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Piercing the corporate Veil in Wyoming - An Update

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PIERCING THE CORPORATE VEIL IN WYOMING – AN UPDATE

*John P. Glode*¹

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INTRODUCTION

The Wyoming Supreme Court has long recognized the need to occasionally disregard limited liability protection a corporation offers its owners, the shareholders.² The justifications offered, however, to support the Wyoming Supreme Court's occasional willingness to disregard the corporate entity and pass the ultimate financial responsibility of a corporate obligation on to the shareholders are vague, unmanageable, and lead to unpredictable

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2. Robert H. Johnson, *Piercing the Corporate Veil in Wyoming*, 17 WYO. L.J. 63, 64-66 (1962) (discussing the historical development of this doctrine in Wyoming):

results. In *Kaycee Land and Livestock v. Flahive*,³ the Wyoming Supreme Court extended the piercing doctrine to include limited liability companies.⁴ While the ultimate holding in *Flahive* is a logical and a natural extension of piercing the corporate veil, the Court missed a much-needed opportunity to clarify the piercing doctrine in Wyoming.

The current piercing analysis articulated by the Wyoming Supreme Court is based on the idea that courts may correct an unjust result in certain situations by disregarding limited liability protection of the corporation and imposing liability on the shareholders for a corporate debt. The Court has apparently accepted the idea that the corporate form of doing business is a *privilege* conferred by the State and may be disregarded whenever this privilege is abused and used to perpetrate a fraud or achieve some other “unjust” result. The Wyoming Supreme Court, like many courts, does not currently distinguish between contract and tort creditors in its piercing analysis, even though the contract creditor has voluntarily entered into a contractual relationship with a corporation. This distinction is important and should be considered in any piercing case.

This Article will provide a brief overview of the piercing doctrine in Wyoming, including the recent extension of this doctrine to limited liability companies, and then offer a revised analysis, based on this distinction between contract and tort creditors, for the Wyoming Supreme Court to consider in future piercing cases. This Article will conclude with a brief application of the suggested analysis to three past Wyoming cases, two of which this article suggests were wrongly decided.

BACKGROUND

The Competing Policies

There are two general views advanced in the debate of when the veil of limited liability company should be pierced in favor of compensating the creditor of an insolvent corporation.⁵ First, the corporate form of doing business, based at least in significant part on our market-based economy, encourages economic investment in new ideas and ventures, with the promise of limited liability for investors.⁶ Conducting business under a limited liability entity provides an opportunity for people to invest personal resources in a business venture and “cap” their individual exposure to liability

3. 46 P.3d 323 (Wyo. 2002).

4. *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323 (Wyo. 2002).

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 Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 428-29 (1998).

6. *Id.* at 428-29, 438-39.

in the event of the venture's failure.⁷ The theory provides that without limited liability protection, people would be far less likely to invest or demand a much higher return on any such investment.⁸ Those that adhere to this philosophy believe that limited liability is not necessarily dependant on legislation because the market place would recognize limited liability even without legislation, achieving the same result by contract.⁹ This theory is consistent with the importance this Country places not just on individual liberties, but also on the freedom to contract under terms the parties deem appropriate, with the legitimate expectation that these contracts will be enforced as bargained.¹⁰ When the promise of limited liability is "breached" by piercing the corporate veil, and if done on a regular and unpredictable basis, then there is a chilling effect on this investment in new ideas and ventures. Therefore, those that adhere to this contract and market based approach believe piercing should occur only in very rare circumstances.¹¹

On the other hand, some view operating under the corporate form as a "privilege," and when this privilege is "abused" to the point that a corporation is unable to meet its debts, the corporation's creditors end up missing out on their anticipated bargains (in the case of a contract creditor) or absorbing a loss caused by the wrongful action of another party (in the case of a tort creditor), while the shareholder(s) moves on minus his or her investment in the company. Many view this as an unsatisfactory result, at least under certain circumstances, justifying the imposition of liability for the corporation's debt on to its shareholders and thereby piercing the corporate veil. Those who focus on the importance of limited liability and the freedom to contract are less likely to pierce the corporate veil, while those that view the corporate form as a "privilege" subject to abuse by the "owners" are more likely to pierce the corporate veil.¹² The Wyoming Supreme Court's current analysis is based more on the idea that liability should follow when the "privilege" of operating a corporation is abused, regardless of whether the plaintiff's claim is based in contract or tort. This article will argue that the more appropriate approach is that which is based on preserving limited

7. Cohen, *supra* note 5, at 428-29.

8. *Id.* See also *id.* at 434-35 for a summary of the "nature and history of the Business Entities" as it relates to the freedom to enter into contracts and the states duty to enforce any such contracts.

9. Cohen, *supra* note 5, at 428-29, 439-40; STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1.04 (2002) (citation omitted).

10. PRESSER, *supra* note 9, § 1.04. See also U.S. CONST. amend. I-X; U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); WYO. CONST. art. I, § 35 ("No ex post facto law, nor any law impairing the obligation of contracts, shall ever be made.").

11. Cohen, *supra* note 5, at 428-29, 439-40; PRESSER, *supra* note 9, § 1.04.

12. See PRESSER, *supra* note 9, § 1.04 (discussing the distinction between those that view the corporation as based in "contract" and those that view it as based in "privilege" conferred by the state).

liability in all but the most egregious circumstances thereby preserving and respecting the freedom to contract.

The idea advanced in this article, that limited liability, particularly in the case of contract claimants, must be protected except in the most egregious circumstances, is hardly novel and has been argued by many law and economic scholars.¹³ This author believes that the approach offered by these scholars is persuasive and more in line with today's society, particularly the fact that limited liability entities are now so widely used and accepted. In addition to the policy reasons that are discussed in further detail below, it is this author's opinion that while the equitable remedy of piercing the corporate veil certainly has a place in our corporate governance, when a court exercises its equitable powers it should do so consistently with current societal values and social policy, as established in the common law and by our elected policy makers. In other words, the piercing remedy should be applied in a manner that is consistent with the policies reflected in our corporate code and in principles of contract and tort law. Black's law dictionary defines "equity" in part as "[t]he recourse to principles of justice to *correct or supplement* the law as applied to particular circumstances."¹⁴ Thus, the piercing remedy, it seems, ought to fill in missing blanks and supplement applicable principles of "the law." At times it appears that piercing cases are diametrically opposed to the idea of protecting and fostering limited liability and the enforcement of voluntarily incurred contractual obligations.

The result that necessarily follows from adoption of the analytical approach advocated in this article is fewer successful piercing cases in Wyoming and a judicial "intolerance" or "attitude" toward piercing cases in general. That would leave to "society" in general or, perhaps, "the market" more specifically, to demand from elected policy makers more accountability from the "owners" of limited liability entities to unpaid creditors of insolvent limited liability entities. This balance between corporate responsibility and who should bear certain losses, particularly in the contractual setting, is more properly left to the state legislature through the corporate codes than the courts through the imposition of liability through ad hoc litigation. This is certainly the far more efficient approach.

Overview of Wyoming Piercing Cases

Wyoming piercing cases are varied in their reasoning and are at times difficult to reconcile. In some cases, the Wyoming Supreme Court has appeared more receptive to the idea of piercing the corporate veil than in others. There has been no clear direction provided by the Court for judges,

13. PRESSER, *supra* note 9, § 1.04 (discussing piercing views of several scholars, including Posner, Fischel, and Easterbrook).

14. BLACK'S LAW DICTIONARY 560 (7th ed. 1999) (emphasis added).

practitioners, or the business community in this area. Rather, the Court continues to vaguely announce that whether the veil should be pierced is a fact-based inquiry properly decided by the trial judge who may consider up to 18 different factors after a trial on the merits.

*Caldwell v. Roach*¹⁵ was perhaps the earliest case in which the Wyoming Supreme Court recognized piercing the corporate veil, as the Court relied on this doctrine when deciding whether the holder of a promissory note was a holder in due course.¹⁶ In *Caldwell*, the court simply determined that the veil might be pierced “whenever recognition thereof in a particular case will lead to injustice.”¹⁷ Thus, the Court offered no real analysis to determine what might constitute an injustice in a particular case. Other early Wyoming cases, however, discussed with apparent approval a two-step test when determining whether to pierce the veil of a corporation. First, “that the corporation is not only influenced and governed by [the shareholder], but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased.” Second, that “the facts are such that an adherence to the fiction of the separate existence of the corporation would under the particular circumstances sanction a fraud or promote injustice.”¹⁸

More recently in *Amfac Mech. Supply Co. v. Federer*,¹⁹ the Wyoming Supreme Court cited a long list of factors that a court might consider when determining whether to disregard the corporate entity and pierce the corporate veil.²⁰ While the *Amfac* opinion is not entirely clear on the point,

15. 12 P.2d 376 (Wyo. 1932).

16. *Id.* at 379-81. The Wyoming Supreme Court plainly confirmed “[t]hat the legal entity of a corporation will be disregarded whenever the recognition thereof in a particular case will lead to injustice” *Id.* at 380-81 (citations omitted). See also *Christensen v. Nugget Coal Co.*, 144 P.2d 944 (Wyo. 1944) (explaining how the Wyoming Supreme Court, relying on concept of piercing the corporate veil, determined that a newly formed corporation was liable for the unpaid unemployment premium obligations of its predecessor, a co-partnership, after the co-partnership was dissolved and the new corporation formed in order to avoid the unpaid unemployment premiums).

17. *Caldwell*, 12 P.2d at 334.

18. *Nugget Coal*, 144 P.2d at 950. See also *Johnson*, *supra* note 2, at 64-67 (discussing the early development of piercing the corporate veil in Wyoming).

19. 645 P.2d 73 (Wyo. 1982). Professor Presser provides an excellent and detailed summary of *Amfac* in his treatise. See PRESSER, *supra* note 9, § 2.52, at 2-530.10 – 2-540.

20. *Amfac*, 645 P.2d at 77-78 (citing *Arnold v. Browne*, 103 Cal. Rptr. 775, 781-82 (1972)). The list of factors cited by the Court includes:

[C]ommingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue or subscribe to stock; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the

the factors cited with apparent approval followed the two-step (alter ego, unjust result) analysis originally discussed in *Nugget Coal*.²¹

Amfac was a breach of contract action where Amfac Mechanical Supply sued to collect \$11,000 from the defendants, a husband and wife and the sole shareholders of the debtor, C & B Plumbing.²² While C & B had incurred the contractual obligation upon which the \$11,000 default judgment was obtained, Amfac sought to pierce the corporate veil of C & B in order to reach the Federers' personal assets.²³ The district court granted summary judgment in favor of the defendants, concluding that the plaintiff "failed to prove a prima facie case because it did not 'show that the corporation was organized or used to mislead creditors or to perpetrate fraud upon them.'"²⁴

The Wyoming Supreme Court reversed summary judgment, holding that the plaintiffs made a prima facie showing for piercing the corporate veil. In its opinion, the Wyoming Supreme Court rejected the district court's suggestion that a showing of fraud is a requisite element in piercing cases, stating instead that while "fraud is, of course, a matter of concern in suits to disregard corporate fictions, . . . [it] is not a prerequisite to such a result, especially where there is gross undercapitalization and complete domination

identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; the failure to adequately capitalize a corporation; the absence of corporate assets, and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity.

Id. (citation omitted). See also *Kloefkorn-Ballard Constr. and Dev. v. North Big Horn Hosp. Dist.*, 683 P.2d 656, 661 (Wyo. 1984) (summarizing factors in *Amfac*, 645 P.2d at 77-78).

21. See *Amfac*, 645 P.2d at 74; PRESSER, *supra* note 9, § 2.52, at 2-530.14 - 2-530.15, 2-530.17 (discussing the relationship between the factors cited in *Amfac* and the two-step alter ego, unjust result test).

22. *Amfac*, 645 P.2d at 74.

23. *Id.* The Plaintiff had apparently voluntarily extended credit to C & B, but refused to continue the line of credit when C & B's unpaid obligations exceeded \$11,000. *Id.* at 76.

24. *Id.*

by the stock holders.”²⁵ The Court went on to find that C & B was “inadequately capitalized” because the initial contribution of shareholders took the form of a loan rather than a capital contribution.²⁶ The Court also concluded that “there is a prima facie inference present that an injustice resulted because of the undercapitalization of C & B.”²⁷

The Court’s final justification for determining that the plaintiff established a prima facie case of piercing the corporate veil was that the defendants had ignored basic corporate formalities since incorporation: “Failure to maintain the requisite corporate formalities substantially increases the probability that the corporate existence will be disregarded. Conversely, maintenance of corporate formalities is often relied on by courts when refusing to hold the owners of a corporation liable.”²⁸

25. *Id.* at 79 (citations omitted). Instead, the court began with the basic proposition that “in an appropriate case and in furtherance of public policy or the ends of justice, the doctrine will be disregarded.” *Id.* at 77 (citing *Opal Mercantile v. Tamblyn*, 616 P.2d 776, 778 (Wyo. 1980)).

26. *Id.* at 80. The shareholders borrowed \$50,000 and then loaned it to the corporation. *Id.* at 76. Yet, somewhat inconsistently, the Wyoming Supreme Court was critical of the \$1,000 per month payment made by the corporation to the defendant shareholders, treating it as a payment to themselves to the exclusion of creditors such as the plaintiff. *Id.* at 80-81; see *PRESSER*, *supra* note 9, § 2.52, at 2-536 (discussing this inconsistent treatment).

27. *Aufac*, 645 P.2d at 81.

28. *Id.* at 82. The Wyoming Supreme Court also focused on the “lack of formalities” and improper bookkeeping in *Miles v. CEC Homes, Inc.*, 753 P.2d 1021, 1024 (Wyo. 1988), where the defendant shareholder, in addition to not keeping records, engaged in the shuffling of money in and out of the corporation with no documentation; received personal services from the corporation with no record of payment for such services; and engaged in other self-dealing transactions all apparently during the time that the plaintiffs remained unpaid. The case of *Kloefkorn-Ballard Constr. and Dev., Inc. v. North Bighorn Hosp. Dist.*, 683 P.2d 656 (Wyo. 1984), provides a good example of a case in which the court was persuaded by the proper “bookkeeping” and “records” maintained by the parent corporation and its wholly-owned subsidiary. The plaintiff was a disappointed bidder in a hospital construction project. The plaintiff brought suit claiming the defendant corporation did not satisfy the residency requirements of the applicable bidding statute because it was the mere alter ego of its parent, a corporation organized in Minnesota. *Id.* at 658. While the parent corporation was in the process of acquiring the subsidiary corporation (a construction company), the subsidiary transferred its existing construction contracts and assets to the selling shareholders. *Id.* at 659. Thus, at the time of the acquisition, the subsidiary was only capitalized with \$12,000 worth of tools. After the parent corporation acquired control of the subsidiary, it did not “inject capital into [the subsidiary,] but advanced [the subsidiary \$200,000] under a promissory note, payable on demand.” *Id.* The Court rejected the idea that the parent and subsidiary “commingled” their assets. “[T]he note from [subsidiary to parent] for \$200,000 is in writing and requires [subsidiary] to pay interest. We do not consider this to be commingling of funds but an arm’s length transaction.” *Id.* at 661. The presence of a promissory note between the shareholder and the debtor corporation validated the same capitalization method rejected in *Aufac*. For additional cases discussing parental liability for wholly-owned subsidiary obligations, see *Wyoming Constr. Co. v. W. Cas. & Sur. Co.*, 275 F.2d 97, 104 (10th Cir. 1960) (noting parental liability for the debts of its subsidiary shareholder does not require a showing of fraud, but rather “it is enough if the disregard of the corporate entity is required to prevent injustice”), and *Fiscus v. Atl. Richfield*, 773 P.2d 158 (Wyo. 1989) (discussing the liability of

In *Amfac*, the Court did not address the fact that the plaintiff had voluntarily extended credit to the defendant.²⁹

In *RiverMeadows, Inc. v. Zwaanshoek Holding and Financiering, B.V.*,³⁰ the Wyoming Supreme Court appeared less receptive to the idea of piercing the corporate veil.³¹ *RiverMeadows* was a multiple party dispute over the sale and development of real property.³² The first issue presented for review was whether the district court properly refused to pierce the corporate veil.³³ After a review of the jury findings, the Court rejected the appellant's piercing demand, focusing not so much on the defendants allegedly acting in an alter ego capacity, but on the complaining party and his voluntary participation in the transaction that caused the loss.³⁴ The Court noted that the appellant was a knowledgeable businessman and attorney, experienced in real estate transactions,³⁵ and concluded:

In cases such as this where the parties are aware of the corporate status and they knowingly enter into transactions with no fraud being evidenced, there is no rationale or policy which requires that the corporate entity be disregarded. Courts have refused to pierce the corporate veil in cases where 'the intent in consequences of [the relevant transactions] were known and understood by all the parties, who are all represented by legal counsel.'³⁶

a parent corporation for the acts of its subsidiary in the context of a claim by an injured employee).

29. Some courts in fact do consider whether the plaintiff voluntarily extended credit to the defendant. *See, e.g.*, *Browning-Ferris Indus. of Illinois v. Ter Maat*, 195 F.3d 953, 959-61 (7th Cir. 1999) (applying Illinois law, the court discussed the distinction between voluntary and involuntary creditors for purposes of piercing analyses); *Secon Serv. Sys., Inc. v. St. Joseph Bank and Trust Co.*, 855 F.2d 406, 413-14 (7th Cir. 1988) (same); *Brunswick Corp. v. Waxman*, 599 F.2d 34, 35-36 (2nd Cir. 1979) (same).

30. 761 P.2d 662 (Wyo. 1988).

31. *See infra* notes 34-38.

32. *RiverMeadows*, 761 P.2d at 662-67.

33. *Id.* at 665. The jury returned a finding of unity of interest in ownership, which the district court disregarded in rendering its judgment. *Id.*

34. *Id.* at 666.

35. *Id.*

36. *Id.* at 666-67 (internal citation omitted). Similar reasoning was applied in *Daniels v. Kerr McGee Corp.*, 841 F. Supp. 1133 (D. Wyo. 1993), where the federal District Court for the District of Wyoming applied the *Amfac* factors when determining that a parent corporation was not liable in a suit instituted by a terminated employee of its subsidiary. The employee worked in the Jacobs Ranch Mine, owned by Kerr McGee Coal Corporation, a wholly owned subsidiary of Kerr McGee Corporation. In arguing that the corporate form should be disregarded in the suit against the parent corporation, the employee relied on six facts: (i) there were interlocking directors between the two corporations; (ii) the parent corporation's annual report "refers to the operations of the subsidiary and includes the revenue generated by the subsidiary;" (iii) parent corporation manages the benefit plan for employees of its subsidiary; (iv) parent and subsidiary share the same logo and headquarters; (v) subsidiary is wholly

Thus, unlike the Court in *Amfac*, in this case the Wyoming Supreme Court focused its attention on the nature of the relationship between the complaining creditor and the debtor corporation.

Finally, in *Bergh v. Mills*,³⁷ the Wyoming Supreme Court affirmed judgment against individual defendants who fraudulently induced the plaintiffs into investing in an insolvent corporation.³⁸ In *Bergh*, four individuals decided to open a saloon and dance hall called Billys, which they decided to own and operate through a corporation called Billys, Inc.³⁹ One of Billys' shareholders, Leslie Bergh, and two of his brothers, then formed a partnership to purchase the land and construct the bar.⁴⁰ Upon completion of construction, the partnership would then lease Billys to Billys, Inc.⁴¹ The partnership ran out of money before final construction at which point the individual defendants met with the Plaintiffs, John Mills and his wife Dianne, in order to offer them the "opportunity" to purchase shares in Billys, Inc., and loan the corporation money.⁴² Mills agreed to invest in Billys, Inc., both as a shareholder and through a loan.⁴³ Unfortunately, the defendants failed to

owned by parent; and (vi) a medical examination of the plaintiff was performed by a doctor employed by the parent. *Id.* at 1136-37.

The federal District Court determined that notwithstanding these facts, which "demonstrate that there is some degree of interdependence" it was not enough to overcome "the strong presumption of limited liability and to survive a motion for summary judgment." *Id.* at 1137. The court reasoned that the employee acknowledged he was an employee of the subsidiary (and not the parent) and "the subsidiary corporation is certainly adequately capitalized, has sufficient assets and would be capable of satisfying any potential judgment that might be entered against it in this matter." *Id.* Also, in *Atlas Constr. Co. v. Slater*, 746 P.2d 352 (Wyo. 1987), the Wyoming Supreme Court analyzed the issue of piercing the corporate veil in the context of a corporate parent/subsidiary relationship. After the jury returned a verdict against the subsidiary, the trial court awarded summary judgment in favor of the plaintiff on the issue of piercing the corporate veils of the subsidiary and parent corporation. The Court reversed and concluded that material issues of fact remained in determining whether to pierce the corporate veil. For other parent subsidiary cases in Wyoming, *see generally Wyoming Constr. Co. v. W. Cas. & Sur. Co.*, 275 F.2d 97, 104 (10th Cir. 1960) (noting parental liability for the debts of its subsidiary shareholder does not require a showing of fraud, but rather "it is enough if the disregard of the corporate entity is required to prevent injustice"), and *Fiscus v. Atl. Richfield*, 773 P.2d 158 (Wyo. 1989) (discussing the liability of a parent corporation for the acts of its subsidiary in the context of a claim by an injured employee).

37. 763 P.2d 214 (Wyo. 1988).

38. *Id.* at 216-17.

39. *Id.* at 215.

40. *Id.*

41. *Id.*

42. *Id.* The Court described Mills as the "friend and drinking companion" of Leslie Bergh, a major shareholder of Billys. *Id.*

43. *Id.* at 216. Mills and Dianne agreed to loan Billys \$125,000 and purchase 5% of Billys for \$25,000.

inform Mills that the corporation was insolvent and severely undercapitalized.⁴⁴

Upon discovering the insolvent condition of Billys, and “in order to protect their investment” in Billys, Mills opened an account for Billys at the Dunmar Inn, a local hotel of which Mr. Mills was the general partner.⁴⁵ The open account at the Dunmar Inn was used to “lodge Billys entertainers.”⁴⁶ Eventually Billys closed and Mills initiated this case in order to recover their original \$150,000 investment, and the outstanding balance owed by Billys to the Dunmar Inn.⁴⁷ After a bench trial, the district court issued a judgment for the plaintiffs on all counts, finding the defendants had defrauded them.⁴⁸

On appeal, the Wyoming Supreme Court affirmed the judgment for all plaintiffs including the Dunmar Inn. The Court was required, however, to find an alternative justification for the judgment against the individual defendants for Billys’ outstanding balance owed to the Dunmar Inn.⁴⁹ With respect to the judgment in favor of the Dunmar Inn, the Supreme Court rejected the district court’s theory that the fraud committed by the defendants rendered “void” the entire deal (including Billys’ unpaid account with Dunmar Inn). In the course of this discussion, the Supreme Court noted that the Dunmar Inn opened an account for Billys because of Mills’ partners’ (in the Dunmar Inn) desire “to try to help out John and Dianne Mills after fraud had been committed.”⁵⁰ In other words, the Dunmar Inn opened the account for Billys knowing of its financial condition and of the fraud committed against the Mills. Therefore, the Court concluded that the individual defendants could not be liable to the Dunmar Inn on the basis of their fraudulent conduct toward the Mills.⁵¹

Alternatively, the Wyoming Supreme Court noted that Billys had breached its contract with the Dunmar Inn, which the Dunmar Inn had properly pled in its case.⁵² Recognizing that a breach of contract judgment against Billys would be of no value, the Supreme Court affirmed judgment

44. *Id.*

45. *Id.*

46. By the time Billys closed its account with Dunmar, the balance was \$58,876.74. *Id.*

47. *Id.* Mills initiated the suit against two of the four initial shareholders in Billys and the three partners of Khybur Investments. *Id.*

48. *Id.* The Court recognized that the defendants had not committed fraud in the sense that they had made affirmative misrepresentations to the plaintiffs. Instead, the Court found that the defendants’ *silence* with respect to the insolvent condition of Billys and the fact that defendants had paid for their stock primarily through the issuance of promissory notes rather than cash constituted fraud. *Id.* The Court justified its position based on a “fiduciary duty” owed by “promoters of a corporation” to disclose material facts when an individual is induced to invest. *Id.*

49. *Bergh*, 763 P.2d at 216-18.

50. *Id.* at 217.

51. *Id.*

52. *Id.* at 217.

against the two defendant shareholders of Billys based on piercing the corporate veil, summarily concluding: "We will not reward appellants' fraud by allowing them to enjoy the benefits of corporate status."⁵³ When piercing the corporate veil, the Court did not address the fact that the Dunmar Inn had voluntarily opened the account for Billys knowing of its financial condition and the fraudulent conduct of the defendants.

*The Delaware Approach*⁵⁴

Although Delaware is recognized as having some of the most developed corporate case law in the United States, it has relatively few piercing cases.⁵⁵ The Delaware courts traditionally conveyed an attitude of intolerance toward liability by piercing the corporate veil, except upon the showing of "fraud or something like it."⁵⁶ Today, Delaware courts appear caught in a struggle between their historical reluctance to pierce the corporate veil and adopting an analysis that permits piercing for something less than a showing of actual fraud. The movement toward a more liberal piercing analysis in Delaware has been a slow undertaking.

In an early piercing case, *Pauley Petroleum Inc. v. Continental Oil Co.*,⁵⁷ the Delaware Supreme Court discussed the piercing doctrine by stating:

[U]pon a proper showing corporate entities as between parent and subsidiary may be disregarded and the ultimate party in interest, the parent, be regarded in law and fact as the sole party in a particular transaction. . . . It may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved.⁵⁸

53. *Id.* Given Mills' position as general partner in the Dunmar Inn and his knowledge of the insolvent condition of Billys at the time Dunmar opened the account for Billys, this portion of the opinion is extraordinary.

54. Additional summaries of Delaware law on piercing the corporate veil may also be found in: Jennifer S. Martin, *Consistency In Judicial Interpretation? A look at CERCLA Parent Company and Shareholder Liability after United States v. Best Foods*, 17 GA. ST. U. L. REV. 409, 424-25 (2000). This article also reviews the piercing doctrine in California, Florida, New York, and the Federal Common Law. *Id.* at 423-29. *Tale of the Corporate Tape: Delaware, Nevada and Texas*, 52 BAYLOR L. REV. 45, 61-64 (2000); Cohen, *supra* note 5, at 429, 480-86; PRESSER, *supra* note 9, § 2.08.

55. PRESSER, *supra* note 9, § 2.08.

56. PRESSER, *supra* note 9, § 2.08, at 2-63 (quoting *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989)).

57. 239 A.2d 629 (Del. 1968).

58. *Id.* at 633 (citations omitted). Wyoming courts have also analyzed the liability of a parent shareholder for the acts of its shareholder under the piercing the corporate veil doctrine

While some courts have construed this position as requiring "fraud or something like it,"⁵⁹ this language has also been construed by Delaware courts to mean that piercing the corporate veil may be proper upon the showing of something less than actual fraud.

For example, in *Mabon, Nugent & Co. v. Texas American Energy Corp.*,⁶⁰ the court of chancery of Delaware stated:

Under Delaware law, the separate corporate existences of parent and subsidiary will not be set aside merely on a showing of common management of the two entities, nor a showing that the parent owned all the stock of the subsidiary. Generally, the corporate veil may be pierced where there is fraud. The Delaware courts have also stated, although not held, that the corporate veil may be pierced where a subsidiary is in fact a mere instrumentality or alter ego of its parent. The second ground for disregarding the separateness of corporate entities is consistent with the general principle that this Court may regard a corporate parent as the sole party in interest where equitable considerations require it.⁶¹

and other liability theories. *See generally* Wyoming Constr. Co. v. W. Cas. & Sur. Co., 275 F.2d 97, 104 (10th Cir. 1960) (noting parental liability for the debts of its subsidiary shareholder does not require a showing of fraud, but rather "it is enough if the disregard of the corporate entity is required to prevent injustice"); *Fiscus v. Atl. Richfield*, 773 P.2d 158 (Wyo. 1989) (discussing the liability of a parent corporation for the acts of its subsidiary in the context of a claim by an injured employee).

59. *PRESSER*, *supra* note 9, § 2.08, at 2-63 (quoting *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989)).

60. No. 8578, 1990 WL 44267 (Del. Ch. April 12, 1990).

61. *Id.* at *5 (internal citations omitted). Disappointed creditors when trying to hold a parent corporation liable for the debts of its subsidiary have also used the principle of agency. *See generally* *Phoenix v. Canada Oil Co. Ltd. v. Texaco, Inc.*, 842 F.2d 1466 (3rd. Cir. 1988). The Third Circuit panel stated:

The relationship between parent and subsidiary corporations has been a fruitful source of litigation and although the case law on the subject is extensive, it is neither uniform nor clear. Some decisions apply an agency theory to a sub-parental liability, others focus on an alter ego basis, and some speak in terms of piercing the corporate veil. Much of the confusion stems from a failure to distinguish between subsidiaries treated as independent entities and those in fact not independent, but considered part of the parent corporations.

Unlike the alter ego/piercing the corporate veil theory, when customary agencies allege the proponent must demonstrate a relationship between the corporations and the cause of action. Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing.

The *Maybon* court stated that whether a subsidiary is the alter ego of the parent would depend upon whether the parent and subsidiary “operated as a single economic entity such that it would be inequitable for this Court to uphold a legal distinction between them.”⁶²

This general “alter ego” principle was also discussed in *Irwin & Leighton, Inc. v. W.M. Anderson Co.*,⁶³ where the court cited a federal district court case with approval and stated that there are two elements for “liability under the instrumentality doctrine. ‘First the dominant corporation must have controlled the subservient corporation and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control.’”⁶⁴

In *Harco National Ins. Co. v. Green Farms*,⁶⁵ the Delaware court began its piercing analysis by restating the traditional rule that a showing of fraud is sufficient to pierce the corporate veil of a Delaware corporation.⁶⁶ The court also explained: “[P]ersuading a Delaware Court to disregard the corporate entity is a difficult task.”⁶⁷ The court then acknowledged that while Delaware courts had not “explicitly adopted the *alter ego* theory,” a federal district court in Delaware has accepted this theory as an appropriate form of piercing the corporate veil.⁶⁸ The court cited with apparent approval certain factors used by the federal district court when determining whether the alter ego theory is satisfied, including:

[W]hether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder.⁶⁹

Id. at 1476-77. In still other cases, creditors have also attempted to use the concept of joint venture as an alternate theory to piercing the corporate veil. See *Secon Serv. Sys., Inc. v. St. Joseph Bank and Trust Co.*, 855 F.2d 406, 413, 416-17 (7th Cir. 1988).

62. *Mabon*, 1990 WL 44267 at *5.

63. 532 A.2d 983 (Del. Ch. 1987).

64. *Id.* at 987-88. *Irwin & Leighton* was unique because a creditor of a debtor corporation brought suit against another creditor of the corporation under a veil piercing theory alleging the defendant creditor exercised too much control over the debtor corporation.

65. No. 1131, 1989 WL 110537 (Del. Ch. Sept. 19, 1989).

66. *Id.* at *4 (citations omitted).

67. *Id.*

68. *Id.*

69. *Id.* at *5 (quotations omitted).

The *Green Farms* court concluded that while the facts of the case at hand “present a good case for piercing the corporate veil,” it determined that this was not an appropriate conclusion at the summary judgment stage, again demonstrating an overall reluctance to piercing the corporate veil by Delaware courts.⁷⁰

Piercing the Veil of a Limited Liability Company

The use of the limited liability company as the entity of choice for business owners seeking the protection of limited liability has expanded greatly since the IRS ruled that limited liability companies would be treated as partnerships for income tax purposes.⁷¹ The limited liability company is attractive to many business owners because it offers the liability protection of a corporation, but the tax and management features of a partnership. The proliferated use of limited liability companies has also raised many questions, including whether a limited liability company’s veil may be pierced in favor of imposing liability on the members for company obligations.⁷²

The Wyoming Supreme Court recently answered this question in the affirmative.⁷³ In *Flahive*, the Court addressed the certified question of “whether, in the absence of fraud, the [equitable] remedy of piercing the corporate veil is available against a company formed under the Wyoming Limited Liability Company Act.”⁷⁴ Because the case was before the Wyoming Supreme Court on a certified question, the facts were not fully developed.⁷⁵ The Court’s analysis centered on the contrasting language used in certain sections of the Wyoming Business Corporation and Limited Liability Company Acts.⁷⁶ Specifically, the Court compared the language used in Section 17-16-622(b) of the Wyoming statutes with that in Section 17-15-113.⁷⁷ The Court reconciled these two sections through a historical review

70. *Id.* at *6. Much like the Wyoming Supreme Court in the *Mills* opinion, the Court in *Green Farms* indicated that a showing of fraud in Delaware does not require a common law showing of a “false representation of a material fact knowingly made with intent to be believed to one who, ignorant of its falsity, relies thereon and is thereby deceived.” *Id.* at *13. Rather, the court indicated that the Chancery is willing “to provide a remedy for negligent or innocent misrepresentations.” *Id.* at *14.

71. See Cohen, *supra* note 5, at 449-68 for a general discussion of limited liability companies and piercing the veil of the same.

72. *Id.*

73. *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323 (Wyo. 2002).

74. *Id.* at 324-25.

75. *Id.* Rule 11 of the Wyoming Rules of Appellate Procedure permit federal and state courts to certify determinative legal questions in a pending case when there is no controlling precedent. WYO.R.APP.P 11.01 (2002). The Supreme Court then has 30 days to decide whether or not to answer the certified question. WYO.R.APP.P. 11.04(b).

76. *Flahive*, 46 P.3d at 326.

77. *Id.* Section 17-16-622(b) provides: “Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.” WYO. STAT. ANN. § 17-16-622(b) (2001). While Section 17-15-113 provides:

of both acts. The Court concluded that Section 622(b) merely recognizes the general rule that shareholders enjoy limited liability, but may assume liability by agreement or through their own conduct.⁷⁸ While the language of Section 113 may appear to offer members and managers of a limited liability company more liability protection than Section 622 does for shareholders, because of its lack of reference to voluntarily imposed liability or liability from the actions of a shareholder, the Court concluded that Section 113 does not foreclose judicially imposed piercing in the context of a limited liability company.⁷⁹

The Court reasoned that Wyoming was the first state to adopt a Limited Liability Company Act and, therefore, the legislature very likely was not focused on the piercing issue when passing the Wyoming Limited Liability Company Act.⁸⁰ The Court also explained that it will not “presume” that the legislature intended to “abrogate or modify a rule of common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended unless the language employed clearly indicates such an intention.⁸¹” The Court also opined that applying the piercing doctrine to a Wyoming limited liability company would not run counter to “what the legislature would have intended had it considered the issue.⁸²” In order to further support its conclusion on this point the Court noted that most or all of the states that have addressed piercing issues in the context of limited liability companies have followed the corporate model.⁸³ Finally, the Court indicated that there is no policy reason to justify treating members of a limited liability company differently than shareholders of a corporation.⁸⁴ Rather, if the members abuse the limited liability company structure and the statutory requirements and restrictions, then, like their shareholder counterparts, they should expect that liability would be imposed for unmet company obligations.⁸⁵

Due to the nature of review presented in the certified question, the Court’s opinion offered little guidance for future limited liability company piercing cases. The Court did state, however, that piercing cases in the context of a limited liability company would vary from the corporate piercing cases. The distinction, according to the Court, rests with the fact that man-

“Neither the members of a limited liability company nor the managers of a limited liability company managed by a manager or managers are liable under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company.” WYO. STAT. ANN. § 17-15-113.

78. *Flahive*, 46 P.3d at 326.

79. *Id.* at 326-27.

80. *Id.*

81. *Id.* at 327 (internal citations and quotations omitted).

82. *Id.*

83. *Id.* (citation omitted).

84. *Id.* at 327-28.

85. *Id.* at 328.

agement of a limited liability company is more flexible and the statutes do not require as many formalities as compared to the corporate form of entity.⁸⁶ The Court concluded by once again confirming that a showing of fraud is not necessary to pierce the veil, regardless of whether the entity is a corporation or a limited liability company.⁸⁷

ANALYSIS

The remedy of piercing the corporate veil has been described to be "like lightning . . . rare, severe, and unprincipled."⁸⁸ This observation is not surprising, considering that the outcome of piercing cases depends on the "facts and circumstances" of each case and the deciding judge's sense of what constitutes an "unjust" outcome under these particular facts. Any such analysis is sure to lead to confusion and unpredictable results.⁸⁹ This unpredictability is only compounded when courts impose vague and unfocused tests that govern the outcome, as some would describe the approach in Wyoming.⁹⁰ Therefore, the Wyoming Supreme Court should utilize its next piercing case as an opportunity to refine its analysis for piercing cases.

Overview

The starting point for any piercing analysis should always be with a reminder that limited liability is the *rule*, described by some as a "strong presumption", and not the *exception*.⁹¹ While this point may seem obvious, often times when one reviews piercing cases it is difficult to capture the idea

86. *Id.* The court declined to specify any factors to consider in the LLC piercing cases:

It would be inadvisable in this case, which lacks a complete factual context, to attempt to articulate all the possible factors to be applied to LLCs in Wyoming in the future. For guidance, we direct attention to commentators who have opined on the appropriate factors to be applied in the LLC context.

Id. (citations omitted); see Cohen, *supra* note 5, at 458-59 (discussion of piercing analysis adjusted for the LLC).

87. *Flahive*, 46 P.3d at 328. The Court also again confirmed that the inquiry is fact and case specific. *Id.*

88. PRESSER, *supra* note 9, § 1.01, at 1-7 (internal quotations omitted). Professor Presser continued, "There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law." *Id.*

89. *Id.*

90. See PRESSER, *supra* note 9, § 2.52 (describing the *Amfac* opinion as "wide ranging," "moves in so many directions," and one that places Wyoming in the "forefront of veil-piercing states;" Prof. Presser also explains that "[t]he courts of Wyoming have not hammered down hard and fast rules for determining when the corporate veil is to be pierced").

91. See *Daniels v. Kerr McGee Corp.*, 841 F. Supp. 1133, 1137 (D. Wyo. 1993) (stating that there is a "strong presumption" of limited liability); *Harco Nat'l Ins. Co. v. Green Farms*, No. 1131, 1989 WL 110537, *4 (Del. Ch. Sept. 19, 1989) (noting that "persuading a Delaware Court to disregard the corporate entity is a difficult task").

that a particular court is working from the “presumption” of limited liability. Indeed, one article suggests that California courts have pierced the corporate veil in a full 45% of the piercing cases.⁹² This “fact” is significant because both the piercing analysis adopted by the Wyoming Supreme Court as far back as *Roach* in 1932, as well as its modern analysis formulated in the 1982 *Amfac* opinion, were each based on California cases.⁹³ The Wyoming Legislature has always been progressive with the recognition of limited liability in the Wyoming corporate codes, as evidenced by the fact that it was the first state to adopt a Limited Liability Company Act in 1977.⁹⁴ Viewed from this perspective, it is somewhat ironic that the Wyoming Supreme Court’s analysis is based, at least in significant part, on cases from a state viewed by some as a latecomer in “embracing the concepts of limited liability.”⁹⁵

After confirming that there is a “presumption” of limited liability, the second step in the analysis suggested by this article is to distinguish between voluntary and involuntary creditors of the limited liability entity. In other words, is the unpaid creditor that is seeking to pierce the corporate veil a contract or tort claimant. If the piercing claimant is a contract creditor, the plaintiff should be required to demonstrate that the defendant (shareholders of a corporation or members of a limited liability company) directly caused the claimant’s loss by fraud or some other form of misrepresentation. Such an approach for contract creditors is more consistent with the now widespread use and acceptance of limited liability entities, the importance placed on the freedom to contract and the desire for the free flow of goods and services in our interstate economy, and does not impair existing contractual obligations through the arbitrary concept of fairness.⁹⁶

92. See Martin, *supra* note 54, at 423-24, n.72 (citations omitted).

93. See Caldwell v. Roach, 12 P.2d 376, 381 (Wyo. 1932) (citing Bryan v. Banks, 277 P. 1075, 1078 (Cal. 1929) (supporting the idea that the corporate veil may be pierced)); *Amfac Mech. Supply Co. v. Federer*, 645 P.2d 73, 77-78 (Wyo. 1982) (citing *Arnold v. Browne*, 103 Cal. Rptr. 775 (1972) (listing the many factors now often cited in Wyoming piercing cases)); *Christensen v. Nugget Coal Co.*, 144 P.2d 944, 950-52 (Wyo. 1944) (citing numerous California cases).

94. See WYO. STAT. §§ 17-15-101 *et. seq.* (2001). In addition to being the first state to adopt an LLC Act, Wyoming also permits a corporation incorporated in a foreign jurisdiction to continue into Wyoming upon termination of its corporate existence in the foreign jurisdiction, WYO. STAT. § 17-16-1710; Wyoming allows a corporation incorporated in Wyoming to “transfer” out of Wyoming to a foreign jurisdiction, WYO. STAT. § 17-16-1720; Wyoming provides flexibility with respect to the merger and consolidations of corporations with and into other limited liability entities, whether organized in Wyoming or in another state, WYO. STAT. §§ 17-15-139, 17-16-1101, 1107; and Wyoming permits a corporation to elect statutory close corporation status permitting it to do away with a board of directors and the imposition of liability due to the failure of following “formalities.” WYO. STAT. §§ 17-17-101, *et. seq.*; WYO. STAT. § 17-17-125.

95. See Martin, *supra* note 54, at 423-24, n.72 (citations omitted).

96. As explained in the introduction, there are competing views of when the corporate veil should be pierced. See *supra* notes 6 – 12 and accompanying text. As also noted, our federal and state constitutions each protect the right to contract and the unreasonable interfer-

It is not unreasonable to suggest that contract law is based on the idea that enforceable promises should be enforced in order to provide predictability and, in the market place, to further foster the free flow of goods and services. These objectives are frustrated when courts alter agreed upon terms under enforceable promises in the interest of "fairness," as may be the case when the corporate veil is pierced in order to compensate a contract creditor. The Wyoming approach, including the consideration of numerous factors with the ultimate result based in the judge's determination of what is "fair" under the circumstances of the particular case, appears unworkable when viewed in this context.

Finally, if the Wyoming Supreme Court would like to articulate certain "factors" that a district court may evaluate after a trial on the merits when deciding whether to pierce the corporate veil, then this article submits that any such factors, in order to add any persuasive value, must have an impact on the relationship between the loss suffered by the creditor and the corporation. In other words, there must be a direct relationship between the loss suffered by the unpaid creditor and the "factor" relied on to pierce the corporate veil.

The remainder of this section will evaluate the importance of the distinction between voluntary and involuntary creditors of a limited liability entity when deciding whether to pierce the corporate veil. This section will then evaluate three "factors" commonly cited by courts in piercing cases: The failure of the corporation to follow corporate formalities; inadequate capitalization, and the fact that the shareholders and the corporation are the alter ego or mere instrumentality of one another. This section will then discuss these three considerations in connection with the distinction between voluntary and involuntary creditors seeking to pierce the corporate veil. This discussion will then conclude with an application of the suggested analysis to the three Wyoming piercing cases reviewed in the Background Section.

The Unpaid Creditor – Voluntary or Involuntary

A logical beginning for any piercing case (after noting the "presumption" of limited liability) is the nature of the relationship between the complaining creditor and the debtor corporation.⁹⁷ In particular, one ought

ence with existing contractual expectations by the state. *See* U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); WYO. CONST. art. I, § 35 ("No ex post facto law, nor any law impairing the obligation of contracts, shall ever be made.").

97. *RiverMeadows, Inc. v. Zwaanshoek Holding and Financiering, B.V.*, 761 P.2d 662, 666-67 (Wyo. 1988); *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat*, 195 F.3d 953, 959-60 (7th Cir. 1999); *Secon Serv. Sys., Inc. v. St. Joseph Bank and Trust Co.*, 855 F.2d 406, 413-14, 416 (7th Cir. 1988); *Brunswick Corp. v. Waxman*, 599 F.2d 34, 35-36 (2nd Cir. 1979); *Cohen, supra* note 5, at 439-40 (noting scholars argument for a distinction between

to begin by answering the question of whether the relationship was voluntary or involuntary.⁹⁸ Only by focusing on this relationship is any relevance attached to the factors announced by the Wyoming Supreme Court.⁹⁹ In other words, the nature of this relationship ought to define the analysis utilized by a court when deciding whether to pierce the corporate veil, instead of utilizing a vague, one-size-fits-all, approach to piercing cases. For example, if contract law arises out of society's desire to construe and enforce legally enforceable promises, as bargained, and tort law is based in the policy consideration of what party should bear an unexpected and uncompensated loss in a given situation, it is illogical to apply the same analysis to two distinct relationships based on separate policy considerations. Right now the Wyoming Supreme Court's approach, based on the idea of "fixing" what is considered by some to be an unjust result, fails to distinguish between contract and tort claimants in piercing cases.

If the plaintiff in a piercing case is a voluntary contract creditor, the court should focus on the nature and origins of this contractual relationship. Was fraud or misrepresentation the motivating factor in obtaining the disappointed party's participation in the contract, or is fraudulent activity the reason the contract creditor remains unpaid?¹⁰⁰ If so, the corporate veil will almost certainly be pierced.¹⁰¹ As explained by Easterbrook and Fischel in their treatise, the distinction between contract and tort creditors, and the idea that contracting parties protect themselves during the bargaining process, "breaks down" when fraud or misrepresentation is involved in the contractual process:

This distinction between contract and tort creditors breaks down when the debtor engages in fraud or misrepresentation. For the costs of excessive risk taking to be fully internalized, creditors must be able to assess the risk of default accurately. If the creditor is misled into believing that the risk of default is lower than it actually is, the creditor will not demand adequate compensation. This will lead to excessive amount of risk taking by firms, because some of the costs will be shifted to creditors.¹⁰²

contract and tort (involuntary) creditors and how the former already factor in the risks associated with contracting with a limited liability entity through the terms of credit offered (citations omitted)).

98. Cohen, *supra* note 5, at 439-40.

99. *Amfac Mech. Supply Co. v. Federer*, 645 P.2d 73, 77-78 (Wyo. 1982) (citation omitted).

100. *Bergh v. Mills*, 763 P. 2d 214, 216 (Wyo. 1988).

101. *Id.* at 216-18.

102. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 58 (1991) [hereinafter EASTERBROOK].

On the other hand, if the two parties were free to negotiate and in fact willingly entered the contractual relationship, the corporate form should be respected in virtually all cases, even when the corporation might be undercapitalized (even grossly undercapitalized) or the "formalities" are completely ignored.¹⁰³ Under circumstances such as these, the parties had a full and fair opportunity to conduct the necessary diligence and use the bargaining process to protect their respective interests.¹⁰⁴ Presumably, if, after conducting any necessary diligence, a party feels uncertain about the ability of a limited liability entity to perform its obligations under a proposed contractual arrangement, this party may protect its interest in several ways, including by insisting that the "owners" guarantee the obligations of the limited liability entity. If a party contracting with a limited liability entity decides not to conduct any diligence or knowingly proceeds to contract with a limited liability entity even though this entity may lack sufficient capital to satisfy its obligations under the contract, then this party necessarily assumes the risk of non-payment and lack of acceptable recourse upon any such breach. In *Brunswick Corp. v. Waxman*,¹⁰⁵ the Second Circuit succinctly made this point when refusing to pierce the corporate veil when the plaintiff extended credit to a corporation it knew had no assets and which was created for the sole purpose of taking title to the equipment sold to it by the plaintiff:

Under these circumstances Brunswick obtained precisely what it bargained for, and it did not bargain for or contemplate the individual liability of the Waxmans which it now seeks to enforce. To pierce the corporate veil here would not in our view accomplish justice or equity but would in fact thwart that end.¹⁰⁶

If the nature of the relationship between the creditor and the company is involuntary (almost certainly a tort claimant), a far more difficult situation, then a different approach is appropriate.¹⁰⁷ In this situation the

103. *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat*, 195 F.3d 953, 960 (7th Cir. 1999); *Secon Serv. Sys., Inc. v. St. Joseph Bank and Trust Co.*, 855 F.2d 406, 416 (7th Cir. 1988) ("We are unaware of any decision relying on undercapitalization alone as grounds for disregarding the corporate entity in a contract case."); *Brunswick Corp. v. Waxman*, 599 F.2d 34, 36 (2d Cir. 1979) (affirming the district court's decision not to pierce the corporate veil when plaintiff "had knowingly entered into the conditional sales contracts involved in this litigation with a no-asset corporation which was created for the sole purpose of taking title to the equipment which Brunswick sold"); *EASTERBROOK*, *supra* note 102, at 55 n.8 ("Which is not to say that investors' liability is common even when the corporation and the manager are scarcely distinguishable. There is no reason to disregard a "shell" corporation in favor of a creditor that can negotiate for such protection as it desires. Courts routinely enforce limited liability in such cases." (citation omitted)).

104. See *supra* note 103; *RiverMeadows, Inc. v. Zwaanshoek Holding and Financiering, B.V.*, 761 P.2d 662, 666-67 (Wyo. 1988); *Ter Matt*, 195 F.3d at 960.

105. 599 F.2d 34 (2d Cir. 1979).

106. *Id.* at 36.

107. *Ter Maat*, 195 F.3d at 960.

focus ought to be on whether the type of tort committed was one that was reasonably anticipated and whether the company adequately addressed these foreseeable losses through capitalization and insurance.¹⁰⁸ If not, then piercing the corporate veil may very well be appropriate.¹⁰⁹

By beginning the analysis with a focus on the nature of the relationship between the creditor and the corporation (i.e. voluntary or involuntary), a deciding court is in a better position to persuasively support its ultimate holding and balance the policies of: Limited liability, demanded in the market place; the value placed on enforcing contracts as originally bargained (even when such a result may appear “unjust” in some circumstances); protecting parties from fraud and misrepresentations that cause inexcusable loss and loss that may not be protected against during the bargaining process; protecting against unanticipated and uncompensated tort losses; and encouraging all parties to exercise personal responsibility, *including* those that contract with limited liability entities.

Importance of Corporate Formalities, Alter Ego/Mere Instrumentality, and Inadequate Capitalization

The importance of the question of whether the creditor is a voluntary or involuntary creditor is amplified when viewed in connection with arbitrary factors often relied on by courts when piercing the corporate veil. This issue is particularly exposed when a court relies on factors that focus on the relationship between the shareholder and the corporation and have no direct connection to the loss suffered by the complaining creditor who seeks to pierce the corporate veil. A Seventh Circuit panel discussed the vague approach of balancing numerous factors widely accepted by many courts, and the difficulty presented with this analytical approach by noting:

108. Cohen, *supra* note 5, at 439-41 (noting scholars' argument for a distinction between contract and tort (involuntary) creditors and how the former already factor in the risks associated with contracting with a limited liability entity through the terms of credit offered) (citations omitted). Cohen also summarizes Easterbrook's and Fischel's assertion that “courts will be willing to pierce the veil of close corporations and subsidiaries when there are tort creditors and when the firm is undercapitalized. Courts will pierce the veil of any entity when the burden of risk has fallen on those who could not negotiate with the firm or with whom the firm negotiated in bad faith. This is why courts will pierce the veil for tort claims and when there has been fraud or misrepresentation. When a firm is undercapitalized, the courts will pierce the veil because the lower the amount of capital, the greater the incentive for managers to engage in risky behavior.” *Id.*

109. *Id.*; EASTERBROOK, *supra* note 102, at 56 (“Under a rule of unlimited liability, investor-managers bear all of the costs of their actions. Under a rule of absolute limited liability, by contrast, investor-managers can limit their risk to the amount of capital in the corporate treasury and transfer more of the risk to third parties. Piercing the veil – especially in favor of trade and tort creditors who cannot negotiate with the firm – reduces the extent to which third parties bear these costs.”).

When must innocent third parties be protected? Courts in Indiana and elsewhere typically rely on long lists of factors, including such things as inadequate capitalization, disregard of corporate formalities, day-to-day control by shareholders, concentration of stock ownership, commingling of receipts, and so forth. . . . Such an approach, requiring courts to balance many imponderables, all important but none dispositive and frequently lacking a common metric boot, is quite difficult to apply because it avoids formulating a real rule of decision. This keeps people in the dark about the legal consequences of their acts, a result that is bad enough in one-of-a-kind fact situations like torts but that is surely worse in situations like this, where the unknowable 'rule' may affect every contract any Indiana corporation may undertake.¹¹⁰

The most obvious example of a factor often times relied on by courts, even though it likely had little or no relationship to the loss suffered by the plaintiff, is the disregard of corporate formalities.¹¹¹ While at most perhaps relevant in theory, this factor should play no part in the analysis unless this failure somehow impacted the relationship between the corporation and its creditor.¹¹² It is difficult to justify a court's reliance on a shareholder's/corporation's failure to follow formalities if the failure had no bearing on the loss suffered by a creditor, whether contract or tort. Nonetheless, courts have justified this factor playing a role in the decision of whether to pierce the corporate veil with the assertion that if shareholders do not "respect" the corporate form, then they should lose the protection of limited liability generally offered by the corporate form.¹¹³ Why?

The legislature, which has provided for the protection of limited liability, has not mandated this result. In fact, it is apparent that, if anything, the Wyoming Legislature believes the failure to follow corporate formalities

110. *Secon Serv. Sys., Inc. v. St. Joseph Bank and Trust Co.*, 855 F.2d 406, 414 (7th Cir. 1988).

111. *Amfac Mech. Supply Co. v. Federer*, 645 P.2d 73, 82 (Wyo. 1982) ("Failure to maintain the requisite corporate formalities substantially increases the probability that the corporate existence will be disregarded.").

112. *See, e.g., Miles v. CEC Homes, Inc.*, 753 P.2d 1021, 1024 (Wyo. 1988) (disregarding formalities and undocumented use of corporate assets and services for personal gain to the exclusion of unpaid creditors was relied on by Wyoming Supreme Court to pierce the corporate veil); *See also* Harvey Gelb, *Piercing the Corporate Veil*, 59 CHI-KENT L. REV. 1 (1982) (arguing that the disregard of corporate formalities should not form the basis for piercing the corporate veil).

113. *See generally Amafac*, 645 P.2d at 82 ("failure to maintain the requisite corporate formalities substantially increases the probability that the corporate existence will be disregarded"). Cohen, *supra* note 5, at 444-45 (stating that scholars argue that the weakness with the "privilege" approach was the analysis was purposefully kept vague and therefore relied too much on an individual judge's discretion).

provides no basis to disregard the corporate entity.¹¹⁴ Legislatures in other states have in fact passed statutes that limit piercing cases to a showing of fraud and misrepresentation, thereby preventing courts from considering factors such as whether a corporation's shareholders have followed the necessary formalities.¹¹⁵ In a piercing case, the fact that shareholders have not held a yearly meeting, or failed to keep a full and accurate minute book, will very likely have no impact on the loss suffered by the unpaid creditor of the corporation. If that is the case, then why should the creditor be allowed to rely on this in order to reach the assets of the corporate shareholders, particularly in the case of a contract creditor? In short, unless the "failure" to follow corporate formalities has somehow perpetrated a fraud or misled the unpaid creditor or otherwise caused the harm complained of, this factor should play no role in deciding whether to pierce the corporate veil.¹¹⁶ If the Wyoming Supreme Court fails to acknowledge and address the arbitrary nature of relying on this factor when it bears no relation to the loss suffered, then this author would strongly encourage the Wyoming Legislature to adopt legislation like that passed in Texas, which would work to reinforce the "strong presumption" of limited liability.¹¹⁷

114. WYO. STAT. § 17-17-125 (2001) ("The failure of a statutory close corporation to observe the usual corporate formalities or requirements relating to the exercise of its corporate powers or management of its business and affairs is not a ground for imposing personal liability on the shareholders for liabilities of the corporation.").

115. See, e.g., TEX. BUS. CORP. ACT art. 2.21. Providing, in part:

Liability of Subscribers and Shareholders

A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to:

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, or other similar theory, unless the obligee demonstrates that the holder, owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.

116. See Gelb, *supra* note 112, at 7-8 (discussing relevance of failure to follow corporate formalities).

117. Any such legislation should apply to all limited liability entities.

Another circumstance or "conclusion" often cited by courts when piercing the corporate veil is that the corporation is but the "alter ego" or "mere instrumentality" of its shareholder, or that the shareholders "dominated" and "controlled" the corporation. While this factor appears so vague it is difficult (at least for this author) to know what is exactly meant in a given situation; perhaps this means that the shareholders dictate day to day decisions and exercise complete control over the corporation and operate the corporation to their sole financial benefit. Piercing almost exclusively happens in the context of small, closely held corporations.¹¹⁸ Is it unreasonable to expect that the "owners" of these companies will exercise considerable "dominion and control" over the corporation and operate the corporation for their financial benefit?¹¹⁹ As the Seventh Circuit panel noted: "If control alone were sufficient [to pierce the corporate veil], there would be no meaningful distinction between affiliated corporations; yet Indiana courts recognize their separateness."¹²⁰ Again, this factor seems arbitrary when viewed in connection with the relationship between the corporation and its unpaid creditor, whether contract or tort. Unless the shareholders misled the creditor into believing that it was dealing with the shareholders individually, or that assets of the shareholders were really the assets of the corporation, this "circumstance" or "conclusion" lacks much, if any, relevance to a piercing case.¹²¹ If the shareholder/corporation did mislead the creditor into believing that it was dealing with the individual or that the corporation had more assets

118. EASTERBROOK, *supra* note 102, at 55 ("Almost every case in which a court has allowed creditors to reach the assets of shareholders has involved a close corporation."); Cohen, *supra* note 5, at 441 (citing study by Robert Thompson in which Thompson concluded that, at the time of the study, there had been no successful piercings of firms with more than nine shareholders).

119. *Id.*; see also *Atlas Constr. Co. v. Slater*, 746 P.2d 352, 355-56 (Wyo. 1987) (analyzing the relationship between a corporate parent and its corporate subsidiary, the Court stated that merely a parent corporation's complete ownership of the shares of a subsidiary and common officers and directors is not enough to pierce the corporate veil. Rather, additional factors must be present to pierce the corporate veil. The court reasoned that a parent and its subsidiary "are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers. Such control, after all, is no more than a normal consequence of controlling share ownership." (quoting H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* 148 (1983)); Gelb, *supra* note 112 at 2 (explaining a court's use of such terms as "alter ego", and "sham", in piercing opinions are "of little aid in explaining such decisions," and that the dominant shareholder should be able to exercise its control over the corporation without losing limited liability protection).

120. *Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 415 (7th Cir. 1988).

121. *Id.* "There is an excellent reason for requiring something more than control: unless the corporation engaged in some practice that might have misled its contract creditors into thinking they were dealing with another entity, there is simply no need to "protect" them. Unlike tort claimants, they [contract claimants], chose to deal with the corporation; to allow them access to shareholders or parent corporations when the deal goes sour is to give them more than the benefit of their bargain." *Id.*

than it really did, then the presence of this “misrepresentation” may in fact form the basis of a piercing claim.¹²²

The last common factor cited in piercing cases is whether the corporation was “adequately capitalized.”¹²³ While this factor should have no place in voluntary (contract) creditor piercing cases, this factor certainly has a place in involuntary (tort) piercing cases.¹²⁴ Easterbrook & Fischel argue that capitalization is a relevant factor in some voluntary creditor piercing cases.¹²⁵ It is Easterbrook’s and Fischel’s position that in most or all small credit transactions the costs of conducting protective diligence is too high to justify the protection offered by such diligence. Therefore, in these instances it is “desirable that creditors be able to assume that the debtor is adequately capitalized. The firm should have a duty to notify the creditor of any unusual capitalization.”¹²⁶

This position is inconsistent with the idea of personal responsibility we all must bear when entering into contractual relationships. If Easterbrook’s and Fischel’s position is accepted, then corporations are put in a position of having to determine, first, whether the particular transaction is one in which the adverse party is entitled to “rely” on the assumption that the corporation is adequately capitalized, and if so, second, whether its capitalization is actually adequate to satisfy any such “small credit transaction.” This is an unnecessary burden to place on a corporation and ignores the idea that contracting parties should be responsible for their side of the bargain. The responsibility more properly lies with the adverse party to ask questions and conduct its own diligence.

In addition to unreasonably shifting the burden conducting diligence to the corporation in small credit transactions by way of this “presumption” and a “disclosure” of inadequate capital, there are basic business reasons why the debtor corporation should not be put in this position. First, the creditor has made a business decision, presumably based on the particular creditor’s experience in the market place, that it is more profitable to offer its particular service or product on credit than to require cash up front. Second, the creditor that offers short-term credit in these small dollar transactions has likely already anticipated and protected itself against defaults. In other words, the creditor in these situations is still able to protect itself through product pricing and credit terms even if it chooses not to conduct diligence

122. WYO. STAT. ANN. §§ 17-15-105(a), (b) (2001).

123. See generally Gelb, *supra*, note 112, at 1. This factor, and its use in piercing cases, is the entire focus in this excellent article.

124. *Id.*

125. EASTERBROOK, *supra* note 102, at 59.

126. *Id.*

against individual debtors.¹²⁷ When balancing the policy of protecting individual voluntary creditors with the policy of respecting limited liability demanded by the market, the burden should fall to the voluntary creditor in these situations. The creditor is better able, and indeed likely has, protected itself by spreading the risk of anticipated defaults amongst all of its customers through pricing and credit terms.

In tort cases, when capitalization is indeed a relevant consideration, some courts analyze whether a corporation was adequately capitalized to pay anticipated or foreseeable obligations, at the time of its inception.¹²⁸ Wyoming, perhaps more appropriately, appears to analyze this factor on an ongoing forward basis in a piercing case. Specifically, the Wyoming Supreme Court will analyze whether any "undercapitalization" was the result of the shareholders "draining" the corporation of its assets to the exclusion of known creditors, or the result of bad luck or past business decisions.¹²⁹ In the former situation, piercing is likely regardless of whether it is coupled with some other "factor," whereas in the latter piercing will likely not take place.

There is one final fact situation that is a "hybrid" of the mere instrumentality/alter ego and inadequate capital situations and that involves a situation in which the shareholder(s) is accused of knowingly draining the corporation of its assets to the exclusion of known or anticipated creditors. This situation is covered in the tort creditor situation by the ongoing capitalization analysis advocated by Professor Gelb and utilized by the Wyoming Supreme Court.¹³⁰ This situation may also appropriately give rise to piercing liability in the context of a contract creditor as well, as the Wyoming Supreme Court discussed in *Miles v. CEC Homes*.¹³¹ By way of example, when shareholders co-mingle assets or cash accounts, or engage in the constant shuffling of money in and out of a corporation, or use the resources of the corporation for personal gain and without reimbursing the corporation for

127. It is hardly uncommon to see vendors offer two sets of prices for a product or service, a price for a "credit" transactions, and a discounted price for cash transactions. Also, the creditor is likely to charge an interest fee on credit transaction, the collection of which helps offset anticipated defaults.

128. See generally *Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 416 (7th Cir. 1988) ("Moreover, undercapitalization, when considered at all, is evaluated with emphasis on the time of incorporation rather than thereafter. A requirement to provide continuing capitalization, as Secon urges, probably would injure noncontrolling creditors, rather than helping them, by precipitating unnecessary forced sales." (citation omitted)).

129. *Atlas Constr. Co. v. Slater*, 746 P.2d 352, 356-57 (Wyo. 1987) (stating that when analyzing whether a corporation is adequately capitalized, it is important to look at factors such as whether the corporation is adequately insured and what may have caused undercapitalization; for example, inadequate capitalization caused by a shareholder who "bled the corporation of its assets" should be distinguished from that caused by "purely business reasons"); Gelb, *supra* note 112, at 12-13, 15, 22.

130. Gelb, *supra* note 112, at 12-13, 15, 22.

131. See *id.*

these resources, all to the detriment of known or foreseeable/anticipated creditors, then piercing may very well be appropriate. Under these circumstances, it may be difficult or impossible for a potential contract creditor to engage in the diligence advocated herein, or even if this diligence is undertaken to have any confidence in the results of any such diligence. Again, however, this is the type of misrepresentation or fraudulent conduct that would form the basis of any piercing case and is not inconsistent with the position advocated in this article.

Furthermore, piercing under these circumstances is also generally in line with situations in which individual liability is imposed under the Wyoming Business Corporation Act. If, for example, the shareholders' continuous "milking" or "draining" of assets of the corporation to the exclusion of creditors is treated as "dividend distributions" that render the corporation unable to meet its known obligations, the Business Corporation Act imposes individual liability on any director that knowingly approves any such distribution.¹³² In a small, closely held corporation in which most or all piercing cases occur, the few shareholders will generally also be directors of such corporation. Regardless, this example is provided to demonstrate that the Wyoming Business Corporation Act already contemplates and is consistent with piercing the corporate veil under these fact situations.¹³³

Application to Past Wyoming Cases

Amfac Mechanical Supply Co. v. Federer,¹³⁴ *Bergh v. Mills*,¹³⁵ and *RiverMeadows, Inc. v. Zwaanshoek Holding and Financiering, B.V.*,¹³⁶ were three cases in which a contract claimant sought to pierce the corporate veil. Only in *RiverMeadows* did the Wyoming Supreme Court affirmatively decide that piercing the corporate veil was inappropriate. This article submits that under the analysis suggested herein, piercing the corporate veil was inappropriate in all three cases.

In *Amfac*, the plaintiff voluntarily extended credit to the debtor corporation.¹³⁷ Only when the corporation failed to pay its outstanding balance did the plaintiff insist on advance cash payments before it would deliver further supplies.¹³⁸ After the corporation went out of business and the plaintiff obtained a judgment against the debtor corporation, the plaintiff initiated suit against the individual shareholders seeking payment for the unpaid bal-

132. WYO. STAT. ANN. § 17-16-833 (2001).

133. *Id.*

134. 645 P.2d 73 (Wyo. 1992).

135. 763 P.2d 214 (Wyo. 1988).

136. 761 P.2d 662 (Wyo. 1988).

137. *Amfac Mech. Supply Co. v. Federer*, 645 P.2d 73, 76 (1988) (providing a summary of trial court's findings of fact).

138. *Id.*

ance owed by the corporation.¹³⁹ The Wyoming Supreme Court reversed summary judgment for the shareholders and instead found the plaintiffs had established a *prima facie* case for piercing the corporate veil. The court relied primarily on the fact that the defendant shareholders failed to observe the corporate formalities and the corporation was "grossly undercapitalized."¹⁴⁰

According to the Court, the corporation was "undercapitalized" from its inception.¹⁴¹ This conclusion is somewhat questionable, however.¹⁴² The corporation received a \$50,000 "loan" from the shareholders at the time of formation. The shareholders had received this "seed" money from a bank loan, which they had personally guaranteed. While the Wyoming Supreme Court took a strict view of the shareholders "contribution" in this case, the shareholders had indeed put a significant amount of their own personal net worth at risk in the venture, and the corporation had liquid "assets" to meet its foreseeable demands when the venture was started.¹⁴³

The shareholders also apparently did a poor job of documenting meetings and the initial loan from the shareholders to the corporation, which the Wyoming Supreme Court also found persuasive in its opinion.¹⁴⁴ What is not apparent, however, is whether the plaintiff relied on, or was misled by, this lack of formalities and documentation or in anyway relied on representations as to what type of capital the corporation had at its disposal to pay any credit extended by the plaintiff. In other words, if the plaintiff failed to conduct any diligence and instead extended credit on the "hope" that the corporation would repay its obligations, how has the lack of formalities or the alleged lack of adequate capitalization harmed the plaintiff? The Court made an apparent policy decision that the defendant shareholders should bear this loss, not the plaintiff creditor, even though the plaintiff apparently voluntarily extended credit to the defendant's corporation. If the defendant corporation (or its shareholders) did not mislead the plaintiffs during the contract formation process (the extension of credit), under the analysis advocated in this article it is inappropriate for a court to impose a guarantee for which the creditor failed to ask during the bargaining process.

Commonly accepted principles of contract law support this conclusion. For example, it is widely accepted that a court will not review the suf-

139. *Id.* at 74.

140. *Id.* at 79-82.

141. *Id.* at 79.

142. See PRESSER, *supra* note 9, § 2.52, at 2-532, 2-536 (questioning the Wyoming Supreme Court's treatment of the \$50,000 "loan" for capitalization purposes); Gelb, *supra* note 112, at 17 (stating under certain circumstances shareholder loans should be considered capital for purposes of piercing cases).

143. *Amfac*, 645 P.2d at 79.

144. *Id.* at 82.

iciency of consideration in freely negotiated contracts.¹⁴⁵ Similarly, when two parties have a valid contract, courts will not impose liability based on a quasi-contract theory. Instead, the complaining party is required to accept the terms of the freely negotiated contract, rather than attempt to change the negotiated terms after the fact.¹⁴⁶ These basic propositions only recognize that a court will not (and should not) change the terms of enforceable promises simply because a party later regrets the bargain he or she has struck. A piercing case should be no different.

Consistent with these contract principles and the approach advocated in this article, in *RiverMeadows, Inc. v. Zwaanshoek Holding and Financiering, B.V.*,¹⁴⁷ the Wyoming Supreme Court applied a much narrower piercing analysis. *RiverMeadows* involved a dispute over the sale and development of a piece of real property.¹⁴⁸ The plaintiff who sought to pierce the corporate veil was experienced in real estate transactions of this type. The Wyoming Supreme Court relied on this fact when rejecting the plaintiff's piercing demand and summarily concluded:

In cases such as this where the parties are aware of the corporate status and they knowingly enter into transactions with no fraud being evidenced, there is no rationale or policy which requires that the corporate entity be disregarded. Courts have refused to pierce the corporate veil in cases where 'the intent in consequences of [the relevant transactions] were known and understood by all the parties, who are all represented by legal counsel.'¹⁴⁹

Had the Court applied similar reasoning in *Amfac*, a different result may have followed in that case. In *RiverMeadows, Inc.*, the court was persuaded by the fact that all parties to the contract were sophisticated and otherwise "represented by legal counsel."¹⁵⁰ Are parties that are represented by legal counsel and that are perhaps more "sophisticated" in the eyes of the court entitled to have their bargains enforced, but "unsophisticated" parties

145. Students are taught that courts will not review the sufficiency of consideration received by parties in a freely engaged bargain. See, e.g., KENNETH W. CLARKSON ET AL., WEST'S BUSINESS LAW 229 (2001) ("In general, a court will not question the adequacy of consideration if the consideration is legally sufficient. Under the doctrine of freedom of contract, parties are normally free to bargain as they wish.").

146. See, e.g., *Industrial Lift Truck Serv. Corp. v. Mitsubishi Int'l Corp.*, 432 N.E.2d 999, 1002 (Ill. App. Ct. 1982) ("The general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests. . . . Quasi-contract is not a means for shifting a risk one has assumed under a contract.") (citation omitted).

147. 761 P.2d 662 (Wyo. 1988).

148. *Id.* at 664.

149. *Id.* at 666-67 (citations omitted).

150. *Id.*

are subject to a "fairness" test if pressed in litigation? When read together, these two opinions appear to suggest the answer is yes. If, however, one truly values the freedom to contract, then these considerations should have no bearing on the outcome, and contracting parties must be required to accept responsibility for their bargains no matter how "unfair" this may seem in certain situations. Furthermore, the legislature has already made the policy decision that if one or more parties chose to operate their business under a limited liability form, whether a corporation, limited liability company, or some other type, then these principals enjoy limited liability protection. This legislative decision is only frustrated when the corporate veil is pierced for reasons unrelated to the loss suffered by the plaintiff.

Perhaps the most inconsistent opinion on this topic is *Bergh v. Mills*.¹⁵¹ In *Mills*, the Wyoming Supreme Court found that the shareholders of an insolvent corporation engaged in fraud when selling the plaintiffs shares of the corporation and obtaining a loan from the plaintiffs.¹⁵² The Court held that the fraudulent conduct of the defendant shareholders was justification for the imposition of liability on these individuals and their partners.¹⁵³ While this conclusion is perfectly logical in compensating the defrauded party, the plaintiff investors, the court went further and pierced the corporate veil for the debt owed by Billys to the Dunmar Inn, a local hotel, operated as a limited partnership. While this holding is generally recognized as proper,¹⁵⁴ when carefully considered it is somewhat suspect.

The facts in this case are important (as they are in any piercing case). One of the two plaintiffs (John Mills)¹⁵⁵ that were fraudulently induced into investing (as shareholders and through a loan) in the insolvent corporation (Billys) started by the defendants was also the general partner of the limited partnership that operated the Dunmar Inn.¹⁵⁶ The Dunmar Inn opened an account for Billys (at Mills' insistence) after Mills discovered the insolvent condition of Billys.¹⁵⁷ In other words, Mills used the Dunmar Inn, of which he was general partner and to whose other partners Mills owed

151. 763 P.2d 214 (Wyo. 1988).

152. *Id.* at 216-17.

153. *Id.*

154. See Douglas J. Gardner, *An Innovative Approach to Piercing the Corporate Veil: An Introduction to the Individual Factor and Cumulative Effects Analysis*, 25 LAND & WATER L. REV. 563, 572 (1990). See also PRESSER, *supra* note 9, § 2.52, at 2-539 (concluding generally that the holding was proper).

155. John Mills and his wife Dianne were the two individual investors in Billys. The other plaintiff in this case was the Dunmar Inn of which John Mills was the General Partner.

156. *Bergh*, 763 P.2d at 215. The case caption indicates that John Mills was the General Partner of Dunmar Inn.

157. *Id.* at 216. "In order to protect their investment [in Billys], they [the Mills] arranged to lodge Billys entertainers in the Dunmar Inn on an open account." *Id.* at 217. "When John and Dianne Mills were defrauded, they were not acting as agents of the Dunmar Inn. When they later convinced the Dunmar Inn to allow Billys, Inc. to run up an open account, they had already become aware of the true financial status of Billys, Inc." *Id.*

fiduciary obligations, to subsidize a corporation he knew was insolvent (and in which he was a shareholder and creditor) by extending unsecured credit to this corporation.¹⁵⁸ When Billys finally closed, Mills sued on behalf of himself individually, and on behalf of the Dunmar Inn of which he was a General Partner.¹⁵⁹ The Wyoming Supreme Court permitted the Dunmar Inn to recover from two of Billys' shareholders based on a piercing theory.¹⁶⁰ This result is not sound and demonstrates the danger of relying on little more than "fairness" or a results oriented approach to dictate which party should bear the loss in a given situation.

The Dunmar Inn voluntarily extended credit to Billys knowing it was in financial trouble.¹⁶¹ Some might call this throwing good money after bad. Regardless, in its opinion, the Wyoming Supreme Court acknowledged that Mills created the account so that he might "protect" his investment in Billys.¹⁶² While not entirely clear from the opinion, it appears that the Dunmar Inn's other partners agreed to open the account for Billys, at the urging of Mills.¹⁶³ Under these facts it is difficult to justify any recovery from Billys' shareholders in favor of the Dunmar Inn.¹⁶⁴ If there was to be any recovery for the Dunmar Inn against any individual, it should have at most been against Mills, its General Partner, based on a breach of fiduciary duty claim.¹⁶⁵

This conclusion is supported in the facts recited by the Wyoming Supreme Court. The Court acknowledged that Mills had to "talk the hotel into" opening the account.¹⁶⁶ Furthermore, the account was not opened for the express benefit of Billys, but rather in an attempt to protect Mills' investment in Billys.¹⁶⁷ Mills was acting as an agent for both Billys and the Dunmar Inn and was in an incurable conflict of interest. By piercing the corporate veil, the Wyoming Supreme Court appeared to ignore "one of the

158. *Id.*

159. *Id.* at 215. The case caption indicates that John Mills was the General Partner of Dunmar Inn.

160. *Id.* at 218.

161. *Id.* at 216-17.

162. *Id.* at 216 ("In order to protect their investment [in Billys], they [the Mills] arranged to lodge Billys entertainers in the Dunmar Inn on an open account.").

163. *Id.* at 217 ("When John and Dianne Mills were defrauded, they were not acting as agents of the Dunmar Inn. When they later *convinced* the Dunmar Inn to allow Billys, Inc. to run up an open account, they had already become aware of the true financial status of Billys, Inc.").

164. The Wyoming Supreme Court justified its decision by stating it would not "reward appellants' fraud by allowing them to enjoy the benefits of corporate status." *Id.* at 218.

165. This cause of action likely would not follow if the remaining partners knowingly and voluntarily approved the transaction after full disclosure from the interested party (Mills in this case). See WYO. STAT. ANN. §§ 17-21-404(b)(ii), 17-14-503, 17-16-830, 31 (2001).

166. *Bergh*, 763 P.2d at 217.

167. *Id.* at 216.

basic tenets of equity” that “equitable remedies depend upon a showing by the claimant of clean hands.”¹⁶⁸

Given Mills’ knowledge of the financial condition of Billys, and the character of his business partners in Billys, the Dunmar Inn could have asked that the individual shareholders of Billys guarantee the account. This, in fact, would have been the prudent business decision given the defendant shareholders past fraudulent conduct in this business relationship. While we will never know, perhaps this request was made, but the defendants refused. Regardless, when a party knowingly enters into a risky transaction and that party has apparently not protected itself in advance, that party must bear the risk of loss in that situation. Whether the outcome may appear unjust should not change the result. Under the analysis suggested above, the Dunmar Inn would have been unable to collect from Billys’ shareholders.

CONCLUSION

Until the Wyoming Supreme Court provides a more defined analysis, piercing cases in Wyoming will be unnecessarily unpredictable. At the very least, the Wyoming Supreme Court should analyze whether a plaintiff seeking to pierce the veil of a limited liability entity is a voluntary or involuntary claimant. This distinction will almost always lie in whether the claimant is a contract or tort creditor of the corporation. If a contract (voluntary) claimant, the Court should carefully scrutinize the circumstances surrounding the contract formation and only pierce the veil when some type of fraud or misrepresentation is present. If a tort (involuntary) claimant, the Court should focus primarily on the nature of the tort suffered by the plaintiff, particularly whether the loss was reasonably foreseeable, and then determine whether the corporation adequately prepared for the reasonably foreseeable loss suffered by the plaintiff through adequate capitalization and insurance. Finally, generally irrelevant considerations often relied on by courts in piercing cases, like whether the formalities have been respected, should not be relied on in piercing cases unless any such factor directly caused or has a direct relationship to the loss suffered by the plaintiff.

In the event the Wyoming Supreme Court is unwilling to refine its piercing analysis, the Wyoming Legislature should be proactive in this area and consider legislation that addresses when piercing the corporate veil is, or is not, appropriate. Texas, like other states, has adopted one form of such

168. *Dewey v. Wentland*, 38 P.3d 402 (Wyo. 2002). *See also* *Yellowstone Sheep Co. v. Ellis*, 96 P.2d 895, 904, 907 (Wyo. 1939) (“[A] court of equity may not assume power to administer justice because of the hardship of a case.” “[H]e who seeks equity must do equity.”); *Wettlin v. Jones*, 234 P. 515, 517 (Wyo. 1925) (“It is a fundamental axiom in law that no man can profit by his own wrong.”).

piercing legislation that could guide the Wyoming Legislature should it decide to take up this issue.¹⁶⁹

169. See TEX. BUS. CORP. ACT art. 2.21 (2001).

