

1983

Corporation Law - A Prima Facie Case for Piercing the Corporate Veil - AMFAC Mechanical Supply Co. v. Federer

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Recommended Citation

Lubnau, II, Thomas E. (1983) "Corporation Law - A Prima Facie Case for Piercing the Corporate Veil - AMFAC Mechanical Supply Co. v. Federer," *Land & Water Law Review*: Vol. 18 : Iss. 2 , pp. 823 - 836.
Available at: https://scholarship.law.uwyo.edu/land_water/vol18/iss2/16

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In February of 1977, Carl and Beverly Federer incorporated, in Wyoming, C & B Plumbing and Heating, Inc.¹ An organizational meeting was held, stock was issued to Carl and Beverly Federer as sole stockholders, and by-laws were adopted.² Other corporate meetings were said to have been held, but no minutes were kept, nor were any other records kept of any other business-related activities of the corporation.³

In exchange for 30,000 shares of stock issued by the corporation, the Federers contributed the minimum statutorily required capital of \$500,⁴ some tools and a Bronco.⁵ Approximately one year later, the Federers borrowed \$50,000 which they, in turn, loaned interest free to C & B Plumbing and Heating, Inc. to provide additional operating capital for the corporation.⁶

The corporation carried on business for one year. In early 1978, C & B Plumbing and Heating, Inc. became indebted to AMFAC Mechanical Supply Co. for approximately \$11,000. AMFAC stopped credit sales to C & B as payments from C & B became chronically late, but continued to sell to the corporation on a cash basis.⁷ In August, 1980, AMFAC obtained a default judgment against C & B Plumbing and Heating, Inc. in the sum of \$11,497 plus various fees and costs.⁸ The corporation, however, was judgment proof.

Unable to satisfy the judgment out of the C & B assets, AMFAC filed suit against Carl and Beverly Federer, sole shareholders of C & B Plumbing and Heating, Inc., praying that the court pierce the corporate veil and reach the personal assets of the Federers to satisfy the judgment.⁹ At the conclu-

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1. Brief for Appellant at 3, *AMFAC Mechanical Supply Co. v. Federer*, 645 P.2d 73 (Wyo. 1982).
2. *AMFAC Mechanical Supply Co. v. Federer*, 645 P.2d 73, 76 (Wyo. 1982).
3. *Id.* at 80.
4. WYO. STAT. § 17-1-205 (1977).
5. Brief for Appellee at 4, *AMFAC Mechanical Supply Co. v. Federer*, 645 P.2d 73 (Wyo. 1982).
6. Brief for Appellant, *supra* note 1, at 3.
7. 645 P.2d at 76.
8. *Id.* at 75.
9. *Id.* at 74.

sion of AMFAC's case, the trial judge granted the Federers' motion to dismiss because AMFAC had failed to present a prima facie case in that it did not "show that the corporation was organized or used to mislead creditors or to perpetrate fraud upon them."¹⁰

On appeal, AMFAC argued that 1) proof of fraud or bad faith is not a prerequisite in a case to pierce the corporate veil, and 2) sufficient evidence was offered to prove a prima facie case for piercing. The Wyoming Supreme Court, reversing and remanding with directions to proceed with trial, analyzed the factors necessary to pierce the corporate veil and held that a prima facie case had been presented.¹¹

SUMMARY OF WYOMING LAW ON DISREGARDING THE CORPORATE ENTITY¹²

Courts generally uphold the separate entity status of a corporation because the concept of limited liability for corporations is a basic assumption that underlies many commercial transactions.¹³ Given the appropriate circumstances, though, courts have not hesitated to disregard the corporate fiction.¹⁴

The corporate entity was disregarded by United States courts as early as 1809, holding that the corporate veil would be pierced if the entity was used to promote injustice;¹⁵ however, it was not until 1932 that the Wyoming Supreme Court first pierced the corporate veil, in *Caldwell v. Roach*.¹⁶ In *Caldwell*, the Laramie Water Company, a Wyoming corporation, defaulted on its obligation to transfer water for which promissory notes had been given as consideration. The corporation transferred the notes to Caldwell, who also happened to be the major stockholder of the Laramie Water Company. Caldwell, the plaintiff, maintained that he was a holder in due course of the promissory notes and was entitled to the

10. *Id.*

11. *Id.* at 75. Upon remand, on the night before retrial, the case was settled out of court. Laramie County Dist. Court, Civil Docket No. 9593.

12. See also Note, *Piercing the Corporate Veil in Wyoming*, 17 Wyo. L.J. 63 (1962) (a more extensive discussion of the evolution of disregarding the corporate entity in Wyoming).

13. HAMILTON, *THE LAW OF CORPORATIONS IN A NUTSHELL* 67 (1980).

14. *Id.*

15. *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

16. 44 Wyo. 319, 12 P.2d 376 (1932).

balance due. The defendant argued, and the Wyoming Supreme Court agreed, that the corporation was the alter ego of the plaintiff and thus, he could not be a holder in due course.¹⁷ Justice Blume, writing for the majority, said, “the legal entity of a corporation will be disregarded whenever the recognition thereof in a particular case will lead to injustice. . . .”¹⁸ The court used the metaphor mere “instrumentality” to describe the corporation, but set no specific criteria for piercing the veil.¹⁹

The next case in which the Wyoming Supreme Court addressed the issue of piercing was *State ex rel. Christensen v. Nugget Coal Co.*²⁰ In *Nugget Coal* a coal mining partnership, deeply in debt, incorporated in order to avoid a special workmen’s compensation assessment.²¹ The court held that ordinarily a corporation is a separate entity, distinct from the individuals composing it and, furthermore, that persons may incorporate for the purpose of escaping personal liabilities for the debts of the corporation.²² However, the law will regard the corporation as an association of persons where the “notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime.”²³ The court went further to say that 1) actual intent to defraud is not necessary—an inequitable result is all that is necessary to pierce the veil;²⁴ 2) a corporation may be held liable for debts incurred before incorporation;²⁵ 3) the conditions under which a corporate entity may be regarded as the alter ego of the stockholder vary according to the circumstances of each case;²⁶ 4) piercing is justified where the corporation is not simply influenced and governed by the person or persons governing it, but where there is “such a unity of interest and ownership that the individuality, or separateness of said person or corporation has ceased . . .”²⁷ and 5) the stockholder need not own 100 percent

17. *Id.* at 378.

18. *Id.* at 380-81.

19. *Id.* at 380.

20. 60 Wyo. 51, 144 P.2d 944 (1944).

21. *Id.* at 946-47.

22. *Id.* at 948.

23. *Id.* at 949 (quoting 1 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 46, at 136).

24. 144 P.2d at 950.

25. *Id.*

26. *Id.* at 952.

27. *Id.* at 950 (quoting *Minifiey v. Rowley*, 187 Cal. 481, 202 P. 673 (1921)).

of the corporation's stock to be held liable for corporate obligations.²⁸

In 1975, the Supreme Court of Wyoming pierced the corporate veil to satisfy debts incurred prior to incorporation.²⁹ In *Peters Grazing Association v. Legerski*, a grazing organization incorporated to avoid paying a real estate commission on the purchase of a ranch. The court stated that it has "never felt too kindly about the technical use of a corporate device as a means of slithering from under a contract or other lawful obligation."³⁰ *Legerski* stands for the proposition that where a corporate scheme is used to avoid a pre-existing legal obligation, the court will not hesitate to pierce the corporate veil.

In September of 1980, the Wyoming Supreme Court handed down its decision in *Opal Mercantile v. Tamblyn*.³¹ In *Opal*, an action was instituted against an individual who was the sole stockholder, officer, and director of the corporation to collect an amount owed on insufficient funds checks written by the corporation. A default judgment was entered against the corporation. The trial court held that there was not enough evidence to pierce the corporate veil and dismissed the action.

On appeal, the Wyoming Supreme Court held that the "circumstances of this case [do not] . . . require the doctrine of limited liability to be disregarded in furtherance of public policy of the ends of justice."³² Justice Rooney, writing for an unanimous court, stated "The obligations here involved came into being long after Westside [Implement and Hardware, Inc.] became a corporation. Appellant was aware of its corporate status, and such was evidenced on the checks themselves. Fraud was not evidenced. . . ."³³ The court further stated that the separate entity doctrine must be governed by the facts of each case. In *Opal*, a knowledgeable businessman voluntarily dealt with a corporation that he knew was in financial trouble. The court held that the facts of the case did not justify reaching the stockholder.³⁴

28. 144 P.2d at 951.

29. *Peters Grazing Ass'n v. Legerski*, 544 P.2d 449 (Wyo. 1975).

30. *Id.* at 454.

31. 616 P.2d 776 (Wyo. 1980).

32. *Id.* at 778.

33. *Id.*

34. *Id.*

The language of the *Opal* decision implies that in order to pierce the veil, there must be some evidence of fraud, or in the very least, some evidence of an intentional effort to mislead creditors. This language seems to be the basis of the trial court's decision in *AMFAC*.³⁵

Piercing the corporate veil is an equitable doctrine. In order to pierce, two things must be shown: that the stockholder has substantial control over the corporation, and that an injustice would result if the corporation were upheld. For a stockholder to have substantial control over the corporation, the stockholder need not own 100 percent of the corporation's stock. Such a unity of interest must be shown that for all practical purposes the corporation is the mere instrumentality of the stockholders.³⁶

The degree of injustice which the court considered sufficient to pierce the corporate veil was unclear before *AMFAC*. In all of the cases where the veil was successfully pierced, the limited liability of the corporation had been used to avoid pre-existing legal obligations or as a shield against misconduct.³⁷ A showing of fraud was not actually required to pierce the veil. However, the language the court used in *Opal* seemed to indicate that something closely akin to fraud was required.³⁸

35. 645 P.2d at 76-77.

36. *State ex rel. Christensen v. Nugget Coal Co.*, 144 P.2d at 950-52 (1944). Compare with *State v. Laramie Rivers Co.*, 59 Wyo. 9, 136 P.2d 487, 491 (where the court refused to disregard the corporate entity because there was insufficient unity of interest.) The term "mere instrumentality" is an example of the terminology used in piercing the veil cases.

Many such cases are long on rhetoric and short on reasoning. Indeed, perhaps in no other area are the courts more prone to decide real life disputes by verbal characterizations, epithets and metaphors: "mere adjunct," "agent," "alias," "alter ego," "alter idem," "arm," "blind," "branch," "buffer," "cloak," "corporate double," "instrumentality," "mouthpiece," "name," "nominal identity," "phrase," "puppet," "screen," "sham," "simulacrum," "snare," "stooge," "subterfuge," or "tool," to select a few. Various terms are combined in artful phraseology. "[Such] [sic] language is inherently unsatisfactory since it merely states the conclusion and gives no guide to the considerations that lead a court to decide that a particular case should be considered an exception to the general principal of nonliability. A systematic analysis, moreover, is not readily discernible in the cases, and many courts continue to rely on metaphors to explain their results."

Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979 (1971) in HAMILTON, CASES AND MATERIALS ON CORPORATIONS 210 (2d ed. 1981).

37. *Opal Mercantile v. Tambllyn*, 616 P.2d at 778 (Wyo. 1980).

38. *Id.* ("The obligations here involved came into being long after Westside became a corporation. Appellant was aware of its corporate status, as was evidenced on the checks themselves. Fraud was not evidenced. . . .")

SUMMARY OF AMFAC MECHANICAL SUPPLY CO. V. FEDERER

At the end of AMFAC's case, the trial judge granted the Federer's motion to dismiss. In his letter opinion, the trial judge held that C & B Plumbing and Heating, Inc. was validly incorporated and operated under Wyoming laws; that AMFAC had dealt with the corporation knowingly and voluntarily; that there was no intentional intermingling of the funds of the corporation; that there was no evidence that the corporation was merely the alter ego of its shareholders and that there was no attempt to defraud creditors.³⁹

AMFAC contended on appeal that proof of fraud was not a prerequisite to piercing the corporate veil and that it had offered sufficient evidence to prove a prima facie case.⁴⁰ The court held that AMFAC had presented a prima facie case. In so holding, the court established specific criteria for a prima facie case.

*Fraud or Bad Faith is not Necessary to
Pierce the Corporate Veil*

The AMFAC decision provides specificity in an area of the law that has generally been characterized by metaphor rather than systematic analysis to explain courts' results. The Wyoming Supreme Court in AMFAC interpreted the rule set forth in *Nugget Coal* that a corporate entity will be disregarded in an appropriate case and in furtherance of public policy or the ends of justice,⁴¹ broadly. The AMFAC case held that neither fraud nor bad faith is necessary if upholding the corporate entity would result in injustice.⁴²

The AMFAC court clarified the *Opal* decision by explaining that fraud is not necessary to pierce the corporate veil, as *Opal* seemed to hold.⁴³ Instead, the court explained, the impetus of the *Opal* decision was that the trial court should determine from the special facts of each case whether the corporate entity should be disregarded.⁴⁴ AMFAC made it clear that the

39. 645 P.2d at 76-77.

40. *Id.* at 74-75.

41. 144 P.2d at 950.

42. 645 P.2d at 79.

43. *Id.* at 79.

44. 616 P.2d at 778.

threshold of injustice that will make a case for piercing is less than fraud.

Court Adopts Guidelines for a Prima Facie Case

The Wyoming Supreme Court, in *AMFAC*, looked to California case law for a list of some, but not all, of the factors which are relevant in an action to pierce the corporate veil.⁴⁵ The basic rule of California law is set forth in *Arnold v. Brown*:⁴⁶

[B]efore a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, it must be made to appear that the corporation is not only influenced and governed by that person, but that there is such an unity of interest and ownership that the individuality, or separateness, of such person and corporation has ceased, and that the facts are such that an adherence to the fiction of separate existence of the corporation would, under the particular circumstances sanction a fraud or promote injustice.⁴⁷

The *AMFAC* court also looked to California case law for a partial list of possible fact situations that may justify disregarding the corporate entity.⁴⁸ The court felt that each of these fact

45. 645 P.2d at 77. California is a leading state in the development of piercing the corporate veil case law. See *infra* note 47.

46. 27 Cal. App. 3d 386, 103 Cal. Rptr. 775 (1972).

47. *AMFAC Mechanical Supply Co. v. Federer*, 645 P.2d at 77 (Wyo. 1982) (quoting *Arnold v. Browne*, 27 Cal. App. 3d 386, 103 Cal. Rptr. at 781 (1972)) (citations omitted).

48. 645 P.2d at 78. The situations are as follows: commingling of funds and other assets, failure to segregate funds of separate entities, and unauthorized diversion of corporate funds or other assets to other than corporate uses, *Riddle v. Leuschner*, 51 Cal. 2d 574, 335 P.2d 107 (1959); treatment by an individual of the assets of the corporation as his own, *Minton v. Cavaney*, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961); failure to obtain authority to issue stock or to subscribe or issue the same, *Automotriz ect. De California S.A. De C.V. v. Resnick*, 47 Cal. 2d 792, 306 P.2d 1 (1957); the holding out by an individual that he is personally liable for the debts of the corporation, *Stark v. Corer*, 20 Cal. 2d 839, 129 P.2d 390 (1942); the failure to maintain minutes or adequate corporate records, and the confusion of the records of separate entities, *Riddle v. Leuschner*, 51 Cal. 2d 574, 335 P.2d 107 (1959); the identical equitable ownership in the two entities, the identification of the equitable owners thereof with the nomination 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 total absence of corporate assets, and undercapitalization, *Minton v. Cavaney*, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961); the use of a corporation as a mere shell, instrumentality or conduit for a single venture or business of an individual or another corporation, *McCombs v. Rudman*, 197 Cal. App. 2d 46, 17 Cal. Rptr. 351 (1961); the concealment and misrepresentation of the identity of 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 relationship among related entities so as to concentrate the assets in one and the liabilities in another, *Riddle v. Leuschner*, 51 Cal. 2d 574, 335 P.2d 107 (1959); the contracting with another with intent

situations stand as evidence of a resulting injustice. The presence of any one is controlling for the purposes of establishing a prima facie case.⁴⁹

After setting forth criteria for a prima facie case, the court analyzed the specific facts of the *AMFAC* case, looking for warning flags which indicate a situation that calls for piercing the corporate veil. The court first looked to the capitalization of the corporation. To capitalize the corporation, the Federers contributed the minimum statutorily required amount of \$500, some tools, and a vehicle. They borrowed \$50,000 and, in turn, loaned it to the corporation as operating money.⁵⁰ The Federers then withdrew \$1,000 per month, to the exclusion of other creditors,⁵¹ in repayment of the loan. A relatively large investment of capital was required to run the business, as evidenced by the large debts the corporation accrued in a short time. The net assets were insufficient for the corporation to adequately carry on the plumbing business.⁵² The supreme court concluded that it was prima facie unjust for a corporation to be organized in such a way that the corporation was likely to have insufficient assets with which to operate.⁵³

The next factor the court analyzed was the conduct of the stockholders. Closely held corporations, by their nature, are subject to more abuses than public corporations and, therefore, are subject to closer court scrutiny.⁵⁴ The abuse most common to closely held corporations seems to be the failure to maintain requisite corporate formalities. *C & B Plumbing and Heating, Inc.* did not keep minutes, did not make a formal resolution to borrow money, and did not keep adequate records of the uses of the borrowed money. The

to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions, *Wheeler v. Superior Mortgage Co.*, 196 Cal. App. 2d 822, 17 Cal. Rptr. 291 (1961); the formation and use of a corporation to transfer to it the existing liability of another person or entity, *Shea v. Leonis*, 14 Cal. 2d 666, 96 P.2d 332 (1939).

For a more detailed list of the cases supporting the factors listed in the *Arnold* decision, see *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 838, 26 Cal. Rptr. 806 (1963).

49. 645 P.2d at 78.

50. *Id.* at 79.

51. *Id.* at 81.

52. *Id.* at 79-80.

53. *Id.* at 81. See also H. BALLANTINE ON CORPORATIONS § 129, at 302-03 (rev. ed. 1946); Annot., 63 A.L.R.2d 1051 (1959).

54. *AMFAC Mechanical Supply Co. v. Federer*, 645 at 81 (Wyo. 1982).

AMFAC court held that “[f]ailure to maintain the requisite formalities substantially increases the probability the corporate existence will be disregarded.”⁵⁵

The court also looked to the commingling of the funds of the corporation and the personal property of the Federers. A vehicle which was purchased from the Federers by C & B never had its title transferred to the corporation. The title to another vehicle, purchased new by C & B showed the owner as “Federer, Carl dba/C & B Plumbing and Heating.”⁵⁶ A number of invoices were issued by Federer personally for work done by C & B. Some collections were deposited to C & B’s accounts while others were deposited to the Federer’s personal accounts.⁵⁷ “All of this,” the court held, “definitely shows disregard of the corporate entity as far as a prima facie showing by appellant is concerned.”⁵⁸ The *AMFAC* court concluded that the commingling was so extensive that “[i]t took no more to make a prima facie case.”⁵⁹

The final factor which the court considered was the subordination of other creditors to pay off the loan to the stockholders. The Wyoming Supreme Court held that one may challenge the corporate entity by showing that he has been the victim of some basically unfair device whereby the corporate form of business organization has been used to achieve an inequitable result: “Such is the case when the assets of a corporation are used to pay off a controlling shareholder in preference to a general creditor.”⁶⁰

55. *Id.* at 82.

56. *Id.* at 78. The titles to the Bronco and the pickup were in Carl Federer’s name, and so they could be transferred unencumbered, putting them beyond the reach of any corporate creditors. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 82. To support this proposition, the *AMFAC* court quoted HORNSTEIN, 2 CORPORATION LAW AND PRACTICE § 731, at 263-64 (1959):

Disregard of the corporate form by the participants themselves expose them to personal liability. The courts have even spelled out the elements of disregard, to wit: failure to satisfy the minimal requirements for a corporation de facto, or failure to keep separate books and accounts, or failure to keep the corporate finances scrupulously separate from those of its shareholders or shareholder (whether an individual or a corporation), or use by both the corporation and its shareholders of a common “department” of business so that it is difficult to unscramble the participation of each, or domination by a shareholder (whether an individual or a corporation) so complete that with respect to an alleged improper act the corporation “had no separate mind, will, or existence of its own.”

645 P.2d at 82.

60. 645 P.2d at 81 (citing *Tigrett v. Pointer*, 580 S.W.2d 375 (Tex. Civ. App. 1978)).

ANALYSIS OF THE COURT'S DECISION

A careful analysis of the court's decision demonstrates that each factor for piercing the corporate veil is to be carefully scrutinized. Consider the following factors upon which the court based its decision: 1) inadequate capitalization, 2) disregard of corporate formalities, 3) commingling of assets, and 4) subordination of creditors' debts.

*Inadequate Capitalization*⁶¹

To look at the capitalization of a corporation at any one point in time is a mistake. The corporation should be examined as a going concern to determine the stockholders' treatment of the corporation. How the debt structure appeared two years ago, at the date of incorporation, is not as important as how it appeared at the time the controversy in question arose.⁶² A basic rule of business is that new small businesses are under financed. "It is common knowledge that many such corporations have been highly successful, that others have prospered but without legendary success, and that still others have failed in part, at least, because of inadequate capital. Such is the story of our American enterprise system."⁶³ Initial capitalization, alone, is insufficient to show the treatment by a stockholder of his corporation throughout its life.

Although capitalization of the corporation throughout its life is a good indicator in determining whether to pierce the veil, such undercapitalization should not be enough to declare the business the alter ego of the stockholder. "Evidence of inadequate capitalization is, at best, merely a factor to be considered . . . in deciding whether to pierce the corporate veil."⁶⁴ Courts generally have taken the position that mere undercapitalization is insufficient to pierce the veil.⁶⁵

61. For the purposes of this case note, inadequate capitalization as a factor in piercing the corporate veil will only be discussed in terms of contract cases. Case law in Wyoming is unclear as to what capitalization is necessary to pierce the veil in tort cases. A corporation might be adequately capitalized for a contract case (the corporation has sufficient assets to conduct business) and yet it may be grossly undercapitalized for a tort case (grossly insufficient assets to cover any injury that may arise).

62. Barber, *Piercing the Corporate Veil*, 1981-1982 CORP. PRAC. COMM. 610, 640.

63. *Arnold v. Browne*, 27 Cal. App. 3d 386, 103 Cal. Rptr. 775, 783 (1972).

64. *Associated Vendors Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 838, 26 Cal. Rptr. 806, 816 (1963).

65. *Id.*

Disregard of Corporate Formalities

A corporate creditor does not care whether minutes of a corporation are kept or whether a resolution authorizing the corporation to borrow money is inserted into the minutes. The corporate creditor does have an interest in keeping the corporate assets titled in the corporate name so that they will be subject to creditors' remedies. Standing alone, a disregard by the shareholders for the corporate formalities should be given little weight.⁶⁶ Combined with other factors, such disregard stands as a flag of warning to the businessman to be prepared to lose his limited liability: "[M]aintenance of corporate formalities is often relied on by courts in refusing to hold the owners of a corporation liable."⁶⁷

Commingling of Corporate Assets with Personal Assets

Courts disfavor commingling of personal assets with corporate assets. The creditor has an interest in maintaining the separation of corporate and personal assets so that the corporate assets do not slip away into the "personal coffers" of the shareholders.⁶⁸ The case at hand reveals no evidence of such an attempt at misconduct. The commingling seems to have been an oversight on the part of the shareholders.⁶⁹ Although the commingling had no noticeable effect on the transaction between AMFAC and C & B, the Wyoming Supreme Court seems to consider the commingling as another flag of warning indicating the attitude of the shareholders toward the corporation.

Paying Off the Controlling Shareholder in Preference to a General Creditor

One factor which gives substance to the veil-piercing rationale of the *AMFAC* case was only touched upon briefly by the court. When a shareholder uses the assets of an insolvent corporation to pay himself off in preference to a general creditor, the business organization has been used to achieve an inequitable result.⁷⁰ Such an abuse of the corporate entity in-

66. *Zubik v. Zubik*, 384 F.2d 267, 271 n.4 (3d Cir. 1967), cert. denied, 390 U.S. 988 (1968).

67. *AMFAC Mechanical Supply Co. v. Federer*, 645 P.2d at 82 (Wyo. 1982) (citing *Fisser v. International Bank*, 282 F.2d 231, 240 (2d Cir. 1960)).

68. Hamilton, *supra* note 36, at 991.

69. 645 P.2d at 76-77 (quoting the trial judge's opinion letter).

70. *Id.* at 81.

fringes upon the rights of the general creditor and gives the court tangible grounds to pierce the corporate veil.

Rationale Underlying the Court's Decision

The combination of warning flags which will signal the piercing of the corporate veil cannot be determined by a mathematical formula. The court considered undercapitalization, disregard of corporate formalities, commingling of funds, and subordination of general creditors to pierce the veil in *AMFAC*. However, as we have seen, each factor is itself only an indicator of the stockholders' actions toward the corporation. Each case must be decided on its own facts. Each factor stands as a warning flag. If the corporation begins to look like the United Nations, the stockholders should be prepared to lose their privilege of limited liability. As a matter of interest, "cases attempting to pierce the corporate veil are unified more by the remedy sought—subjecting to corporate liabilities the personal assets directly held by shareholders—than by repeated and consistent application of the same criteria for granting the remedy."⁷¹

What, then, is the rationale underlying the court's decision? A comparison between *Opal*, where the veil was not pierced, and *AMFAC*, where the criteria for a prima facie case for piercing were established, sheds some light on the court's rationale. In *Opal*, the corporation was operated honestly and in good faith as a corporation in the best interests of the corporation.⁷² In *AMFAC*, on the other hand, the corporation seemed to be only an implement to permit the shareholders to avoid accepted commercial standards in their business transactions. The viability of the corporation as an ongoing enterprise was of secondary importance to the stockholders. Each factor the court analyzed reflects on the purpose of the corporation as it is viewed by the shareholders. It seems that when a corporation is chartered, along with that charter goes the obligation to run the corporation reasonably, and in the best interests of the corporation.

71. Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 541 (1977).

72. 616 P.2d at 778.

CONCLUSION

The supreme court, in *AMFAC*, seems to be sending the message to Wyoming businessmen that the court will not tolerate a corporation which is formed and forgotten. If the stockholders give birth to a baby, they are going to have to care for it. If they do not, then neither will the court. The practitioner has an obligation to continue to advise the client throughout the life of the corporation and encourage adherence to the rigid formalities imposed upon corporations.⁷³

73. The following recommendations were offered by David H. Barber, in his article "Piercing the Corporate Veil," for increasing the probability that the corporation maintains its limited liability:

a. *At the time of incorporation:*

- (1) File articles of incorporation with the proper state and local authorities;
- (2) Issue stock, providing certificates to all shareholders of record;
- (3) Provide at least the minimum capital required by law and make sure that all subscription shares are actually paid for;
- (4) Establish a separate bank account in the corporation's name.

b. *After incorporation:*

- (1) Hold the annual shareholders' meetings;
- (2) Hold regular meetings of the board of directors (also include a non-shareholder on the board);
- (3) Keep accurate records of all such meetings;
- (4) Do not commingle corporate and personal funds;
- (5) Document all loans to the corporation by the shareholder—show the purpose for the loan and the reason that the funds were not obtained from outsiders;
- (6) If possible, pay regular dividends which represent a reasonable return on investment;
- (7) Always use the corporation's name in dealing with the public and require that authorized parties sign documents as agents for the corporation, stating their relationship to the corporation.

....

[c] *Capitalization:*

- (1) Document, the reason for selecting a given capital structure, including any comparable business studied (and past operating experience, if the entity was established prior to incorporation);
- (2) Provide a fixed maturity date and reasonable interest rate on any loan made to the corporation by a shareholder;
- (3) Prior to incorporation, discuss the range of contemplated activities and specifically evaluate the reasonable risks of torts liability associated with the business, document reasons for selection of the amount of liability insurance and consult a competent insurance broker for advice in assessing the risks and getting insurance;
- (4) Provide all contracting parties with accurate financial data prior to any contractual agreements;
- (5) Maintain a balance between debt and equity which is in line with the debt equity ratio of other businesses of the same type.

[d] *Other factors:*

- (1) Avoid diversion of corporate assets or funds to shareholders, parent corporations, or related entities for other than corporate uses;
- (2) Do not allow any shareholders or agents of the corporation to represent that they will be personally responsible for the obligations of the corporation;
- (3) Do not establish a separate corporation for conducting a single business venture (particularly one with high risk) unless adequate capital or insurance is provided for the venture;

The Wyoming Supreme Court seems to recommend that the trial court look to the nineteen factors listed in the *AMFAC* decision,⁷⁴ as well as any other factors which would indicate the purposes of the shareholder's business practices. If the default was in good faith, stemming from a corporation that was run in its own best interests as a business, then it seems the court will not pierce the corporate veil. If, on the other hand, the default was caused by the practices of a self-serving stockholder, it is likely that the veil will be pierced.

The interests of the stockholder and the corporation are not always the same. The corporation's interests are served when it is operated as a rational, going-concern. The stockholders are interested, in some cases, in money at any cost and protection from creditors. When these stockholders' interests win out over the corporation's interests, the corporate veil is in danger of being pierced. The factors the court analyzes are symptoms of the stockholder's interests winning out. As noted before, each case will be decided on its own particular facts. The *AMFAC* court listed several situations which stand as warning flags that the veil may be pierced. Each situation is an example of the shareholder's interests superceding those of the corporation.

THOMAS E. LUBNAU II

(4) Make names of all shareholders available to those who deal with the corporation.

Barber, *supra* note 62, at 646-48.

74. See *supra* note 48.