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Piercing the Corporate Veil: The Oklahoma Law of Corporate Alter Egos, Adjuncts, and Instrumentalities

Norwood Beveridge



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PIERCING THE CORPORATE VEIL: THE OKLAHOMA LAW OF CORPORATE ALTER EGOS, ADJUNCTS, AND INSTRUMENTALITIES*

NORWOOD P. BEVERIDGE**

I. INTRODUCTION

A 1993 survey of Oklahoma law on piercing the corporate veil noted with concern a lack of uniformity in the decisions.¹ Another recent survey of the same subject also complained about a lack of guidance in the cases.² This is nothing new, since scholars and judges have been complaining for the last century about a lack of coherence in this area, beginning with Judge Benjamin Cardozo of the New York Court of Appeals, who stated in a famous 1926 case that the relation between parent and subsidiary corporations was “enveloped in the mists of metaphor.”³ In a scholarly article which concluded that existing doctrinal analysis was unsatisfactory,

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** Professor of Law and Associate Dean, Oklahoma City University School of Law. Professor Beveridge is a member of the American Bar Association Committee on Corporate Governance and a former member of the ABA Committee on Corporate Law Departments. He practiced law in New York City as a member of a Wall Street law firm and as Chief Legal Officer of a New York Stock Exchange listed corporation. He is the author of numerous articles on corporate law and governance. He has served as an expert witness on the issue of piercing the corporate veil in civil actions brought in Oklahoma state and federal courts.

1. See Kenneth B. Watt, *Piercing the Corporate Veil: A Need for Clarification of Oklahoma's Approach*, 28 TULSA L.J. 869, 890 (1993).

2. See STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 2.37 (2000).

3. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (refusing to pierce the veil of a subsidiary corporation to hold the parent liable in the absence of agency or fraud).

University of California Professor Henry Ballantine agreed, calling the area a “legal quagmire.”⁴ Modern scholars are of the same opinion.⁵

Ambiguity in the law is one thing. The law suffers from the same indeterminacy that affects all human institutions, and this is perhaps necessary to allow room for development. Incoherence in the law is another thing, and one that cannot be tolerated by judges and lawyers, however much academics can afford to view it with equanimity. The purpose of this paper is to bring a more rigorous analysis to bear on the Oklahoma doctrine and explain how it is applied in practice. There are two primary sources of confusion which should be borne in mind:

1. A single doctrine of piercing the corporate veil is being used to explain many very different problems. Most lawyers probably think of piercing the corporate veil as an equitable remedy for corporate creditors who seek to fix liability for corporate obligations on shareholders.⁶ However, there are many other uses of the doctrine. It is used to adjust equities between the parties without fixing personal liability where the recognition of a separate corporate entity would cause an inequitable result.⁷ It is also used to create jurisdiction over an absent shareholder in an

4. Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CAL. L. REV. 12, 15 (1925).

5. See generally Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) (“[p]iercing seems to happen freakishly”); 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, 853 (1997) (“judicial opinions in this area have made it one of the most befuddled”); John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners’ Limited-Liability Protection*, 75 WASH. L. REV. 147, 150 (2000) (the “doctrine is lost in a fog”); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991) (analyzing 1600 veilpiercing cases for result and rationale).

6. See *Thomas v. Vertigo, Inc.*, 900 P.2d 458 (Okla. Ct. App. 1995) (evasion of workers’ compensation scheme requires veilpiercing). Parallels have been noted between veilpiercing law, fraudulent transfer law, and the corporate trust fund doctrine. See *Castleberry v. Branscum*, 721 S.W.2d 270, 271-72 n.1 (Tex. 1986); ROBERT CHARLES CLARK, *CORPORATE LAW* § 2.4 (1986). For a historical account of the trust fund doctrine, see Norwood P. Beveridge, *Does a Corporation’s Board of Directors Owe a Fiduciary Duty to Its Creditors?*, 25 ST. MARY’S L.J. 589 (1994).

7. See *Mid-Continent Life Ins. Co. v. Goforth*, 143 P.2d 154 (Okla. 1943) (treating two related corporations as the same in land sale and loan transactions where it would be inequitable not to do so); cf. *Blackwell Indus. Found., Inc. v. Texstar Corp.*, 387 F.2d 708 (10th Cir. 1968) (separate entity of two affiliated corporations not ignored despite common management and alleged inequity).

action against the corporation,⁸ or to create an estoppel by judgment against an affiliated corporation.⁹ It is sometimes used in reverse to make a corporation liable for the debts of a shareholder.¹⁰ Finally, it is frequently used, usually unsuccessfully, by a corporate shareholder to pierce the veil of his own corporation to gain some advantage.¹¹ In addition to state law issues, there are a myriad of cases involving federal law issues, such as the closely related doctrines of substantive consolidation, turnover proceedings, and equitable subordination in bankruptcy.¹² The doctrine has also been

8. See *Steinway v. Majestic Amusement Co.*, 179 F.2d 681 (10th Cir. 1949) (no jurisdiction over absent parent corporation based on control over domestic subsidiary); *Wirtz v. Mercantile Stores Co.*, 271 F. Supp. 830 (E.D. Okla. 1967) (refusing to pierce veil to create jurisdiction over parent corporation despite exercise of supervisory control and common officers).

9. See *Bluejacket State Bank v. First Nat'l Bank*, 9 P.2d 2 (Okla. 1932) (bank party to merger bound by judgment against other merger party although not served with process in the suit).

10. See *Terrapin Leasing, Ltd. v. United States*, No. 79-1086, 1981 WL 15490 (10th Cir. Apr. 6, 1981) (reverse piercing corporate veil to make corporate assets liable for shareholder tax debt); *FDIC v. Hinch*, 879 F. Supp. 1099 (N.D. Okla. 1995) (may reverse pierce even if debtor is not a shareholder). *But see* *Ellsworth Motor Freight Lines, Inc. v. North Am. Res., Inc.*, No. 99-5102, 2000 WL 1187706 (10th Cir. Aug. 22, 2000) (unpublished opinion) (no reverse veilpiercing under Oklahoma law); *In re Denton*, No. 99-6059, 2000 WL 107376 (10th Cir. Jan. 31, 2000) (unpublished opinion) (Oklahoma does not recognize reverse veil piercing). These latter two cases are not generally to be cited as precedent according to Rule 36.3 of the Tenth Circuit Court of Appeals Rules. See also *Bankers Trust Co. v. Lee Keeling & Assoc., Inc.*, No. 87-C-20-B, 1992 WL 602830 (N.D. Okla. Nov. 2, 1992) (no reverse veilpiercing under Oklahoma law), *aff'd on other grounds*, 20 F.3d 1092 (10th Cir. 1994). See generally Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1990) (reverse piercing presents different policy considerations than direct piercing).

11. See *Garrett v. Downing*, 90 P.2d 636 (Okla. 1939) (shareholder cannot sue on corporate cause of action); *Hearn v. Petra Int'l Corp.*, 710 P.2d 769 (Okla. Ct. App. 1985) (parent corporation cannot pierce veil of subsidiary to gain protection of exclusive remedy provisions of the workers compensation laws to bar negligence suit by employee of subsidiary); Annotation, *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation*, 30 A.L.R.4th 948 (1984) (general rule is that parent is not immune from suit).

12. See Mary Elisabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381 (1998) (substantive consolidation may unfairly disadvantage creditors of wealthier corporation); *In re Gulfco Inv. Corp.*, 593 F.2d 921 (10th Cir. 1979) (no substantive consolidation of related corporations in bankruptcy); see also John D. Wilmore, *The Bankruptcy Trustee: Can an Alter Ego Sue in Alter Ego?*, 20 CAL. BANKR. J. 155 (1992) (conflict in the cases as to whether a bankruptcy trustee can bring alter ego suits against affiliated corporations).

used in an attempt to create federal court diversity jurisdiction.¹³ There are many other federal law questions such as taxation, labor law obligations, or anti-pollution responsibilities of an affiliated corporation.¹⁴ It would be unreasonable to expect that all of these situations raise the same issues.

2. Many very different terms are being used to describe the same doctrine of piercing the corporate veil. Thus, the courts speak of the dominated corporation as an instrumentality, adjunct, dummy, or sham.¹⁵ Other favorite epithets are that the corporation is the alter ego of its shareholders,¹⁶ or an alias or dummy,¹⁷ or the agent or department of its parent corporation.¹⁸ There is no reason to believe that these different terms are distinguishable from each other.

In addition, it would be well to pay more attention to what a court does than what it says. There is some loose language in the opinions, but the

13. See *Glenny v. American Metal Climax, Inc.*, 494 F.2d 651 (10th Cir. 1974) (no veil pierce to create diversity jurisdiction); *Needham v. Wedtech (USA), Inc.*, 918 F. Supp. 353 (N.D. Okla. 1996) (diversity not created when Canadian parent corporation's principal place of business was not imputed to Delaware corporation with principal place of business in Oklahoma).

14. See, e.g., Lucia Ann Silecchia, *Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 *FORDHAM L. REV.* 115 (1998) (analyzing liability of parent for subsidiary's CERCLA violations); PRESSER, *supra* note 2, at ch. 3. For an exhaustive treatment of all of the possibilities, see PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATE STATUTORY LAW* (1995); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 *HARV. L. REV.* 853 (1982).

15. See *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918) (subsidiary corporation used as mere agency or instrumentality to charge unreasonable fees); *Tulsa Tribune Co. v. State ex rel. Oklahoma Tax Comm'n*, 768 P.2d 891 (Okla. 1989) (court refuses to pierce corporate veil to assess Oklahoma franchise tax on undistributed income of subsidiary corporations).

16. See *Sautbine v. Keller*, 423 P.2d 447 (Okla. 1966) (court refuses to pierce corporate veil to estop related family corporation by judgment in earlier foreclosure action against individual shareholder).

17. See *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

18. See *United States v. Reading Co.*, 253 U.S. 26 (1920) (piercing corporate veil of subsidiary to find violations of the commodities clause of the Hepburn Act). The use of the term "agent" is confusing in this context since the courts are not referring to an agency implied from the relationship, but have limited it to an express agency, which is never found. See *Lowendahl v. Baltimore & O.R. Co.*, 287 N.Y.S. 62, 74 (App. Div.) (use of word "agent" is unfortunate and should be limited to express agency), *aff'd*, 6 N.E.2d 56 (N.Y. 1936); Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 *DENV. L.J.* 1, 3 n.9 (1978).

results reached in the cases make it clear that the purpose of the doctrine is to advance justice, and the corporate veil will not be pierced to create liability of an individual or corporate shareholder upon a mere showing of domination of the corporation. There must also be evidence of wrong, fraud, or injustice which would result from treating the corporation as a separate entity.¹⁹

II. THE OKLAHOMA STATE CASES

In a well-known early case, *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*,²⁰ the controlling shareholder of a taxi corporation caused the formation of a second, dummy corporation to operate the business in order to insulate the first corporation from liability arising out of injury to person and property from the taxi operations.²¹ The new corporation was without

19. See generally WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 41 (1999) (corporation viewed as a legal entity unless used to defeat public convenience or perpetrate or protect crime or fraud); *id.* § 43 (domination and control is not sufficient to cause liability; there must also be fraud or evasion of responsibility). These stylized expressions are of great antiquity. See *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247 (C.C.E.D. Wis. 1905) (dummy corporation formed to evade the Interstate Commerce Act and the Elkins Act of 1903, where it is held "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons"). *Id.* at 255. See generally I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912), and William O. Douglas & Carrol M. Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 214 (1929) (inadequacy of capital is the most important consideration) for a discussion of the early cases. Wormser concluded that

[w]hen the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.

Wormser, *supra*, at 517.

20. 61 P.2d 645 (Okla. 1936).

21. See *id.* For a collection of the cases, see generally Ferdinand S. Tinio, Annotation, *Stockholder's Personal Conduct of Operations or Management of Assets as Factor Justifying Disregard of Corporate Entity*, 46 A.L.R.3d 428 (1972); R.A. Horton, Annotation, *Liability of Corporation for Torts of Subsidiary*, 7 A.L.R.3d 1343 (1966); L.S. Tellier, Annotation, *Inadequate Capitalization as Factor in Disregard of Corporate Entity*, 63 A.L.R.2d 1051 (1959). The fact pattern in *Wallace* is similar to the well-known case of *Luckenbach S.S.*

assets and was nominally owned by employees of the first corporation, whose shares had been bought with funds loaned to them by the controlling shareholder.²² The second corporation operated the business under a lease from the first corporation which was terminable at will.²³ It carried no liability insurance and never showed a profit.²⁴ When a woman injured by the taxicab obtained a judgment for personal injuries against the second corporation which was returned unsatisfied, the Oklahoma Supreme Court had no difficulty in holding that the second corporation was a mere instrumentality or adjunct of the old or dominant corporation, which was held liable for the judgment.²⁵ The court stated:

Generally speaking, it must appear from an examination of the entire facts, either (1) that the separate corporate existence is a design or scheme to perpetuate fraud, or (2) that one corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality or adjunct of another corporation.²⁶

The court has recently expressed the instrumentality test as follows: The separate entity of parent and subsidiary corporations will be set aside if it appears that "the subsidiary or affiliate companies function entirely as instrumentalities or adjuncts of the parent, and that circumstances require disregard of separate corporate entities to avoid fraud or injustice."²⁷

Under either formulation, fraud, wrong, or injustice must be proved to cause liability.²⁸ As the United States Supreme Court said in its famous

Co. v. W.R. Grace & Co., 267 F. 676 (4th Cir. 1920) (shipowning corporation which leased ships at below market price rental to undercapitalized sister corporation held liable for breach of contract by the latter). See also J.A. Bryant, Annotation, *Liability of Corporation for Contracts of Subsidiary*, 38 A.L.R.3d 1102 (1971).

22. See *Wallace*, 61 P.2d at 646.

23. See *id.*

24. See *id.* at 647.

25. See *id.* at 649.

26. *Id.* at 648.

27. *Tulsa Tribune Co. v. State ex rel. Oklahoma Tax Comm'n*, 768 P.2d 891, 892 (Okla. 1989) (refusing to pierce veil to impose franchise tax upon undistributed income of subsidiary).

28. See FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS 40-54 (1931) (proof of instrumentality status alone is not sufficient; there must also be fraud or wrong against the complainant); Ballantine, *supra* note 4, at 14, 20 (control is not enough in the absence of fraud or wrong); Note, *Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 HARV. L. REV. 1122, 1125-26 (1958) (injustice to the third party is the crucial

“Deep Rock” decision, *Taylor v. Standard Gas & Electric Co.*,²⁹ the principle behind the instrumentality rule is that the doctrine of corporate entity “will not be regarded when [to do so] would work fraud or injustice.”³⁰

This principle has been applied by the Oklahoma Supreme Court in many cases. Thus, in *Buckner v. Dillard*,³¹ the court refused to pierce the corporate veil to hold a shareholder personally liable for the unpaid workers’ compensation award of his insolvent corporation. The court held that although the corporation was organized for the purpose of avoiding personal liability, the corporate veil would only be pierced upon a showing that it was used “to defeat public convenience, justify wrong, protect fraud, or defend crime.”³² This principle was applied in a subsequent case where the court refused to pierce the veil of a family corporation: “[T]here is no evidence that such company was organized or used by them to perpetrate a fraud, or to assist them in any inequitable transaction.”³³ Later, the court refused to pierce the corporate veil of an employer corporation to hold the principal stockholder ineligible to be the beneficiary of a group life

factor).

29. 306 U.S. 307 (1939) (establishing principle of equitable subordination in bankruptcy of debt owed to parent company). In a very recent case, the United States Supreme Court has stated that it is a “bedrock principle” of corporate law that a parent corporation is not liable for the acts of its subsidiaries in the absence of fraud or wrong. *See United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) (corporate parent not liable for CERCLA violations by its subsidiary unless it is an “operator” of the facility or grounds for purposes of piercing the corporate veil exist).

30. *Taylor*, 306 U.S. at 322.

31. 89 P.2d 326 (Okla. 1939).

32. *Id.* at 329.

33. *Continental Oil Co. v. Berry*, 103 P.2d 69, 71 (Okla. 1940) (shareholders of corporation which received payment by mistake of payor not personally liable). The court also refused to pierce the corporate veil of a subsidiary corporation in *Gulf Oil Corp. v. State*, 360 P.2d 933, 936 (Okla. 1961) (corporate parent not common purchaser nor common carrier of crude oil based on activities of wholly owned subsidiary), finding no scheme to perpetrate fraud and no instrumentality or adjunct, dummy or sham. *See also State ex rel. Blankenship v. Freeman*, 447 P.2d 782 (Okla. 1968) (no veil pierce where no instrumentality or fraud); *Sautbine v. Keller*, 423 P.2d 447 (Okla. 1966) (no veil pierce of family corporation to create estoppel by judgment where no showing of inequitable or illegal conduct).

insurance policy on a corporate employee finding no "design or scheme to perpetrate a fraud."³⁴

In 1989, the Oklahoma Supreme Court held in *Frazier v. Bryan Memorial Hospital Authority* that the question of a parent corporation's liability for the torts of a dominated subsidiary "hinges primarily on control"³⁵ and said that the following ten factors may be considered:

1. [T]he parent corporation owns all or most of the subsidiary's stock,
2. [T]he corporations have common directors or officers,
3. [T]he parent provides financing to its subsidiary,
4. [T]he dominant corporation subscribes to all the other's stock,
5. [T]he subordinate corporation is grossly undercapitalized,
6. [T]he parent pays the salaries, expenses or losses of the subsidiary,
7. [A]lmost all of the subsidiary's business is with the parent or the assets of the former were conveyed from the latter,
8. [T]he parent refers to its subsidiary as a division or department,
9. [T]he subsidiary's officers or directors follow directions from the parent corporation and
10. [L]egal formalities for keeping the entities separate and independent are observed.³⁶

34. *Hulme v. Springfield Life Ins. Co.*, 565 P.2d 666, 670 (Okla. 1977). *See also* *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269, 1275 (Okla. 1981) (no veil pierce at request of oil and gas lessors where no fraud or instrumentality or common control).

35. *Frazier v. Bryan Mem'l Hosp. Auth.*, 775 P.2d 281, 288 (Okla. 1989).

36. *Id.* The *Frazier* court cites to *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940). In *Fish*, this list was used in a bankruptcy turnover proceeding to pierce the veil of a corporation which had been organized for the purpose of hindering and delaying creditors of an affiliated corporation. *Id.* at 182. The *Fish* court held that the separate corporate entity may be disregarded where not to do so "will defeat public convenience, justify wrong or protect fraud." *Id.* at 191. For some reason, although the list appears to be adapted from *Taylor v. Standard Gas & Electric Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938), *rev'd on other grounds*, 306 U.S. 307 (1939), the *Fish* court omits *Taylor's* ninth factor, "The parent corporation uses the property of the subsidiary as its own." There is no significance to this omission. Similarly, the *Frazier* court omits the word "not" (as in "not observed") in the last

This list is commonly used, in one form or another. It originated with Frederick J. Powell, who collected the cases in a 1931 study.³⁷ Powell created the list from factors cited in the cases as the first part of a three-part test for piercing the corporate veil:

1. The first element: control (instrumentality rule).
2. The second element: defendant's fraud or wrong with respect to the complainant.
3. The third element: unjust loss or injury to the complainant.³⁸

Powell never intended the list to be exclusive, and it obviously contains harmless factors that are found in all parent-subsidary relations.³⁹ The *Frazier* court gave us no indication of how it would weigh the factors in that case, although the facts suggest that the subsidiary was undercapitalized.⁴⁰ Knowing that the plaintiff's pleading was upheld does not tell us anything about ultimate liability.⁴¹ In the next case to come before the Oklahoma Supreme Court, the court adhered to the established

factor for some reason, but this is also without significance. *See Frazier*, 775 P.2d at 288.

37. *See* POWELL, *supra* note 28, § 6; Krendl & Krendl, *supra* note 18, at 11-22 (discussing the impact of the Powell analysis on the cases).

38. *See* POWELL, *supra* note 28, § 3.

39. *See id.* *See also* William J. Rands, *Domination of a Subsidiary By a Parent*, 32 IND. L. REV. 421, 434 (1999) (the Powell list mixes "the innocuous with the noxious"). These lists have been decried as "laundry lists of irrelevant factors that the courts recite without analysis or justification." Matheson & Eby, *supra* note 5, at 151.

40. *See Frazier*, 775 P.2d at 288.

41. *See also* Roberts Ranch Co. v. Exxon Corp., 43 F. Supp. 2d 1252 (W.D. Okla. 1997) (question of fact whether wholly-owned subsidiary was instrumentality); *Oliver v. Farmers Ins.*, 941 P.2d 985 (Okla. 1997) (question of fact presented whether management company liable for insurer's bad faith breach of contract); *Lewis v. Central Okla. Med. Group, Inc.*, 998 P.2d 202 (Okla. Ct. App. 1999) (question of fact presented whether parent corporation liable for torts of subsidiary); *Campbell v. American Int'l Group, Inc.*, 976 P.2d 1102 (Okla. Ct. App. 1999) (question of liability of parent corporation must await trial); *Sproles v. Gulfcor, Inc.*, 987 P.2d 454 (Okla. Ct. App. 1999) (adequate findings of fact necessary to determine whether veil should be pierced); *cf.* *Warner v. Hillcrest Med. Ctr.*, 914 P.2d 1060 (Okla. Ct. App. 1995) (imposing sanctions after trial for bringing meritless alter ego claims against parent corporation and affiliated subsidiaries).

rule that the separate corporate entity will not be ignored “unless it can be shown that there is a scheme to defraud.”⁴²

The lower Oklahoma courts have also refused to pierce the corporate veil unless required “to protect the interests of the public, circumvent fraud, protect the rights of third persons or accomplish justice.”⁴³ Summary judgment was properly granted to a defendant sole shareholder on the issue of piercing the corporate veil where the facts showed no fraud or undercapitalization.⁴⁴ The court stated:

To establish the “alter-ego” doctrine it must be shown that the stockholders’ disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and to adhere to the doctrine of corporate entity would promote injustice or protect fraud.⁴⁵

Veilpiercing is said to be “an extraordinary remedy used sparingly.”⁴⁶ A “showing of a common board of directors and a unity of corporate

42. *Seitsinger v. Dockum Pontiac Inc.*, 894 P.2d 1077, 1079 (Okla. 1995) (court refuses to pierce veil to hold shareholder liable to car buyer who alleged fraud in the sale to him of a used automobile as new). *Frazier* was also cited in *Carlson Reserve Corp. v. State ex rel. Oklahoma Employment Security Commission*, 811 P.2d 1320 (Okla. 1991), but that was not a veil-piercing case since the statute made a parent corporation liable for unpaid unemployment compensation taxes of its subsidiary. *Cf. Gibson Prod. Co. v. Murphy*, 100 P.2d 453 (Okla. 1940) (not a violation of the state constitution for the Oklahoma Unemployment Compensation Law to group related corporations as a single unit).

43. *Hearn v. Petra Int’l Corp.*, 710 P.2d 769, 770 (Okla. Ct. App. 1985) (no self-pierce by parent corporation to bar negligence action by employee of subsidiary corporation); *see also Poteau State Bank v. Mitchell Flying Serv., Inc.*, 599 P.2d 436, 438 (Okla. Ct. App. 1979) (secured party on corporate debt not estopped by earlier judgment against corporation’s sole shareholder); *Mainord v. Sharp*, 569 P.2d 546 (Okla. Ct. App. 1977) (sole shareholder cannot sue on corporate cause of action).

44. *See Oklahoma Oil & Gas Exploration Drilling Program v. W.M.A. Corp.*, 877 P.2d 605 (Okla. Ct. App. 1994); *In re Rahill*, 827 P.2d 896, 897 (Okla. Ct. App. 1991) (no veil pierce except when entity used to defeat public convenience, justify wrong, perpetrate fraud or defend crime).

45. *W.M.A. Corp.*, 877 P.2d at 609.

46. *Puckett v. Cornelson*, 897 P.2d 1154, 1156 (Okla. Ct. App. 1995) (no veil pierce to fix personal liability on shareholder for corporate debt where no violation of public policy or control).

purpose is insufficient to pierce the corporate veil.”⁴⁷ On the other hand, a scheme to evade liability for state unemployment insurance contributions is sufficient to pierce the corporate veil.⁴⁸ The same is true where evasion of the state’s workers’ compensation act is found.⁴⁹ The veil will also be pierced when a subsidiary corporation is used to avoid a contractual obligation.⁵⁰

III. THE OKLAHOMA FEDERAL CASES

The federal cases in the Tenth Circuit have uniformly applied the rule announced early on, beginning with *Taylor*:⁵¹

There is respectable authority for the proposition that to justify the application of the instrumentality rule between parent and subsidiary corporation, there must be present in addition to the elements of control through stock ownership and common directorates and officers, elements of fraud or wrongdoing on the part of the parent corporation to the detriment of the subsidiary and third persons in their relations with the subsidiary.⁵²

Thus, the court has refused to pierce the corporate veil in the absence of a showing of “fraud or collusion,”⁵³ holding that “[i]n accord with the general rule, Oklahoma permits the court to disregard the corporate entity if used, (1) to defeat public convenience, (2) justify wrong, (3) to perpetrate fraud whether actual or implied, or (4) to defend crime.”⁵⁴ Likewise, in a

47. *Warner v. Hillcrest Med. Ctr.*, 914 P.2d 1060, 1067 (Okla. Ct. App. 1995) (no veil pierce of parent corporation or affiliates); *see also Century Inv. Group, Inc. v. Bake Rite Foods, Inc.*, 7 P.3d 510 (Okla. Ct. App. 2000) (no evidence sufficient to pierce veil).

48. *See State ex rel. Oklahoma Employment Sec. Comm’n v. Morrow*, 877 P.2d 1182 (Okla. Ct. App. 1994).

49. *See Thomas v. Vertigo, Inc.*, 900 P.2d 458 (Okla. Ct. App. 1995).

50. *See Pennmark Resources Co. v. Oklahoma Corp. Comm’n*, 6 P.3d 1076 (Okla. Ct. App. 2000) (subsidiary corporation cannot vote in election to replace unit operator where parent unit operator cannot vote).

51. 96 F.2d 693 (10th Cir. 1938), *rev’d on other grounds*, 306 U.S. 307 (1939).

52. *Id.* at 704. *See also Selected Inv. Corp. v. Duncan*, 260 F.2d 918 (10th Cir. 1958) (piercing veil to prevent fraud, injustice, and wrong); *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940); *Continental Oil Co. v. Jones*, 113 F.2d 557 (10th Cir. 1940) (veil pierced where dominated subsidiary corporations used to avoid federal excise tax).

53. *Robertson v. Roy L. Morgan Prod. Co.*, 411 F.2d 1041, 1043 (10th Cir. 1969).

54. *Id.*

suit for common law fraud involving the purchase of a used automobile where the odometer had admittedly been turned back, the court held that issues of fact were presented as to whether the parent corporation had ordered the turnback, saying that under Oklahoma law “[a] court will disregard the corporate entity where fraud or illegal or inequitable conduct is the result of the use of the corporate structures.”⁵⁵

The issue left to be decided in the odometer case was participation in the alleged wrongful tortious conduct, not participation in management generally. In *Luckett v. Bethlehem Steel Corp.*,⁵⁶ the court held that summary judgment was proper by dismissing an instrumentality claim against a parent corporation in a tort suit for personal injuries against a Singapore controlled subsidiary, even though the parent corporation provided management services to the subsidiary.⁵⁷ On the other hand, *Luckett* allowed a claim against the parent based on the alleged negligent conduct of the parent’s management team in the operation of the subsidiary’s business.⁵⁸

Where a retail grocers’ association sued for an injunction against Wal-Mart Stores, Inc. for alleged violations of the Oklahoma Unfair Sales Act, and some members of the association were themselves guilty of the same violations, the court held that the veil of the plaintiff corporation would be pierced to deny equitable relief as barred by the clean hands doctrine.⁵⁹ In a suit for breach of fiduciary duty by the two sole shareholders of a corporation which had violated its agency contract with the plaintiff, the court held that the jury had properly found the individual defendants liable:

55. See *Edgar v. Fred Jones Lincoln-Mercury, Inc.*, 524 F.2d 162, 166 (10th Cir. 1975).

56. 618 F.2d 1373, 1379 (10th Cir. 1980) (no showing of fraud or inequitable conduct); *In re Gulfco Inv. Corp.*, 593 F.2d 921, 928 (10th Cir. 1979) (no substantive consolidation in bankruptcy where no fraud or injustice); *DeBoer Constr., Inc. v. Reliance Ins. Co.*, 540 F.2d 486, 496 (10th Cir. 1976) (no self-pierce where no fraud or wrong or inequity); *cf. Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp.*, 49 F.2d 146, 150 (10th Cir. 1931) (parent corporation liable where third party led to believe it was contracting with parent, not subsidiary).

57. See *Luckett*, 618 F.2d at 1379.

58. See *id.* at 1383.

59. See *Oklahoma Retail Grocers Ass’n v. Wal-Mart Stores, Inc.*, 605 F.2d 1155 (10th Cir. 1979) (court will disregard the entity in the interests of justice).

“Oklahoma permits the court to disregard the corporate entity if used to justify wrong or perpetrate fraud.”⁶⁰

The court has stated that for liability purposes both instrumentality status and fraud must be shown; however, when the issue is one of jurisdiction over the shareholder personally based upon his connections with the forum on behalf of the controlled corporation, only instrumentality status must be shown.⁶¹ For example, the court stated that reverse piercing would not be allowed to base jurisdiction over an absent corporation on the forum activities of its alter ego shareholder.⁶²

In another personal injury case based upon the alleged negligence of employees of a subsidiary corporation, the court stated that the plaintiffs could not maintain suit against the parent in the absence of any evidence that the parent-subsidiary relationship in that case was “detrimental to the public good, justifies wrong, or protects fraud.”⁶³

The lower federal courts in Oklahoma have followed the same path. Thus, where an individual controlling stockholder used the corporation as a facade to purchase an oil drilling rig with a check returned for insufficient

60. *CCMS Publ'g Co., Inc. v. Dooley-Maloof, Inc.*, 645 F.2d 33, 37 (10th Cir. 1981); *see also Terrapin Leasing, Ltd. v. United States*, No. 79-1086, 1981 WL 15490 (10th Cir. Apr. 6, 1981) (allowing reverse piercing to subject corporate assets to tax claim against sole shareholder where corporation was a sham used to defraud creditors); *cf. Warner Bros. Theatres, Inc. v. Cooper Found.*, 189 F.2d 825 (10th Cir. 1951) (charitable corporation not alter ego of founder nor used to evade fiduciary responsibilities).

61. *See Home-Stake Prod. Co. v. Talon Petroleum*, 907 F.2d 1012, 1017 (10th Cir. 1990) (fiduciary shield doctrine does not protect alter ego shareholder).

62. *See id.* at 1021 (disapproving *Rea v. An-Son Corp.*, 79 F.R.D. 25 (W.D. Okla. 1978)).

63. *Key v. Liquid Energy Corp.*, 906 F.2d 500, 504 (10th Cir. 1990). In a footnote, the court stated that it was unnecessary to decide whether Oklahoma required both instrumentality and inequity or fraud since the plaintiff could not show either. *Id.* at 504 n.1. This comment is *obiter dictum*, and the four Oklahoma cases, *Tara Petroleum*, *Gulf Oil*, *Sautbine*, and *Mainord*, cited by the court to demonstrate conflict in the Oklahoma decisions, are actually consistent on this point. *See supra* notes 31, 32, and 41 and accompanying text. *See In re BYOC Int'l, Inc.*, No. WO-97-103, 1998 WL 780435 (B.A.P. 10th Cir. Nov. 10, 1998) (unreported decision) (Oklahoma requires proof both that the corporation is a shell and was used to commit a fraud); *Heritage Mfg. & Bldg. Supply, Inc. v. Abraham Dev. Co.*, Nos. 87-1650, 87-2138, 1992 WL 207989 (10th Cir. Aug. 27, 1992) (unreported decision) (no veil pierced in the absence of fraud or wrong: alternative holding since question moot); Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 DENV. U. L. REV. 763 (1998) (Tenth Circuit Survey).

funds, the district court held that the corporate veil might be pierced.⁶⁴ Similarly, in a case where the controlling shareholder diverted substantial corporate funds for personal use, the court held that the veil would be pierced, saying: "In Oklahoma a corporate entity may be disregarded under the alter ego theory if the corporate existence is used to do wrong, perpetuate fraud, or commit a crime and the individual shareholder may be held personally liable."⁶⁵

IV. SUMMARY AND ANALYSIS

The Oklahoma Supreme Court has not pierced the corporate veil to impose liability on a shareholder or affiliated corporation since its *Wallace* decision in 1936.⁶⁶ It has pierced the corporate veil of two related corporations in order to preserve equities arising from the defendants' dealings with one of the corporations.⁶⁷ Otherwise, the court has

64. See *Miller & Miller Auctioneers, Inc. v. Mersch*, 442 F. Supp. 570 (W.D. Okla. 1977). See also *Stoner v. Ford*, No. 74-311, 1974 WL 476 (N.D. Okla. Dec. 24, 1974) (cause of action stated to pierce corporate veil where controlling shareholder used corporation to perpetrate fraud in the sale of stock); *Palmer v. Stokely*, 255 F. Supp. 674 (W.D. Okla. 1966) (corporate veil pierced where corporation used to defraud creditors of affiliated corporation). In *Roberts Ranch Co. v. Exxon Corp.*, 43 F. Supp. 2d 1252 (W.D. Okla. 1997), the court held that an issue of fact existed as to whether a wholly-owned subsidiary was an instrumentality of its parent used to avoid a contractual obligation. See *id.* at 1268.

65. *Stoltz, Wagner & Brown v. Cimarron Exploration Co.*, 564 F. Supp. 840, 853 (W.D. Okla. 1981); see also *In re Moran Pipe & Supply Co.*, 130 B.R. 588 (Bankr. E.D. Okla. 1991) (substantive consolidation of affiliated corporations ordered); *In re Fitzgerald, DeArman & Roberts, Inc.*, 129 B.R. 652 (Bankr. N.D. Okla. 1991) (piercing veil in interests of justice to allow setoff); *In re Tureaud*, 59 B.R. 973 (N.D. Okla. 1986) (substantive consolidation of affiliated corporations in bankruptcy ordered where fraudulent transfers of assets shown); *In re Sooner Oil & Gas Corp.*, 24 B.R. 479, 484 (Bankr. W.D. Okla. 1982) (piercing veil of affiliated corporations where justice required); cf. *Tatum v. Philip Morris Inc.*, 809 F. Supp. 1452 (W.D. Okla. 1992), *aff'd*, 16 F.3d 417 (10th Cir. 1993) (dismissing suit against affiliated corporation in absence of personal involvement in alleged wrongful discharge of plaintiff from employment). Additionally, a sister state federal court in applying Oklahoma law held that it was the same as Delaware or federal common law on veil piercing. See *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989) (parent corporation not liable for patent infringement by subsidiary in the absence of fraud or something similar).

66. See *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 61 P.2d 645 (Okla. 1936); see also text accompanying note 20.

67. See *Mid-Continent Life Ins. Co. v. Goforth*, 143 P.2d 154 (Okla. 1943); see also text accompanying note 7.

consistently refused to pierce the corporate veil in the many cases to come before it, holding that fraud, wrongdoing, or violation of public policy must be shown, in addition to domination and control, to justify the extraordinary remedy of veilpiercing.⁶⁸ In both *Oliver v. Farmers Insurance Group, Inc.*⁶⁹ and *Frazier*,⁷⁰ the court preserved fact issues for trial, and those cases are not to the contrary. In *Frazier*, these questions of fact are identified and create a possibility for liability.⁷¹ In *Oliver*, the court also identifies questions of fact to be resolved.⁷²

Oklahoma's jurisprudence is therefore consistent with the general rule in this country which has been developed in thousands of decided cases in this century.⁷³ Although there are critics who advocate the abolition of limited liability as inconsistent with their political and social views,⁷⁴ Oklahoma's case law is supported by the great weight of scholarly opinion, and certainly legislative opinion, which is going in the opposite direction of expanding limited liability for other forms of business organizations.⁷⁵

68. See cases cited *supra* notes 20-40 and accompanying text.

69. 941 P.2d 985 (Okla. 1997).

70. 775 P.2d 281 (Okla. 1989).

71. See *id.* at 288 (non-party wholly owned subsidiary may be a dummy and instrumentality based on commingling of cash, common business and officers, non-distinguishable operations, and holding out).

72. See *Oliver*, 941 P.2d at 987-88. The suit involved a claim of bad faith denial of insurance benefits, which is a tort in Oklahoma for which only the contracting corporation and not its agents is liable. See *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982). Among other things, the *Oliver* court referred to an affidavit by former Oklahoma Insurance Commissioner Grimes to the effect that he considered the separate corporations "one entity." *Oliver*, 941 P.2d at 986. Commissioner Grimes apparently did not recall the advice of the Oklahoma Attorney General to him in 1991 that in Oklahoma separate corporations could not be treated as one in the absence of allegations of "fraud or injustice." See 22 Op. Att'y. Gen. 108 (1991). The *Oliver* decision also cites to *Delos v. Farmers Insurance Group, Inc.*, 155 Cal. Rptr. 843 (Ct. App. 1979), although the authority and relevance of that case is questionable. See *Filippo Ind., Inc. v. Sun Ins. Co.*, 88 Cal. Rptr. 2d 881 (Ct. App. 1999) (questioning the basis and continuing validity of *Delos*); *Salido v. Allstate Ins. Co.*, No. C 98-04616 CRB, 1999 WL 977944 (N.D. Cal. Oct. 21, 1999) (same).

73. See FLETCHER, *supra* note 19 and accompanying text.

74. See, e.g., Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991) (advocating abolition of corporate limited liability for tort).

75. Other forms of business organizations include limited liability companies and limited liability partnerships. See Matheson & Eby, *supra* note 5; David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities*

The highest courts of other states have also recently reaffirmed the principle that some fraud, wrong, or inequity must be shown before the courts will pierce the veil of even a wholly-owned corporation.⁷⁶ As the Supreme Court recently noted, limited liability of shareholders is a bedrock principle of corporation law, and should not be violated without the clearest showing of substantial injustice.⁷⁷

Regulation for the Limited Liability Company?, 51 OKLA. L. REV. 427 (1998).

76. See *Doughty v. CSX Transp., Inc.*, 905 P.2d 106 (Kan. 1995) (alter ego status and injustice must be shown); *Theberge v. Darbro, Inc.*, 684 A.2d 1298 (Me. 1996) (pierce only in exceptional circumstances where illegality or fraud is present); *Wolf v. Walt*, 530 N.W.2d 890 (Neb. 1995) (must be control and fraud or wrong); *Gautschi v. Auto Body Discount Ctr., Inc.*, 660 A.2d 1076 (N.H. 1995) (must be fraud or injustice); *TNS Holding, Inc. v. MKI Sec. Corp.*, 703 N.E.2d 749 (N.Y. 1998) (even if one corporation dominates another, fraud or wrong must be proved to warrant alter ego finding); *Lumax Indus., Inc. v. Aultman*, 669 A.2d 893 (Pa. 1995) (sanctity of corporate veil requires that more than control be shown to hold liable sole owner and proprietor); *Jackson Hole Traders, Inc. v. Joseph*, 931 P.2d 244 (Wyo. 1997) (must be control and fraud or injustice).

77. See *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998).