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An Innovative Approach to Piercing the Corporate Veil: An Introduction to the Individual Factor and Cumulative Effects Analysis

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COMMENTS

AN INNOVATIVE APPROACH TO PIERCING THE CORPORATE VEIL: AN INTRODUCTION TO THE INDIVIDUAL FACTOR AND CUMULATIVE EFFECTS ANALYSIS

When a corporation is formed the general rule is that the owners of that corporation risk only those assets invested in the corporation with no risk to their personal assets.[1] This rule that limits corporate liability to the amount of total shareholder investment can sometimes be unfair in the event of a lawsuit against a corporation. Occasionally, a plaintiff will seek to recover a tort or contract claim against a corporation only to find that in the meantime the corporation has become insolvent—thus barring any potential recovery. The injustice that would result from such a circumstance would be the abandonment of an injured party without a course of action against the responsible corporation. Therefore, to avoid this type of harshness, the courts have maintained that the limited liability accorded to corporate shareholders be disregarded in certain objectionable situations.

In situations where the limited liability rule is abandoned, the responsibility for the plaintiff's recovery is transferred from the corporation itself to the corporate shareholders. Hence, recovering from an insolvent corporation requires that the plaintiff and the court look beyond the corporate entity and proceed directly against the corporation's shareholder(s) for recovery. Recovery from a corporate shareholder for a corporate act, however, presents a problem. The problem being that one of the primary advantages of incorporation is limited shareholder liability. Therefore, recovering from a corporate shareholder for a corporate act requires that the court conspicuously ignore a major advantage of incorporation by disregarding the separate entity doctrine and the concept of limited liability.

Piercing the corporate veil generally involves three parties: a plaintiff seeking to enforce a tort or contract obligation, an insolvent corporation that signed the contract or committed the tort, and the controlling shareholder of the corporation. The plaintiff usually contends that the advantage of limited liability granted to corporate shareholders should be disregarded because of an abuse of that privilege to his detriment. Thus, the sharp contrast between limited shareholder liability

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1. While it is the general rule that a corporation is an entity separate from its shareholders, it is equally well settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard the distinct existence and treat them as identical. Equity will look through form to substance where corporations are but the mere instrumentalities through which the association acted. Caldwell v. Roach, 44 Wyo. 319, 335, 12 P.2d 376, 381 (1932) (quoting Bryan v. Banks, 98 Ct. App 748, 277 P. 1075, 1078 (Cal. 1929)). *Contra,* State v. Nugget Coal, 144 P.2d 944, 950 (Wyo. 1944), which held that "unity of interest should exist so that no injustice may be done, for the corporate entity will not be disregarded when to do so would promote an injustice and contravene public policy."

and responsibility for corporate debts surfaces in piercing situations. The early courts had the difficult task of balancing between these considerations to determine whether or not to pierce the corporate veil.[2]

The first consideration facing the court was the necessity of limiting liability to promote the corporate style of doing business. Limited liability was and still is a major advantage of doing business as a corporation.[3] Many previously successful investors might not have been willing to invest assets, time and effort in a new venture if that investment involved risking assets not originally involved in the venture.[4] Therefore, in a business oriented society, not surprisingly, the law correctly sanctioned the corporation as a device to provide investors with the incentive of limited liability.[5]

The second consideration facing the courts was the desire to be fair and to provide litigants with equity in their suits against insolvent corporations.[6] Courts often advanced equitable concerns to determine whether or not to pierce the corporate veil. Eventually, the corporate veil-piercing doctrine evolved essentially into an equitable doctrine.[7] Courts sometimes pierced the corporate veil to further a policy concern of the forum.[8] The outcome of the case was then justified by the presence, or absence, of a number of factors.[9] Thus, considering the com-

2. Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases,* 19 U. KAN. L. REV. 185 (1971).

3. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES §§ 73, 96 (2d ed. 1970).

4. Gelb, *Piercing the Corporate Veil—The Undercapitalization Factor,* 59 CHI[-]KENT L. REV. 1 (1982).

5. H. HENN, *supra* note 3, § 146, at 251.

6. Dobbyn, *supra* note 2, at 185.

7. *See e.g., Roach,* 44 Wyo. at 335, 12 P.2d at 381, where the court stated:

> In proper cases, equity will look behind the corporate entity and consider who are the real and substantial parties in interest, whenever it becomes necessary to promote justice, or obviate inequitable results, and the law will follow equity in this respect.

(Quoting Midwest Air v. Finn, 201 Cal 587, 258 P. 382, 386); See also Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy,* 42 U. CHI. L. REV. 589, 620 (1975) (Hereinafter "Landers").

8. H. BALLANTINE, BALLANTINE ON CORPORATIONS, § 136, at 314 (rev. ed. 1946).

9. See Landers, *supra* note 7, at 619-20. Most veil-piercing literature simply describes the various factual patterns that support piercing without any consistent doctrinal basis. This inconsistency has caused confusion in most veil piercing cases. This confusion has apparently been produced by a failure to identify what is at stake in a veil-piercing case—the very principle of limited liability for the shareholders. As a result, the typical veil-piercing case is an exercise in cataloging a number of factors present in a situation in order to reach a normative conclusion that piercing is or is not appropriate. *Id.* See *e.g., National Bond Financial Co. v. General Motors Corp., 238 F. Supp. 248 (W.D. Mo. 1964), aff'd,* 341 F.2d 1022 (8th Cir. 1965). The *National Bond* court listed several factors important in determining whether a subsidiary is an instrumentality:

> "(1) The parent corporation owns all or a majority of the capital stock of the subsidiary.
> (2) The parent and the subsidiary have common directors or officers.
> (3) The parent corporation finances the subsidiary.
> (4) The parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation.
> (5) The subsidiary has grossly inadequate capital.

peting policies, the difficulty of clarifying rules to provide consistency for future decisions and to lend guidance to shareholders and corporations in ordering their conduct became apparent. This balance between providing equity on the one hand and limited liability on the other proved to be difficult in most situations. Consequently, a jurisdiction's veil piercing policy was often confusing and difficult to apply.

The Wyoming Supreme Court has never announced a particular policy that it would follow to pierce the corporate veil. The cases decided by the court, however, seem to follow the general pattern of piercing under two circumstances. First, the court appears to pierce the corporate veil when the corporation has acted fraudulently or unfairly in its dealings with the public. In those situations the court seeks to eliminate any inequitable situation caused by the fraudulent or unfair dealings by holding corporate shareholders personally liable for any damage resulting from the fraud. Second, the court appears to pierce the corporate veil even in the absence of unfairness when the corporation and the shareholders have failed to maintain formal corporate barriers between themselves. In those situations when the court finds that the corporation and the shareholders are so closely intertwined that they are in reality one entity, then the court apparently treats them as one entity for most purposes. Accordingly, the Wyoming Supreme Court has implemented two avenues, or tiers, by which the corporate veil can be pierced.

This comment explores this two tiered piercing approach used by the Wyoming Supreme Court in piercing situations. Each tier of the approach will be introduced and explained with the accompanying suggestion that satisfaction of either level will influence the court to pierce the corporate veil. The comment will explain that under the first tier of the Wyoming veil piercing approach—the individual factor tier—that the court will focus on the relationship between the shareholder and the plaintiff to determine whether the shareholder has dealt fairly with the plaintiff or if equity requires piercing the corporate veil. Under the individual factor tier the court will pierce the corporate veil when a lone factor such as fraud justifies such a result.

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(6) The parent company pays the salaries or expenses or losses of the subsidiary.
(7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
(8) In the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division.
(9) The directors or officers of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation.
(10) The formal legal requirements of the subsidiary as a separate corporation are not observed."

Id. at 256 (quoting Fish v. East, 114 F.2d 117 (10th Cir. 1940). The court also held that the typical veil piercing case was an exercise in cataloging a number of factors in order to reach a normative conclusion that piercing is or is not appropriate. *National Bond,* 238 F. Supp. at 256.

The comment will also explain that under the second tier of the Wyoming piercing approach—the cumulative effects tier—that the court will focus on the relationship between the shareholder and the corporation to determine whether the relationship warrants piercing the corporate veil. When examining this relationship the court will look at the effect of multiple factors to determine whether to pierce. The court's decision will not be influenced by individual factors as is the case under the first tier of its approach, but instead by multiple factors and their cumulative effect. In conclusion, the comment describes the circumstances under which the court will pierce the corporate veil using both tiers of the Wyoming veil piercing approach.

BACKGROUND

To formulate rules for veil-piercing situations early courts looked at two basic relationships. First, the courts looked at the relationship between the plaintiff and the shareholder for evidence of corporate bad faith that would justify a plaintiffs claim.[10] Second, the courts examined the relationship between the corporation and the shareholders to determine whether the relationship between them justified piercing the corporate veil.[11]

In 1905, concerning the first relationship, the United States District Court of Wisconsin formulated a rule for situations where evidence of bad faith existed between the shareholder and the plaintiff. In *United States v. Milwaukee Refrigerator Transit Company*, the court held that "when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."[12] This statement was an effort to clearly establish the type of wrongdoing that would justify piercing the corporate veil. This statement was also a formula that focused on the relationship between the corporate shareholder and the plaintiff.

Unfortunately, "thirty-two years of quoting . . . [the *Milwaukee Refrigerator*] formula added little to its development or usefulness in . . . guiding shareholder and corporate conduct."[13] Thus, in 1937, the discouragement of courts at the failure to cut to the core of the matter was apparent: "[I]t is because of the vague boundaries of this . . . element [the specific wrong done to the plaintiff by the controlling shareholder] that it is well nigh impossible in the present state of the law to enunciate a clear cut rule for piercing situations."[14] Therefore, focus-

10. Dobbyn, *supra* note 2 at 185.
11. *Id.*
12. 142 F. 247, 255 (E.D. Wis. 1905); *see also,* Majestic Co. v. Orpheum Circuit, 21 F.2d 720, 724 (8th Cir. 1927)(where the corporation is used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetuate a fraud the corporation can be disregarded); Advance-Rumely Thresher Co. v. Geyer, 40 N.D. 18, 26, 168 N.W. 731, 733 (1918)(if the corporation is so organized that it can be used to defeat the rights of innocent parties, defeat public convenience, or cut off the right of redress, or of action against it or against other corporations of which it is, in effect, an agent, then the corporation can be disregarded).
13. Dobbyn, *supra* note 2 at 185-86.
14. Hazeltine Corp. v. General Elec. Co., 19 F. Supp. 898, 902 (D. Md. 1937).

ing on the exchange between the shareholder and the plaintiff alone was insufficient to manage all the situations that involved piercing. The inadequacy of this rule which developed around the conduct of the shareholder directly affecting the plaintiff caused the courts to add a second line of rational to their reasoning. This second line of reasoning has caused much of the confusion that continues to exist in the law today.[15]

The second line of reasoning used by the courts examined the relationship between the shareholder and the corporation to determine whether the bonds of unity between them justified piercing the corporate veil. This relationship between the shareholder and the corporation was significant. If the unity between the two became too close then the shareholder could use the corporation as a conduit for his or her own personal affairs, deplete its assets and generally abuse the corporation. This abuse could allow a shareholder to ignore creditors claims and leave the creditors without any avenue of recourse.[16] Therefore, decisions sprang up in virtually every jurisdiction to focus on the relationship between the corporation and the shareholders.[17] For example, in 1921, *Minifie v. Rowley* set the pattern for every case of "veil piercing" in California.[18]

The *Minifie* court held that the corporate veil would be pierced under two conditions:

> First, [when] the corporation [was] not only influenced and governed by that person, but [when] there [was] such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation [had] ceased; second, [when] the factors [were] such that an adherence to the fiction of the separate existence of the corporation would, under the circumstances, sanction a fraud or promote injustice.[19]

This unity of interest between the shareholder and the corporation could appear in different forms. The California rule placed an emphasis on a unity of financial interest and benefit.[20] New York case law focused on two formulas, one parallelling the California rule,[21] and one based on unity in the sense of overwhelming control.[22] Other jurisdictions

15. Dobbyn, *supra* note 2 at 186.
16. For example, consider the situation the Wyoming Supreme Court faced in Miles v. CEC Homes, 753 P.2d 1021 (1988). In that case the court found evidence that the shareholder used the corporation to procure labor and services for himself. The corporation built storage units and an office building for the shareholder without making any profit. The projects were unauthorized by the corporation until four months after construction began. The shareholder maintained that he reimbursed the corporation for wages, materials and expenses for the buildings, but the record did not support such a claim. *Id.* at 1024.
17. Dobbyn, *supra* note 2 at 186.
18. 187 Cal. 481, 483, 202 P. 673, 676 (1921).
19. The *Minifie* decision was expressly adopted by the Wyoming Supreme Court in its decision in *Nugget Coal*, 60 Wyo. 51, 70 144 P.2d 944, 950 (Wyo. 1944).
20. *See,* Rosen v. Losch, Inc., 234 Cal. App.2d 324, 44 Cal. Rptr. 377 (1965).
21. *See,* Mull v. Colt Co., 31 F.R.D. 154, 163 (S.D.N.Y. 1962); Walkovszky v. Carlton, 24 App. Div.2d 582, 262 N.Y.S.2d 334 (1965).
22. Lowendahl v. Baltimore & O.R. Co., 247 App. Div. 144, 287 N.Y.S. 62 (1936) (control, not mere majority or complete stock control, but complete domination, not only

followed the Massachusetts approach by emphasizing formal appearances such as failure to observe corporate formalities.[23]

These theories based on excessive shareholder control were commonly called instrumentality rules—with a full compliment of labels from "alter ego," to "dummy," "puppet," and "shell."[24] Whatever the label, however, the major concern surrounding these theories was the relationship between the shareholder and the corporation. Ultimately, most jurisdictions combined the equitable element discussed in *Milwaukee Refrigerator*, and the instrumentality element discussed in *Minifie*, to formulate a two-part approach to piercing the corporate veil: "(1) injustice or inequity in the relationship between the plaintiff and the shareholder . . . ; and (2) an 'instrumentality' . . . relationship between the shareholder and the corporation."[25] These elements were considered exclusive, with fruition of either element being sufficient to pierce the corporate veil. Therefore, a jurisdiction utilizing both elements of the approach had a greater range of alternatives available to it for piercing situations.

In Wyoming, the groundwork for piercing the corporate veil established in *Caldwell v. Roach*[26] and *State v. Nugget Coal Company*,[27] incorporated this two part approach. In those cases the supreme court discussed the piercing elements found in the California and Wisconsin decisions. Concerning the equitable element examined in *Milwaukee Refrigerator*, the court in *Roach* held that the notion of disregarding a corporation whenever the recognition thereof in a particular case would lead to injustice was so well established that legal authority on the proposition was hardly necessary.[28] The court also held that equity would look behind the corporate entity to consider who were the real parties in interest whenever it became necessary to promote justice, or to obviate an inequitable result.[29] In *Nugget Coal*, the court held that it would disregard the corporate entity whenever the entity was intentionally used to defeat public convenience, protect fraud, defend a crime or justify wrong.[30] The *Nugget Coal* court emphasized that

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of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind).

23. My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 233 N.E.2d 748 (1968).

24. *See* POWELL, PARENT AND SUBSIDIARY CORPORATIONS §§ 3, 12 (1931); see also DeWitt v. Flemming, 540 F.2d 681 (4th Cir. 1976) (in applying the "instrumentality" or "alter ego" doctrine, the court focused on reality and not form when piercing the corporate veil); McDonough v. West Fork Tow, 298 F. Supp. 1098 (N.D.W.Va. 1969) (when multiple factors support disregard of the corporate entity, courts apply the "instrumentality" or "alter ego" doctrines to hold individual stockholders liable for corporate debts); Kirvo v. National Distillery Co., 483 F.2d 1098 (5th Cir. 1973) (courts should abjure "the mere incantation of the term "instrumentality" and instead spell out the specific factual basis for its conclusion).

25. Dobbyn, *supra* note 2 at 187.

26. 44 Wyo. 319, 12 P.2d 376 (1932).

27. 60 Wyo. 51, 144 P.2d 944 (1944).

28. *Roach,* 44 Wyo. at 334, 12 P. at 381.

29. *Id.*

30. *Nugget Coal,* 60 Wyo. at 67, 144 P.2d at 949.

"without exception, the corporate veil will be torn away whenever the occasion makes it necessary to prevent a fraud or wrong."[31]

Regarding the instrumentality aspect found in the *Minifie* decision, the *Roach* court held that "where a corporation is so organized and controlled. . .as to make it a mere instrumentality or agent or adjunct of another corporation, its separate existence as a distinct corporate entity will be ignored, and the two [entities] will be regarded in legal contemplation as one unit."[32] The *Nugget Coal* court held similarly, but more clearly established the instrumentality aspect of the piercing approach by holding:

> [i]t is now so well established that it has become almost aphoristic that, upon a proper showing that a corporation is but an instrumentality through which its owner . . . transact[s] . . . business [that] both equity and law will look through the form to its substance and will hold such [owner responsible for the corporation's debts].[33]

Finally, in dicta, the *Nugget Coal* court acknowledged that it was difficult to determine the exact circumstances under which an instrumentality would be found.[34] Thus, the *Nugget Coal* decision stopped short of clearly explaining the circumstances that would characterize an instrumentality.[35] The court's decision did, however, make it clear that under no circumstance was a corporation to be recognized if that recognition would promote injustice.[36]

Therefore, in the absence of injustice, the question still remained concerning the circumstances under which the court would find an instrumentality to justify piercing the corporate veil. Admittedly, no universal approach or test existed anywhere in the United States to determine whether to pierce the corporate veil[37] and one legal commentator even suggested that the formulation of a universal piercing test

31. *Id.*

32. *Roach,* 44 Wyo. at 334, 12 P.2d at 381.

33. *Nugget Coal,* 60 Wyo. at 69, 144 P.2d at 949-50.

34. *Id.* at 950.

35. *See DeWitt,* 540 F.2d at 681 (in applying the "instrumentality" or "alter ego" doctrine, the court focused on reality and not form when piercing the corporate veil); *see also* McDonough v. West Fork Tow, 298 F. Supp. 1098 (N.D.W.Va. 1969) (when multiple factors support disregard of the corporate entity, the courts apply the "instrumentality" or "alter ego" doctrines to hold individual stockholders liable for corporate debts); *Kirvo,* 483 F.2d at 1098 (courts should abjure "the mere incantation of the term "instrumentality" and instead spell out the specific factual basis for its conclusion).

36. *Nugget,* 60 Wyo. at 75, 144 P.2d at 952. The court held that the conditions under which the corporate entity may be disregarded necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable doctrine particularly within the province of the trial court. *Id.*

37. *See* Bucyrus-Erie Co. v. General Products Corp., 643 F.2d 413, 418 (6th Cir. 1977) ("No precise test for disregarding the corporate fiction has been articulated by the courts, each case being regarded as 'sui generis' and decidable on its own facts."); *see also* United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977) (whether the corporate veil should be pierced depends upon the innumerable individual equities of each case).

was impossible.[38] Accordingly, the legal community saw the emergence of several veil-piercing approaches.[39]

In resolving its position on these issues the Wyoming Supreme Court has consistently relied upon two lines of thought in veil piercing situations.[40] Suitably, the court has pierced the corporate veil under an approach consisting of two tiers. The first tier under the Wyoming approach, coined the individual factor approach, examines the relationship between the shareholder and the plaintiff to determine whether to pierce the corporate veil. Under this approach, when the court finds that recognizing the corporate entity is inequitable or that the relationship between the corporation and the plaintiff was fraudulent, then the court will pierce the corporate veil.[41] Ultimately, if this first tier is not satisfied then the court can look to the second tier of its approach to pierce the corporate veil.

Under the second tier of the Wyoming piercing approach, coined the cumulative effects approach, the court will examine the bonds of unity between the shareholder and the corporation to determine whether to pierce the corporate veil. Under this tier when the court finds that the shareholder and the corporation act like one entity, then the court will treat the entities as such and pierce the corporate veil and hold the shareholders of the corporation responsible for the corporation's debts.[42] In the past when the court has heard a case and the

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38. Ballantine, *Separate Entity of Parent and Subsidiary Corporations,* 14 CALIF. L. REV. 12, 18 (1925).

39. Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry,* 55 DEN U. L. J. 1, 7 (1978) (Hereinafter "Krendl"). The Krendl article suggests that certain ultimate issues concern courts in applying the applicable veil-piercing test. Those ultimate issues fall into three general categories. The first category contains the preconditions which a plaintiff must meet before he can make a veil-piercing case. Such factors are dominance of . . . a subservient corporation by . . . the dominant party; a beneficial interest by the dominant party in the subservient corporation; and injury to the plaintiff reasonably related to the defendant's dominance of the subservient corporation. *Id.* at 23. The second category requires the showing of an improper purpose, and the final issue to be resolved involves the balancing of policy considerations. *Id.* at 23-24.

40. The basis for both lines of thought can be traced to *Roach* and *Nugget Coal.* These decisions discussed both the individual factor and the cumulative effects tests. In *Roach,* the court clearly explained that injustice was a basis for piercing the corporate veil. *Roach,* 12 P. at 381. In *Nugget Coal,* the court explained that the corporation and the shareholders must maintain a seperate existence or else the corporate veil will be pierced. *Nugget Coal,* 60 Wyo. at 69, 144 P.2d at 949-50.

41. *See* Bergh v. Mills, 763 P.2d 214 (Wyo. 1988) (when a showing of actual fraud is made, that ground alone may be sufficient to pierce the corporate veil); Minton v. Cavaney, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961) (the court was influenced by the lack of corporate formalities, but a fair reading of the case supports the view that undercapitalization by itself was the decisive factor).

42. *See* AMFAC Mechanical Supply Co. v. Federer, 645 P.2d 73, 79 (Wyo. 1983) (to be accorded treatment as a separate entity, the corporation must exist and function as such and not be the alter ego of the person owning and controlling it and cannot be used or ignored just to fit the convenience of the individual); Miles v. CEC Homes, Inc., 753 P.2d 1021 (Wyo. 1988) (based on the lack of individuality or separateness between the shareholder and the corporation, the corporate veil should be pierced); *see also* Arnold v. Browne, 27 Cal. App. 3d 386, 103 Cal Rptr. 775 (1972); Harris v. Curtis, 8 Cal. App. 3d 837, 87 Cal. Rptr. 614 (1970).

facts have satisfied neither the first tier nor the second tier approach, then the court has not pierced the corporate veil.[43]

The Individual Factor Approach

Under the first tier of the Wyoming piercing approach–the individual factor tier–the court focuses on the relationship between the plaintiff and the shareholder to determine whether the relationship was equitable.[44] Under the individual factor approach the main concern of the court is the presence of fraud and the absence of fairness.[45] When a transaction between a corporation and an individual is perpetrated by fraud, then under the Wyoming approach, the court will pierce the corporate veil.[46]

Further, when a transaction is laced with fraud and the court recognizes that maintaining the corporation will be unfair then the court will pierce the corporate veil.[47] Also, under certain circumstances, some courts will pierce the corporate veil when a single instrumentality factor–such as failure to adequately capitalize the corporation–is present. For example, the case of *Minton v. Cavaney*, while not controlling in Wyoming, is a widely recognized articulation of the individual factor approach.[48]

In *Minton*, the plaintiff, whose daughter drowned in a swimming pool, recovered a wrongful death judgment against the corporation that operated the pool.[49] The judgment being unsatisfied, the plaintiff sued the organizer of the corporation and obtained a favorable judgment.[50] On appeal, the defendant contended that the evidence did not support a determination of personal liability. Stating that "[t]he equitable owners of a corporation . . . are personally liable . . . when they provide inadequate capitalization," the California court concluded that the evidence supported findings of such inadequacy and participation and therefore supported the decision to pierce the corporate veil.[51] Thus, the *Minton* view allowed piercing the corporate veil when an individual factor, such as undercapitalization, was present.[52]

43. In *Nugget Coal*, the court clearly established that the corporate veil would not be pierced when to do so would itself promote an injustice. Apparently when viewing the Wyoming piercing approach, the balance between injustice to a plaintiff and injustice to the corporate shareholders must be delicately balanced. *Nugget Coal*, 60 Wyo. at 69, 144 P.2d at 950.

44. For example, in *Bergh*, the court pierced the corporate veil after finding that the relationship between Leslie Bergh–the original shareholder–was laced with fraud regarding the original capitalization of the corporation. The court did not base its decision on any other rationale. *Bergh*, 763 P.2d at 218.

45. *Id.* at 218.

46. *Id.*

47. Whenever it becomes necessary to promote justice or obviate fraud, then the court will pierce the corporate veil. *Roach*, 44 Wyo. at 334, 12 P.2d at 381.

48. 56 Cal.2d 576, 364 P.2d 473, 15 Cal.Rptr. 641 (1961).

49. *Id.* 364 P.2d at 474.

50. *Id.*

51. *Id.* at 475.

52. *See* Gelb, *supra* note 4 at 5, n. 24.

In 1988, in *Bergh v. Mills*, the Wyoming Supreme Court used the individual factor approach to pierce the corporate veil.[53] The facts in *Bergh* were largely undisputed. In 1981, Leslie Bergh and his oil field service corporation were very successful. As such, Mr. Bergh and two of his employees decided to build a saloon and dance hall to be called Billy's Country Music Emporium (Billy's). They formed a corporation to carry out their plan, Billy's, Inc., which was capitalized through sales of stock to Bergh and his two employees.[54] At approximately the same time that Mr. Bergh formed Billy's, Inc., he also formed Khybur investments with his two brothers. The sole purpose for this partnership was to acquire the land for Billy's and to accomplish the construction of Billy's.[55]

Before Billy's was complete, it became apparent that additional funds would be needed to complete the project. To obtain additional funds, Mr. Bergh contacted John Mills, his longtime friend, who was also a partner in the Dunmar Inn—the largest motel in Evanston, Wyoming—to convince him to join the venture. To convince Mills to join the venture, Bergh presented a prospectus which projected a net profit of nearly one-million dollars in the first year of operations. Also, Bergh alluded to his business acumen and inside knowledge of the Evanston oil patch and assured Mills that he would not let him get hurt on the deal. Significantly, however, Mr. Bergh fraudulently failed to tell Mr. Mills that the project was already over budget, that the other investors had purchased their stock at half the price they were now offering, that the stock was purchased with promissory notes,[56] and that the corporation was already insolvent.[57]

Shortly after Billy's opened, Mr. Mills became aware of the poor financial position of the corporation.[58] Therefore, in order to protect

53. 763 P.2d 214 (Wyo. 1988).
54. *Id.* at 215.
55. *Id.*
56. Such a practice, at the time of the case, was strictly prohibited by Wyoming Statutes § 17-1-116(b) (1977), where the legislature allowed neither promissory notes nor future services to constitute payment or part payment for shares of a corporation. In contrast, the recently enacted Wyoming Business Corporation Act, which will replace Wyoming Statute § 17-1-116 with § 17-16-621(b), allows the board of directors of a corporation to authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.
57. *Bergh*, 763 P.2d at 215-16.
58. Appellee's Brief at 23, Bergh v. Mills, 763 P.2d 214, 218 (Wyo. 1988)(No. 87-188): The *Mills* brief records that the corporation had not been capitalized and was in immediate need of further capital and equipment if it was to open, the true beneficiaries of the Mills' investment were the three Bergh brothers, and [the partnership], since they really owned and controlled all of what should have been the assets of the corporation and were at maximum personal risk if the corporation did not open its doors. *Id.* Appellants brief at 7, (the Bergh brief records that "After the Mills invested in [the corporation] they became active participants in the corporate affairs, attending nearly all of the stockholders meetings. The Mills became immediately aware of the financial statues of [the corporation] and nothing about its status was hidden from them. With this information known to the Mills, they agreed, . . .to house [the corporation] entertainers at

his investment, he persuaded the Dunmar Inn to lodge Billy's entertainers on open account. Approximately two years later, Billy's closed and the outstanding balance at the Dunmar Inn was $58,876.74. The Dunmar Inn then sued Bergh and Khybur investments to recover the outstanding balance owed on the account.[59]

The trial court entered judgment in favor of the Dunmar Inn to recover the amount of the unpaid bill against Leslie Bergh, his brothers and Khybur Investments. The trial court found that "fraud rendered [the] entire deal void from the beginning."[60] On appeal, the supreme court reversed. The court held that Mr. Mills was the only defrauded party and that he was not acting as an agent of the Dunmar Inn at the time. Thus, when Mills convinced the Dunmar Inn to lodge Billy's entertainers, he was already aware of the true financial position of the corporation. Therefore, the fraud had already been committed when the Dunmar Inn had become involved. As such, fraud was not available as a means of recovery to the Dunmar Inn at that time according to the supreme court.[61]

In the alternative, the Dunmar Inn chose to pursue a contract claim to recover the outstanding account. The court held that while this theory could clearly succeed against Billy's, which was already insolvent, to succeed against the shareholders of that corporation, the corporate veil would have to be pierced. Accordingly, the court held that the evidence in the case justified piercing the corporate veil.[62]

The court held that if a showing of fraud was made, then that ground alone might be sufficient to pierce the corporate veil under the first tier of its veil piercing approach.[63] The *Bergh* court held that the initial fraudulent capitalization of Billy's was sufficient to set off a chain reaction of events that justified piercing the corporate veil.[64] Therefore, the court held that even though the Dunmar Inn was not directly defrauded, it would not have entered the agreement with Billy's without the initial fraudulent capitalization.[65]

In *Bergh*, the court utilized the individual factor analysis for piercing the corporate veil by examining the relationship between the sole shareholder, Bergh, and the defrauded party, Mills. Its examination revealed that fraud was the moving force behind the entire transaction that influenced the Dunmar Inn to open an account for Billy's. The court held that although the Dunmar Inn itself was not defrauded,

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the Dunmar Inn, on an open account, and continued to do so for several years, running up an unpaid open account bill in the amount of $58,856.74. Additionally, as early as April, 1982, [the corporation] was in default upon the promissory note owing to the Mills."

59. *Bergh,* 765 P.2d at 217.
60. *Id.*
61. *Id.*
62. *Id.* at 217-18.
63. *Id.* at 218.
64. *Id.* at 216-17.
65. *Id.* at 218.

that it would be inequitable to allow Billy's shareholders to escape liability on the open account. Therefore, the *Bergh* decision maintained the longstanding view in Wyoming, established in *Roach*, that the corporate veil will be pierced if necessary to prevent an inequitable result.[66] Thus, under the first tier of the veil piercing approach, an individual factor can account for the court's decision to pierce the corporate veil. However, in contrast, if a plaintiff is unable to satisfy the individual factor approach then the plaintiff can attempt to prove the second approach in an attempt to pierce the corporate veil.

The Cumulative Effects Approach

Under the second tier of the Wyoming piercing approach—the cumulative effects tier—the court focuses on the relationship between the shareholder and the corporation to determine whether to pierce the corporate veil. If the court determines that the relationship between the shareholder and the corporation is too closely linked and that an instrumentality exists between them, then the court will pierce the corporate veil. Typically to prove that an instrumentality exists the plaintiff must substantiate the relationship with multiple facts.[67] Thus, one indiscretion between the shareholder and the corporation would not be enough to prove that the corporation was the instrumentality of the shareholder.[68] The analysis that follows will demonstrate that only an examination of multiple factors and their cumulative effect will conclusively determine whether a corporation is the instrumentality of a shareholder. Thus, contrary to the individual factor approach where a single factor may cause the court to pierce the corporate veil, under the second tier the court will pierce the corporate veil only after

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66. *See supra* note 28 and accompanying text.

67. The Wyoming Legislature adopted the Closed Corporation Act sections to take effect on January 1, 1990. The act creates Wyoming Statutes sections 17-17-101 through 17-17-151 and amends Wyoming Statute section 17-3-101 relating to practice of professions by corporation. This statute adopts the Model Close Corporations Supplement.

This act effectively eliminates several of the grounds previously used to pierce the corporate veil. The Wyoming Supreme Court appears to be loosening the grounds for piercing, while the Wyoming legislature, by enacting this statute, appears to recognize that in close corporations owners are given greater leeway than that afforded by the Wyoming Supreme Court.

68. The type of corporation has a bearing on the types of formalities required. For example, under the Wyoming Close Corporation Supplement, *supra* note 67, the professional close corporations is treated differently than non-professional close corporations. The supplement reduces the standard formalities by which a professional corporation must adhere. For example, under § 17-17-121, the shareholders can agree in writing to eliminate the board of directors. Under § 17-17-122, the corporation can eliminate the need to adopt bylaws for the corporation. Under § 17-17-123, the corporation can eliminate the need to have an annual meeting. Finally, under § 17-17-125, 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 is not a ground for imposing personal liability on the shareholders for the liabilities of the corporation.

All other corporations, however, are apparently required to maintain the formalities mentioned above.

the effect of multiple factors establishes that an instrumentality exists between the shareholders and the corporation.[69]

Under the second tier of the piercing approach, the supreme court will examine each of the bonds of unity between the shareholder and the corporation to determine whether an instrumentality exists between the two entities. To make such a determination, the court has developed a list of factors that, if present, indicate a oneness between the shareholder and the corporation to justify that an instrumentality between the two be found.[70]

In *AMFAC Mechanical Supply Company v. Federer*, the Wyoming Supreme Court examined several such factors that existed between the shareholder and the corporation and found that cumulatively those factors justified piercing the corporate veil.[71] In *AMFAC*, the AMFAC Mechanical Supply Company (AMFAC) sued to collect an unpaid account. AMFAC sued the insolvent C & B corporation (C & B) and the shareholders of that corporation to reach the personal assets of the owners to satisfy its claim. AMFAC alleged that C & B was a sham and that the owners organized the corporation as their "alter ego"[72] to escape contractual responsibilities.[73] The trial court found otherwise and did not pierce C & B or hold its shareholders liable. On appeal, the Wyoming Supreme Court reversed the trial decision and effectively pierced the C & B corporation.[74] The court found that C & B had incorporated solely to judgment-proof its shareholders, as AMFAC had alleged, and that while incorporation could be used to avoid personal liability, it could not be used to intentionally render judgment-proof a company.[75]

The *AMFAC* court held that the facts of the case created an instrumentality that justified piercing the corporate veil,[76] and it listed the factors that it considered important to its decision. First, the court found that the stockholders commingled their property with the corporations' property by mixing contract proceeds, checks, deposits, and

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69. *See Atlas*, 746 P.2d at 356 (where the court had before it a showing of unity of ownership and interlocking directorates, but held that additional factors needed to be examined before piercing the corporate veil).

70. *See infra* note 90 and accompanying text.

71. 645 P.2d at 77-78. For a discussion of the factors *see infra* note 90 and accompanying discussion.

72. *Id.* at 75. When the court uses the label "alter ego" it is recognizing that the corporation has failed to maintain formal barriers between itself and its shareholders. *Cumberland Farms*, 233 N.E.2d at 752. *See* POWELL, PARENT AND SUBSIDIARY CORPORATIONS §§ 3, 21 (1931); *see also* Dobbyn, *supra* note 1, at 186-87.

73. *AMFAC*, 645 P.2d at 75.

74. *Id.* at 77.

75. *Id.* at 81. The *AMFAC* court held that even though the only purpose of incorporation is to insulate owners from personal liability for debts of the business, that alone will not warrant piercing the corporate veil. However, the court held that when that intent is coupled with the incorporation of a judgement-proof company, the courts will not hesitate to disregard the rule of limited liability to prevent injustice to third parties. *Id.*

76. *Id.* at 81.

bank account balances between themselves and the corporation.[77] Second, the court found that the corporation was inadequately capitalized by risking too few assets in the business operations.[78] Third, the court found that the corporation ignored corporate formalities such as record keeping and taking minutes.[79] Finally, the court found that the shareholders had continued the same business after the corporation was defunct in an attempt to prevent creditors from reaching outstanding contract proceeds.[80] Thus, the court held that considering the lack of separateness between the shareholders and the corporation, as evidenced by the above factors, that the corporation was the instrumentality of the shareholders.[81] The *AMFAC* court examined the piercing factors in the case as a group, and not individually as would be the case under the individual factor approach. Suitably, the court held that the factors cumulatively added up to an instrumentality and so the court pierced the corporate veil.[82]

In addition to the above holding, the *AMFAC* court also discussed the ramifications of a finding of fraud in piercing situations. The court held that fraud was one of the factors that it would consider in veil-piercing situations, but that fraud alone was inadequate to justify piercing the corporate veil absent some evidence of inequity toward the plaintiff.[83] The court also rejected the trial court's holding that fraud was a prerequisite to piercing the corporate veil.[84] Thus, the *AMFAC* court reiterated that, under the second tier of the piercing approach, an examination of multiple factors was necessary for the court to make its decision.[85] The court did, however, affirmatively answer the question of whether a single wrong could justify piercing the corporate veil under the first tier of the piercing approach.[86]

Piercing the corporate veil requires a case by case analysis based on the facts of each case.[87] The *AMFAC* court used the cumulative effects

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77. *Id.*

78. *Id.* at 79. As a general rule in piercing cases, where capitalization is relevant it would be more useful and realistic for courts to try to determine not merely if there is undercapitalization but rather whether the corporation has been provided with an "inadequate level of assets" to meet the type of claim involved in light of the business in which it is engaged, its financial needs, and risks of loss. *See* Gelb, *supra* note 4, at 21.

79. *AMFAC,* 645 P.2d at 82.

80. *Id.* at 79.

81. *Id.* at 78-82.

82. *Id.*

83. *Id.* at 79.

84. *Id.*

85. *Id.* at 78-82.

86. *Id.* at 79. The court did not discuss the ramifications of its decision on the *Roach* case or the *Nugget* case. Apparently, the court looks at the circumstances of each case to determine whether the fraud involved justified piercing the corporate veil. In *AMFAC,* the court elected to pierce the corporation based on a number of factors that established an instrumentality rather than on the fact that fraud was involved. The exact standard of when fraud is sufficient to pierce has yet to be defined.

87. The court said: "This court has never so held but has pointed out in . . . that, in an appropriate case and in furtherance of public policy or the ends of justice, the doctrine of limited liability will be disregarded. . . ." *Id.* at 77.

approach, but also held that justice may require piercing the corporation when a single factor is present.[88] Six years after the *AMFAC* decision, the supreme court revisited the cumulative effects approach to piercing the corporate veil in *Miles v. CEC Homes*.[89] In *CEC Homes*, the court specified certain factors that it considered important in veil-piercing cases.[90] To determine these factors the court reviewed a California case, *Arnold v. Browne*, to compile a list of important piercing factors.[91]

In *CEC Homes*, the Meadowbrook corporation (Meadowbrook) and the CEC Homes (CEC Homes) corporation entered into an agreement to share the cost of developing a street to run through the middle of their property. When Meadowbrook defaulted on its share of the cost CEC Homes sued Meadowbrook, which was then insolvent, for its share of the development cost.[92] The evidence in the case was such that the court pierced Meadowbrook and held its owner, Miles, personally lia-

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88. *Id.*
89. 753 P.2d 1021 (Wyo. 1988).
90. The *CEC Homes* court specified the following factors to be important in piercing situations:

> "Among the possible factors pertinent to the trial court's determination are: commingling 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 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 the another; the contracting with another with the intent to avoid performance by use of a corporation as a subterfuge of illegal transaction; and the formation and use of a corporation to transfer to it the existing liability of another person or entity."

CEC Homes, 753 P.2d at 1023-24 (quoting *AMFAC,* 645 P.2d at 77 (quoting Arnold v. Browne, 27 Cal. App. 3d 386, 103 Cal.Rptr. 775 at 781-82 (1972))); *see also* Yost v. Harpel Oil Co., 674 P.2d 712, 717 (Wyo. 1983).
91. 27 Cal. App. 3d 386, 103 Cal Rptr. 775 (1972). The Browne court retreated from the position that undercapitalization alone was a sufficient basis to pierce the corporate veil. The *Browne* decision suggests that multiple factors are necessary before piercing the corporate veil. *Id.*
92. *CEC Homes,* 753 P.2d at 1022.

ble for the debt. In doing so, the court listed several factors from the *Arnold* decision that it considered important to its decision.[93] These factors were the same factors the court found important in the *AMFAC* decision.

The *CEC Homes* court found that a number of *AMFAC* factors were present in the Meadowbrook Corporation.[94] For example, Meadowbrook failed to maintain adequate corporate records,[95] it commingled funds and assets and diverted corporate funds for non-corporation uses.[96] Ultimately, the court held that a lack of individuality between Miles and Meadowbrook created an instrumentality between the two that justified piercing the corporate veil.[97] Additionally, the court held that limiting Miles' liability to the amount of his investment in the corporation would promote injustice and so it pierced Meadowbrook and held Miles personally responsible for its debts.[98]

The results in *CEC Homes* and *AMFAC* illustrate that when mere evidence of fraud or unfairness alone will not justify piercing the corporate veil that the corporation can still be pierced with evidence of an instrumentality. In those cases the court examined the cumulative effect of multiple factors to determine whether or not to pierce the corporate veil. Then on the basis of those factors, the court decided whether or not an instrumentality had been created. The question still remained, however, about the precise combination of factors sufficient to satisfy the court's cumulative effects approach.

Such a question was raised in the *Atlas Construction Company v. Slater* decision.[99] In that case a home owner sued the Atlas Company, its wholly owned subsidiary the Atlas Construction Company—the company that built his home—and the individual shareholder of the two companies, for breach of an implied warranty of habitability. A jury found the Atlas Construction Company (Atlas) liable for the diminution in value of his house, the cost of demolition, and the rental expenditures incurred by the plaintiff when he found it necessary to rent another home. Additionally, the trial court granted summary judgment in favor of the plaintiff on the issue of piercing the corporate veil. Thus, the trial court found Atlas, the Atlas Company and Francis Ferguson, the sole shareholder, jointly and severally liable for the judgment entered upon the jury's verdict.[100]

On appeal, the supreme court reversed, and held that the issue of piercing the corporate veil should not have been decided on summary

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93. *Id.* at 1023-24.
94. *Id.*
95. *Id.*
96. *Id.*
97. The *CEC Homes* court cited evidence that Miles gave away a corporate dump truck in exchange for snow plowing services at his personal residence. The court held that this fact, among others, indicated an absence of individuality that justified piercing the corporate veil. *Id.* at 1024-25.
98. *Id.*
99. 746 P.2d 352 (Wyo. 1987).
100. *Id.* at 353.

judgment.[101] The court did recognize, however, that the trial court had based its decision on sound principles and that the apparent instrumentality that existed between the corporation and the shareholder needed further review.[102] The supreme court found that while the trial court's finding of interlocking directors and unity of ownership were relevant in piercing situations, that by themselves those factors were not sufficient to pierce the corporate veil and that additional factors needed to be considered.[103] Therefore, the court examined three additional allegations which, if true, would weigh in favor of piercing: (1) the members of the "Atlas group" failed to maintain an arms length relationship in intercorporate transactions; (2) the Atlas Construction Company was undercapitalized; and (3) the assets of the Atlas Construction Company were depleted and sold to form an identical corporation under another name to continue business but to evade the existing obligations of the Atlas Construction Company.[104]

Concerning those allegations, the court held that genuine issues of fact still existed at the time of trial and consequently, the court remanded the case back to the trial court to decide the issue of piercing the corporate veil.[105] Under *AMFAC* and *CEC Homes*, the court may have pierced Atlas because of the multiple factors in the case. Unfortunately, the question of whether those factors along with the interlocking directorates and the unity of interest would have been sufficient to pierce the corporate veil was never answered. The case was settled before the case reached the trial court.

The real significance of *Atlas* is that while the court had the opportunity to affirm the trial court and effectively pierce the corporate veil because of interlocking directorates and the unity of interest between the members of the "Atlas group," it elected to examine additional factors before making a decision. Thus, the court maintained its longstanding precedent that finding an instrumentality requires an examination and proof of the cumulative effect of multiple factors.

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101. *Id.* at 355. The *Atlas* court stated that " 'piercing the corporate veil ordinarily should not be disposed of by summary judgement, in view of the complex economic questions often involved, especially if fraud is alleged, but summary judgement may be granted in a proper case where no genuine issue of material fact is raised or shown.' " *Atlas,* 746 P.2d at 355 (quoting 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.95, p. 462 (C. Sweringen ed. 1983)).

102. *Atlas,* 746 P.2d at 355. The court explained its decision by holding that a corporation is recognized as a separate entity, even though all of its stock is owned by a single individual. Additionally, the court stated that "[a] parent corporation 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.' " *Id.* at 355-56 (quoting H. HENN AND J. ALEXANDER, LAWS OF CORPORATIONS § 148 (1983)). It is for this reason the *Atlas* court held that interlocking directorates and unity of interest was insufficient to pierce the corporate veil without considering additional factors. *Atlas,* 746 P.2d at 356.

103. *Atlas,* 746 P.2d at 356.

104. *Id.* at 356-58.

105. *Id.* at 359.

This cumulative effects approach to piercing the corporate veil has the advantage of promoting fairer results. This approach forces the court to develop a causal connection between the plaintiff's injury and the shareholders' improper conduct. For example, if an individual factor could establish an instrumentality, then the court could pierce the corporate veil for a reason unrelated to the plaintiff's claim. A court could pierce the corporate veil for something as remote as failure to keep minutes at a board meeting even if such a failure had nothing to do with the plaintiff's injury.[106] The cumulative effects approach requires the court to focus on the substance of the plaintiff's claim rather than one peculiarity in the defendant's corporation. By focusing on substance rather than form, the court can develop a consistency to the application of Wyoming's veil-piercing theory.

In spite of the preceding cumulative effects cases, however, the Wyoming court still recognizes the individual factor analysis as an alternative in piercing situations. The court will always pierce the corporate veil if the interests of justice so require.

ANALYSIS

To disregard the separate entity doctrine—or in other words to pierce the corporate veil in Wyoming—the unique facts of each case must first be examined by the trial court.[107] The decision of whether to pierce the corporate veil is within the sole discretion of the trial judge.[108] To aid the trial judge in making a determination of whether or not to pierce the corporate veil, the Wyoming Supreme Court has utilize a two-tiered, veil-piercing approach. Such an approach has never been expressly adopted by the court, but the court's decisions consistently follow such a pattern. As established in two supreme court decisions, *Roach* and *Nugget Coal*, the approach examines two important relationships.

The first relationship under the scrutiny of the court is the relationship resulting from the transaction between the injured party and the shareholder of the corporation. If the court finds that injustice or inequity existed between the two parties at the time of the transaction, then the court will probably pierce the corporate veil if necessary to aid in the plaintiff's recovery. The second relationship under the scrutiny of the court is the relationship between the shareholder and the corporation. If the court finds that the shareholder used the corporation as an instrumentality, to avoid creditors claims, then the court will pierce the corporate veil to aid in the plaintiff's recovery.

Satisfaction of both tiers of the two-tiered approach is not a prerequisite to obtaining a judgment favorable to a plaintiff. Satisfaction of either tier of the approach will sanction the court's decision to pierce

106. See *supra* note 90 and accompanying text for a discussion of corporate formalities.
107. Opal Mercantile v. Tamblyn, 616 P.2d 776, 778 (Wyo. 1980).
108. *Roach,* 44 Wyo. at 344, 12 P. at 381.

the corporate veil. Each tier of the approach, however, requires that the plaintiff satisfy a different burden of proof. Under the first tier, the court may pierce the corporate veil when evidence of a single wrong such as fraud is proven, if to hold otherwise would be inequitable. This burden is substantially lower for the plaintiff having only to prove fraud or unfairness, than the burden for the plaintiff having to prove multiple wrongs under the second tier of the piercing approach. Therefore, when determining trial strategy for piercing the corporate veil, any evidence of fraud or inequity, would suggest that satisfying the individual factor approach would pursuade the court to pierce the corporate veil. Alternatively, if the evidence reveals very little unfairness, then the approach likely to gain the attention of the court is the cumulative effects approach. The prudent strategy would be to examine both tiers of the approach. The position of this analysis is that both the individual factor approach and the cumulative effects approach have a useful place in Wyoming decisional law.

The Individual Factor Analysis

Under the individual factor approach, a plaintiff can recover against a shareholder if to hold otherwise would be inequitable. This fact was clearly established in *Roach* when the court held that:

> The notion of disregarding a corporation whenever the recognition thereof in a particular case will lead to injustice is so well established that legal authority on the proposition is hardly necessary.[109]

In *Nugget Coal*, the court opened up the individual factor analysis further when it held that a legal entity will be disregarded *any* time that entity is used to defeat public convenience, justify wrong, protect fraud or defend a crime.[110] Such a declaration clarified the plaintiff's burden of proof under the individual factor approach—the first tier of the two part piercing analysis.

In *Bergh*, the court pierced the corporate veil after the plaintiff established that fraud was the single moving factor behind the transaction between Billy's and the Dunmar Inn.[111] The court relied on the position that the initial fraud between Mr. Bergh and Mr. Mills adequately justified piercing the corporate veil.[112] In so holding, the court clearly utilized the individual factor approach to impute liability to the corporate shareholder.

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109. *Id.*
110. 60 Wyo. at 69, 144 P.2d at 949 (1944).
111. 763 P.2d at 218.
112. *Id.* The actual fraud in representing the corporations viability was demonstrated by the fact that the corporation had no assets, was grossly undercapitalized and needed further capital and equipment if it was to open. The true beneficiary of the Mill's investment was Leslie Bergh for he was the one that owned and controlled all of what should have been the assets of the corporation and was at maximum personal risk if it did not open its doors. *See generally* Bergh v. Mills, 763 P.2d 214 (1988).

The significance of the *Bergh* decision is that when the plaintiff met this first burden of proving fraud, that the court's inquiry stopped without an examination the second tier of the piercing approach. Thus, the plaintiff's burden was substantially lessened by proving that the shareholder acted inequitably when dealing with the plaintiff. This concept can further be illustrated by the *Bergh* decision. For example, in *Bergh*, the corporation was structured with inadequate assets[113] and the corporation was committed to make extensive lease payments for all its needed resources.[114] The lease payments went to the original shareholders and enabled them to manipulate the assets, liabilities and income of the corporation. Additionally, these facts demonstrated a diversion of corporate assets by the shareholders to themselves.[115] These facts illustrated how the shareholders manipulated the corporate assets and liabilities. By concentrating all the assets in entities separate from the corporation, while shifting all the liabilities to the corporation, concealment and misrepresentation of the true financial interests at stake were accomplished.

In spite of these multiple instrumentality factors, the court chose to stop short of examining the second tier of the veil piercing approach, and chose instead to pierce the corporate veil for an individual factor, namely fraud.[116] Ultimately, the court pierced the corporate veil because it had before it a situation suggesting that adherence to the corporate form would be unfair to the plaintiff. Primarily, the court found that Bergh induced Mills to pay more than double the price for his stock and extend credit as a condition for its purchase. No other shareholder had these terms placed upon their involvement in the corporation and no other stockholder had to salvage their investment in the corporation—e.g., persuading the Dunmar Inn to house Billy's entertainers—because no one else had anything at stake. In fact, all the other shareholders had paid for their stock almost entirely with illegal promissory notes.[117] This, the court held, promoted an inequitable situation—the sole factor behind the courts decision to pierce the corporation under the individual factor approach.[118]

113. *Id.* at 216.

114. *Id.* See also Appellee's Brief at 23, Bergh v. Mills 763 P.2d 214 (Wyo. 1988)(No. 87-188) ("[T]he corporation had not been capitalized and was in immediate need of further capital and equipment if it was to open, the true beneficiaries of the Mill's investment were the three Bergh brothers, and [the partnership], since they really owned and controlled all of what should have been the assets of [the corporation] and were at maximum personal risk if [it] did not open its doors.").

115. *Bergh*, 763 P.2d at 215, 217.

116. *Id.* at 216-17. Under WYO. STAT. § 17-17-125 (1977) the legislature appears to be eliminating many of the factors that originally could be used to pierce the corporate veil in a close corporation, for example, 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. *Id.* Also, under WYO. STAT. § 17-17-121 (1977) the legislature enacted a provision eliminating a board of directors.

117. At the time this case went to trial, WYO. STAT. § 17-1-116(b) (1977), prohibited capitalizing a corporation with promissory notes.

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

The *AMFAC* court found that the corporate veil will be pierced "to prevent unjust or inequitable consequences."[119] The exact definition of "inequitable consequences" was not explained in *AMFAC*, but the court made it clear that fraud inevitably leads to an inequitable circumstance. The court held, however, that fraud was not a prerequisite to piercing, although it was a major concern where there was undercapitalization and complete domination by the shareholders.[120] The court recognized that fraud was often found as one of the grounds for disregarding a corporation's limited liability protection,[121] but that fraud was generally combined with other shareholder-owners failures before disregarding the corporate entity absent some inequity.[122] The *Bergh* court, however, found the evidence of fraud so pervasive, that under the individual factor approach, fraud alone supported piercing the corporate veil.[123] Thus, the *Bergh* decision illustrated the way the court will pierce the corporate veil to insure fairness.

Even with the equitable advantages of the individual factor approach for piercing the corporate veil it must still, however, be relied upon with caution.[124] The individual factor approach has not won universal acceptance.[125] Even in California, where *Minton* was decided, the court has retreated somewhat from an individual factor approach and has shifted more in favor of a cumulative effects approach.[126] The reasons for this retreat are varied, but ultimately, the individual factor approach presents the philosophical difficulty of balancing limited shareholder liability with equity. As such, only in extremely unfair situations will the individual factor approach be the unfailing approach for piercing the corporate veil. In most situations the individual factor approach will carry some weight, but the central focus will be on the cumulative effects approach.

The circumstances in *Bergh* were egregious enough to justify piercing the corporate veil for fraud. Alternatively, the circumstances in *AMFAC*, while they may have resulted in an unjust result, did not raise to the level of injustice as did the facts in the *Bergh* decision. Thus, in *AMFAC*, the court chose to pierce the corporate veil using the cumulative effects approach by examining multiple factors to establish shareholder liability.

119. 645 P.2d at 79.

120. *Id.*

121. *Id; see also* Dewitt v. Flemming, 540 F.2d 681, 684 (4th Cir. 1976). Perhaps attention should be drawn to the courts' use of the plural "grounds" in order to emphasize that fraud is only one of several grounds that may be considered when piercing. *AMFAC*, 645 P.2d at 79.

122. *AMFAC*, 645 P.2d at 79.

123. 763 P.2d at 216-17.

124. *See Browne*, 27 Cal. App. 3d 386, 103 Cal Rptr. 775 (1972) (the *Browne* court retreated from the position that undercapitalization alone was a sufficient basis to pierce the corporate veil. The *Browne* decision suggests that multiple factors were necessary before piercing the corporate veil).

125. *See* Gelb, *supra* note 4 and accompanying text.

126. For subsequent California case that retreat from the *Minton* position, *see* Harris v. Curtis, 8 Cal. App.3d 837, 87 Cal. Rptr. 614 (1970); Arnold v. Brown, 27 Cal.App.3d 386, 103 Cal. Rptr. 775 (1972).

The Cumulative Effects Analysis

Under the cumulative effects approach, the court will not pierce the corporate veil unless a causal connection between the corporation and the plaintiff can be proven. For example, if failure to maintain corporate formalities had no effect on the plaintiff, then the court will not pierce the corporate veil for failure to maintain such formalities.[127] Such reasoning benefits the corporate shareholder and attaches limited liability to the shareholder if the shareholder acts reasonably. Contrary reasoning may result in erratic piercing for reasons unrelated to the plaintiff's claim.[128] For example, the cumulative effects approach requires the court to justify its reason for piercing the corporate veil with several factors before its decision to pierce is made.

Serious implications attach to a decision to pierce the corporate veil. If there has been one major inducement leading investors and entrepreneurs to realize the potential of the corporate style of doing business, it has been the security of limited liability. Eliminating this advantage, regardless of the circumstances, detracts from the major advantage of doing business as a corporation. In piercing cases, the court takes a colossal step when it finds for the plaintiff. Thus, the need for strong justification in the opinion is necessary. The cumulative effects approach provides this justification.

First, in appropriate cases, the numerous factual elements pointing to unity or control between the shareholder and the corporation add "weight" to the court's rationale. Additionally, the more unity proven between the shareholder and the corporation, the less radical the action of the court appears to be when it eliminates the protection of limited liability. If the shareholder is so closely linked to the corporation that the two are in reality one, then the court is doing nothing more than recognizing reality. Thus, the court's step in piercing the corporate veil is not really that big of a step; it only identifies the two entities as they truly exist.

The *AMFAC* decision provides a correct example of the above rationale.[129] In *AMFAC*, the court examined multiple factors before piercing the corporate veil.[130] The *AMFAC* court established that the burden

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127. For the Wyoming statutory provisions dealing with limited liability see Wyoming Statute § 17-17-125 (1977):

> 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.

Also, under WYO. STAT. § 17-17-121 (1977) the legislature enacted a provision eliminating a board of directors: "(a) A statutory close corporation may operate without a board of directors. . . ."

128. *See supra* note 90, and accompanying text.

129. For example, in *AMFAC*, the corporation stopped doing business in the name of one business and continued the same business under a different name. While doing business under the new name, the proceeds were deposited into a personal account. The evidence showed that the proceeds then were beyond the reach of corporate creditors. *AMFAC*, 645 P.2d at 79.

130. *Id.* at 77-78.

of success under the second tier of the piercing approach is more difficult than the burden under the first tier.[131] The difficulty of this burden, however, is justified considering that when fraud dominates a relationship the defrauded party is usually unaware of the consequences of his or her business dealings. On the other hand, when dealing with a small closely held corporation, where the threat of an instrumentality is much greater, the danger of insolvency is more apparent. Therefore, the party to the transaction with a small closely held corporation, should recognize the degree of risk that can occur in the transaction and assume that risk.

The *AMFAC* court did not pierce the corporate veil without first reviewing several possible piercing factors.[132] The court held that to establish a prima facia case for piercing the corporate veil that the plaintiff had to expose multiple corporate problems.[133] Further, those problems had to cumulatively provide adequate proof that the corporation was the instrumentality of the shareholder.

In *CEC Homes*, the court held that the evidence provided a sufficient basis to find an absence of individuality between the corporation and the sole stockholder.[134] Additionally, the court held that adherence to the limited liability concept would promote injustice.[135] Thus, the court satisfied both tiers of its approach by finding proof of an instrumentality and an inequitable result. The *CEC Homes* court reasoned that the existence of the corporation in that case depended upon whether the stockholder wished to add to the corporate account or withdraw from the account.[136] Such an existence allowed the stockholder to use the corporation as a conduit for his own affairs, deplete its assets, ignore claims from creditors and generally abuse the corporation.[137]

The rationale behind piercing the corporate veil is to prevent shareholders, like those in *CEC Homes*, from abusing the corporate form to escape personal liability. In veil piercing cases, the burden is correctly on the plaintiff to show that the stockholder intended to use the corporation as a shell to escape personal liability. The burden should be as such because a corporation does enjoy a presumption of validity and separateness unless otherwise proven and this separateness serves an important public policy—the policy of encouraging investment by limiting risks.[138] In *AMFAC*, the injury to the plaintiff resulted from

131. *Id.* at 77.
132. *Id.*
133. *Id.* at 78.
134. *CEC Homes*, 753 P.2d at 1024-25.
135. *Id.*
136. *Id.*
137. For example, in *CEC Homes*, the court cited evidence that Miles used the corporation to procure labor and services for himself. The corporation built storage units and an office building for Miles without profit. The projects were not authorized by the corporation until four months after construction began. Miles maintained that he reimbursed the corporation for wages, materials and expenses for the buildings, but the record did not support such a claim. *Id.*
138. *See* Gelb, *supra* note 4 at 1.

his mistaken belief that he was dealing with a going concern.[139] The *AMFAC* court, however, correctly analyzed the corporation and held that the plaintiff's injury resulted from a lack of separateness between the shareholder and the corporation.[140]

The *CEC Homes* court pierced the corporation only after reviewing several possible factors that it considered important to piercing decisions.[141] The court's step-by-step analysis correctly illustrated the process that courts should use in piercing cases. For example, first the court established that the defendant corporation had in fact injured the CEC Homes Corporation.[142] Next, the court undertook to analyze whether to pierce a "judgment-proof" corporation to satisfy its creditors with the personal assets of its owner.[143] The court then considered whether sufficient evidence justified disregard of the corporate entity. To make such a determination, the court examined the relationship between the owner and the corporation to determine whether the bonds of unity between the two justified piercing the corporate veil. To make its decision, the court established a list of factors that indicated a oneness between owners and corporations.[144] The court then analyzed the facts of the case and found that the corporation possessed several of the factors on its piercing list and therefore, the owner and the corporation should be treated as one entity.[145] The court additionally found that maintaining the corporate entity would be inequitable and for that reason the corporate veil should be pierced. Thus, the *CEC Homes* analysis insured that before disregarding the corporate entity, the court would examine the effect of multiple factors.

The cumulative effects approach to piercing the veil requires that the plaintiff prove an actual injury sustained as the result of several elements of corporate misconduct.[146] Such an approach lends itself to a secure and uniform atmosphere for corporations faced with the threat of being pierced. The security comes in knowing that before disregarding the corporate entity, a plaintiff must point to specific factors that have actually worked to his or her detriment. The cumulative effects

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139. 645 P.2d at 80-81.
140. *Id.* at 82.
141. For example, the *CEC Homes* court based its decision to pierce on a number of factors. The court cited inadequate corporate records, commingling of funds and other assets, unauthorized diversion of corporate funds, and unauthorized procurement of labor and services to make its decision. *CEC Homes,* 753 P.2d at 1024-25; *see also, AMFAC,* 645 P.2d at 77-78; *Atlas,* 746 P.2d at 355-57.
142. *CEC Homes,* 753 P.2d at 1023.
143. *Id.*
144. *See supra,* note 90 and accompanying text.
145. *CEC Homes,* 753 P.2d at 1024.
146. Beginning with the case of Durlacher v. Frazer, 55 P. 306 (Wyo. 1898), the Wyoming Supreme Court has consistently recognized multiple factors when piercing the corporate veil. Following is a partial list of cases in which the court used a multifactor approach. Rivermeadow, Inc. v. Zwaanshock Holding and Financier, B.V. 761 P.2d 662, 665-667 (Wyo. 1988); Stratman v. Admiral Beverage Corp. 760 P.2d 974, 980-982 (Wyo. 1988); Yost v. Harpel Oil Co. 674 P.2d 712, 716-719 (Wyo. 1983); Opel Mercantile v. Tamblyn 616 P.2d 776, 778 (Wyo. 1980).

approach does not allow a plaintiff to base a suit on a single factor discovered subsequent to the lawsuit.

Ultimately, when piercing the corporate veil in Wyoming, the prudent strategy would be to focus on the first tier of the veil piercing approach. If an inequitable relationship or result can be proven, then the court's inquiry may end at that point by piercing the corporate veil as the court did in the *Bergh* decision. If such an inequitable relationship can not be established, then the second approach must be examined. If the facts establish that the relationship between the shareholder and the corporation indicate that the shareholder used the corporation as an instrumentality then the court will probably pierce the corporate veil.

Finally, whether proceeding under the individual factor approach or the cumulative effects approach, the business person must be able to confidently predict that only a deliberate hinderance of a contract or tort claim through corporate manipulation will lead to personal liability.

CONCLUSION

The Wyoming Supreme Court has consistently pierced the corporate veil for two separate reasons. First, the court generously pierces the veil any time it is necessary to avoid unfairness. Next, the court pierces the corporate veil whenever the shareholder and the corporation have become so intertwined that they become one entity. Without ever expressly announcing its policy, the court has created a two tiered approach to piercing the corporate veil. Piercing the corporate veil in Wyoming requires that at least one of the two tiers be satisfied.

Under the first tier—the individual factor tier—the court holds that if maintaining the corporate identity would promote injustice among the parties or if the relationship between the shareholder and the plaintiff was inequitable then the veil will be pierced. Under the second tier—the cumulative effects tier—the court holds that when a oneness exists between the shareholder and the corporation such that the corporation is nothing more than the shareholder's alter ego used to avoid economic obligations then the court will pierce the corporate veil.

The burden of satisfying the individual factor approach requires evidence of only a single inequitable factor such as fraud. Alternatively, the burden of satisfying the cumulative effects approach requires proof of an inequitable result, resulting from the cumulative effect of several factors. This two tiered piercing doctrine serves an important role in Wyoming as a safety valve to limit or impose liability under a controlled set of facts. Prudence requires a careful examination of the facts of each case, thus promoting consistency and predictability in Wyoming's corporate decisional law.

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