistently refused to pierce the corporate veil in cases dealing with federal labor laws, the facts of these cases render the decisions appropriate. In *I.W.G.*, the Board did not apply the applicable federal common law test, and the court's refusal to veil pierce was appropriate since the record did not clearly indicate reasonable grounds for the Board's decision. If, after application of the two-prong test, the Board determines that Arlene, I.W.G, and Con-Bru acted as alter egos to evade I.W.G.'s & Con-Bru's obligations, Gordon may face personal liability.[209] This result would be consistent with *Greater Kansas City Roofing*, in that the basis for piercing would satisfy the two-prong test—unity of interest *plus* the requirement that inequity resulted from the misuse of the corporate form.

CONCLUSION

During the survey period the Tenth Circuit twice addressed piercing the corporate veil in a non-traditional context. Both cases adhere to precedent, adding little to the substantive law, and both refuse to disregard the corporate form. The *Floyd* decision is notable for its thorough discussion of reverse veil piercing and its delineation of issues that states may consider in adopting the doctrine. The *I.W.G.* decision is notable for the court's insistence on the application of *Greater Kansas City Roofing*'s two-prong analysis for corporate veil piercing and the implied acceptance of piercing the corporate veil to hold an individual accountable when a corporation is established as a means of evading previously established legal obligations. These cases continue to demonstrate the Tenth Circuit's respect for the corporate form and its hesitance to engage in veil piercing unless clearly warranted by the facts of the case. When

205. *See id.*

206. NLRB v. I.W.G., Inc., 144 F.3d 685, 689 (10th Cir. 1998).

207. *See I.W.G.*, 144 F.3d at 689.

208. *See* Huard v. Shreveport Pirates, Inc., 147 F.3d 406, 409 (5th Cir. 1998); SOLOMON & PALMITER, *supra* note 7 and accompanying text.

209. *See I.W.G.*, 144 F.3d at 689.

viewed together, these cases may indicate a great resistance by the court to pierce the corporate veil in non-traditional circumstances. At the very least, the court firmly established that lower courts must prudently set forth and investigate the factors justifying their disregard of the corporate form in each instant case.

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