LITIGATION BINGO – PIERCING THE CORPORATE VEIL, THE SINGLE BUSINESS ENTERPRISE THEORY, AND INSURANCE COVERAGE SCENARIOS

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I. PIERCING THE CORPORATE VEIL

A) Equitable nature of the remedy

1. Veil piercing is equitable in nature. *See Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 610 (7th Cir. 2009) ("Veil-piercing is an equitable remedy governed by state law.").

2. Typically, the trial court has discretion in crafting equitable remedies and may refuse to pierce the corporate veil where existing remedies at law are adequate.

    a. *Floyd v. IRS*, 151 F.3d 1295, 1300 (10th Cir. 1998) (declining to piercing the corporate veil for taxation purposes where "the transfer of an economic benefit to a shareholder may be reachable … as a constructive dividend").

    b. *Commissioner of Envtl. Prot. v. State Five Indus. Park, Inc.*, 37 A.3d 724 (Conn. 2012) (explaining that "because corporate veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law," and "many legal remedies potentially are available to reach corporate assets that rightfully should be available for collection, including the attachment of the debtor's shares in the corporation, if he or she is a shareholder, garnishment of his or her pay from the corporation, if he or she is an employee, challenging of his or her transfers of assets to the corporation as fraudulent conveyances or illegal conversion, or attribution of individual conduct to the corporation under theories of agency or respondeat superior").

B) Theories

1. **"Alter ego" or "mere instrumentality" doctrine.**

    a. Two general elements: (1) such unity of interest and ownership that the separateness of the corporation and the individual no longer exist and (2)

adherence to fiction of separate corporate existence would sanction fraud or promote injustice. 1 Fletcher Cyc. Corp. § 41.30 (September 2019 update).

b. Standard piercing test: (1) whether the corporation was controlled by another to the extent its independence was in form only, and (2) whether the corporation was used as a subterfuge to perpetrate a fraud or injustice. *Id.*

c. **Common factors: (1) inadequate capitalization, (2) failure to observe corporate formalities, (3) failure to issue stock or pay dividends, (4) comingling of personal and corporate assets.** *See id*.

i. No single factor is dispositive. *Id.*

ii. **Inadequate capitalization.**

- Generally, this means that the initial capitalization, measured at the time of formation, was very small in relation to the nature of the business of the corporation and the risks attendant to such business. *See e.g., HOK Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 938 (8th Cir. 2007) ("A corporation may be undercapitalized due to either an insufficient contribution of equity capital or an insufficient amount of capital available to satisfy the corporation's liabilities").

- **Exceptions to measuring capital at the time of formation:**

  - Although generally measured at the time of formation, "if an adequately capitalized corporation later substantially expands the size or nature of its business with an attendant substantial increase in business risks, the corporation might be deemed inadequately capitalized unless there is an infusion of additional risk capital by shareholders." 1 Fletcher Cyc. Corp. § 41.33.

  - Courts may also consider post-formation capitalization "when the inadequacy of capitalization arises after commencement of the business, as a result of capital transfers to the controlling shareholder, and the withdrawal renders the initial adequacy irrelevant." *Id.*

iii. **Failure to observe corporate formalities.**

- Failure to observe corporate formalities may include commencing business without issuing shares, failure to hold shareholder's or director's meetings, failure to maintain corporate books, and shareholders making decisions as if they were partners in a partnership. *See* 1 Fletcher Cyc. Corp. § 41.31.

- *HOK Sport, Inc.*, 495 F.3d at 939-40 (meetings).

- *Trustees of Nat. Elevator Indus. Pension v. Lutyk*, 140 F. Supp. 2d 447, 457 (E.D. Pa. 2001) (records).

- *Laborers Clean-Up Contract Admin. Tr. Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 525 (9th Cir. 1984) (stock).

iv. **Failure to issue stock or pay dividends**

- *Schoenberg v. Benner*, 59 Cal. Rptr. 359, 367-68 (Cal. Ct. App. 1967) (piercing the corporate veil and considering the fact the corporation had "never declared a dividend").

- *Automotriz Del Golfo De California S. A. De C.V. v. Resnick*, 306 P.2d 1, 4 (Cal. 1957) ("The failure to issue stock or to apply at any time for a permit, although not conclusive evidence, is an indication that defendants were doing business as individuals."); *see also Hooper v. C.I.R.*, T.C. Memo. 1974-176 (1974) declining to treat a corporation as a sole proprietorship for tax purposes and observing that the corporation's "failure to issue stock does not affect the reality of its existence for tax purposes").

v. **Comingling personal and corporate assets.**

- "Evidence that shareholders used corporate funds for personal purposes, mixed corporate and personal accounts, or commingled assets so that the ownership interests were indistinguishable will be weighed, along with other factors, when a disregard of corporate separateness is pleaded." 1 Fletcher Cyc. Corp. § 41.50 (September 2019 update); *see also Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1389 (7th Cir. 1994) (listing "commingling of funds or assets" and "one corporation treating the assets of another as its own" as factors to consider in the veil piercing context).

d. **Fraud and the intent to defraud.**

i. Fraud, illegality, or fundamental unfairness are required in many jurisdictions. *See e.g.*, *Rimade Ltd. v. Hubbard Enters., Inc.*, 388 F.3d 138, 143 (5th Cir. 2004) ("Under Texas law, 'there are three broad categories in which a court may pierce the corporate veil: (1) the corporation is the alter ego of its owners and/or shareholders; (2) the corporation is used for illegal purposes; and (3) the corporation is used as a sham to perpetrate a fraud.'" (quoted source omitted)); *Dombrowski v. WellPoint, Inc.*, 895 N.E.2d 538, 544-45 (Ohio 2008) (requiring fraud or illegality and explaining "[w]ere we to allow piercing every time a

corporation under the complete control of a shareholder committed an unjust or inequitable act, virtually every close corporation could be pierced when sued, as nearly every lawsuit sets forth a form of unjust or inequitable action and close corporations are by definition controlled by an individual or small group of shareholders.").

ii. Actual intent to defraud is not always necessary; constructive fraud and avoiding inequitable results may be enough. 1 Fletcher Cyc. Corp. § 32 (September 2019 update).

e. **LLCs**

i. **Some LLC statutes provide that the common law regarding piercing the corporate veil as to corporations applies equally to LLCs.** *See* Stephen B. Presser, Piercing the Corporate Veil § 4:2 (October 2019 update).

- Minn. Stat. 322C.0304 subd. 3 (2015) ("Except as relates to the failure of a limited liability company to observe any formalities relating exclusively to the management of its internal affairs, the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies").

- N.D. Cent. Code § 10-32.1-26.3 (2015) ("Except as relates to the failure of a limited liability company to observe any formalities relating exclusively to the management of its internal affairs, the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under North Dakota law also applies to limited liability companies.").

- Colo. Rev. Stat. § 7-80-107(1) (2016) ("In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.").

ii. **Some statutes explicitly provide that failure to follow corporate formalities does not, by itself, provide a ground for personal liability**. 1 Fletcher Cyc. Corp. § 41.77 (September 2019 update).

- Minn. Stat. 322C.0304 subd. 2 (2015) ("The failure of a limited liability company to observe formalities relating exclusively to the management of its internal affairs is not a ground for imposing

liability on the members, managers, or governors for the debts, obligations, or other liabilities of the company.").

- Colo. Rev. Stat. § 7-80-107(2) (2016) ("For purposes of this section, the failure of a limited liability company to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the members for liabilities of the limited liability company.").

- N.D. Cent. Code § 10-32.1-26.2 (2015) ("The failure of a limited liability company to observe formalities relating exclusively to the management of its internal affairs is not a ground for imposing liability on the members, managers, or governors for the debts, obligations, or other liabilities of the company.").

iii. **Even in the absence of any specific authorization in the applicable LLC act, courts have applied the piercing doctrine to LLCs.**

- *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323, 327-28 (Wyo. 2002) (explaining that "[w]e can discern no reason, in either law or policy, to treat LLCs differently than we treat corporations," and "[i]f the members and officers of an LLC fail to treat it as a separate entity as contemplated by statute, they should not enjoy immunity from individual liability for the LLC's acts that cause damage to third parties").

- *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (applying Delaware case law on veil piercing to an LLC).

- *Morris v. Cee Dee, LLC*, 877 A.2d 899, 907 (Conn. App. Ct. 2005) (explaining that the theories on corporate veil piercing "also apply to the protection afforded by a limited liability company").

iv. **Because many of the typical requirements of corporate formalities do not apply to LLCs, the analysis of the piercing factors may differ from a corporation**.

- *Kaycee Land and Livestock*, 46 P.3d at 328 ("Certainly, the various factors which would justify piercing an LLC veil would not be identical to the corporate situation for the obvious reason that many of the organizational formalities applicable to corporations do not apply to LLCs.").

- *NetJets Aviation, Inc., LLC*, 537 F.3d at 178 ("In the alter-ego analysis of an LLC, somewhat less emphasis is placed on whether

the LLC observed internal formalities because fewer such formalities are legally required.").

- *Martin v. Freeman*, 272 P.3d 1182, 1185 (Colo. App. 2012) (pointing out possible differences in the piercing analysis between corporations and LLCs, including the observation that "LLCs might be distinguished from corporations regarding the likelihood that the veil will be pierced for failure to observe formalities" (quoted source omitted)).

2. **Reverse Piercing.**

a. Reverse piercing of the corporate veil seeks to hold a corporation liable for the activities of its shareholder. *See* 1 Fletcher Cyc. Corp. § 41.70 (September 2019 update).

i. *United States v. Badger*, 818 F.3d 563, 568 (10th Cir. 2016) (explaining that under a reverse piercing theory, "a corporation or other entity can be liable for the debt of someone who controls the entity").

ii. *Taurus IP v. DaimlerChrysler Corp.*, 519 F. Supp. 2d 905, 919 (W.D. Wis. 2007) (explaining that veil piercing "can also be 'applied in reverse' to reach a controlled entity" (quoted source omitted)).

b. Many jurisdictions will allow reverse piercing under the same considerations applicable to ordinary piercing. 1 Fletcher Cyc. Corp. § 41.70 (September 2019 update).

i. *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 387 (4th Cir. 2018) (construing Delaware law as applied to an LLC and explaining that the same considerations that justify traditional piercing may justify veil piercing in the reverse and "in Delaware, disregarding the corporate fiction '*can always be done* if necessary to prevent fraud or chicanery'" (quoted source omitted)).

ii. *Goya Foods, Inc. v. Unanue*, 233 F.3d 38, 43-44 (1st Cir. 2000) (construing New York law and using the same two-part test applicable to traditional veil piercing).

iii. *Taurus IP*, 519 F. Supp. 2d at 919 (applying the "alter ego doctrine" in "reverse").

c. Outside vs. inside veil piercing.

i. Inside reverse veil piercing is where a controlling insider attempts to have the corporation disregarded to his or her benefit. *See Hibbs v.*

Berger, 430 S.W.3d 296, 310 (Mo. Ct. App. 2014) ("Inside reverse piercing claims allow a shareholder to disregard the corporate form of which he or she is a part." (quoted source omitted)).

ii. Outside reverse veil piercing allows third parties to use veil piercing to get at corporate assets to satisfy the debts of one of the shareholders. *See Sky Cable, LLC*, 886 F.3d at 386 (explaining that outsider reverse veil piercing "applies when an outside third party, frequently a creditor, urges a court to render a company liable in a judgment against its member").

d. Courts should consider the potential harm to innocent shareholders or corporate creditors before deciding to allow reverse piercing.

i. *Sky Cable, LLC* 886 F.3d at 387 ("Reverse veil piercing is particularly appropriate when an LLC has a single member, because this circumstance alleviates any concern regarding the effect of veil piercing on other members who may have an interest in the assets of an LLC.").

ii. *LFC Mktg. Grp., Inc. v. Loomis*, 8 P.3d 841, 847 (Nev. 2000) ("We recognize, however, as the district court also did, that there are other equities to be considered in the reverse piercing situation—namely, whether the rights of innocent shareholders or creditors are harmed by the pierce.").

iii. Additionally, in the insurance context, some courts will decline to allow veil piercing to expand an insurer's coverage absent culpable conduct on the part of the insurer. *See Estate of Cartledge v. Columbia Cas. Co.*, 2011WL5884255, *4 (E.D. Cal. 2011) (declining to pierce the corporate veil to expand coverage in the absence of inequitable conduct on the part of the insurer; discussed in greater detail below).

e. A person who has voluntarily adopted a corporate form may be prevented from asserting reverse veil piercing.

i. *Sky Cable, LLC* 886 F.3d at 385 (explaining that "many courts strongly oppose allowing a company's veil to be pierced for the benefit of the individuals who themselves have created the company").

3. **Single Business Enterprise Theory.**

a. Single business enterprise theory is a method of laterally piercing the corporate veil between two separate companies and impose partnership-type liability "when corporations integrate their resources and operations to achieve a common business purpose." 1 Fletcher Cyc. Corp. § 43 (September 2019 update).

i. "Under the 'single business enterprise' doctrine, when corporations are not operated as separate entities, but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for the debts incurred in pursuit of that business purpose." *National Plan Administrators, Inc. v. National Health Ins. Co.*, 150 S.W.3d 718, 744 (Tex. Ct. App. 2004) *rev'd on other grounds by* 235 S.W.3d 695.[1]

ii. Essentially, this doctrine treats two separate corporations as a single business enterprise.

iii. Courts that adopt this theory allow this form of veil piercing on the basis that the corporation and its affiliate have integrated their assets to achieve a common business purpose.

b. **Factors:** (*See, e.g. National Plan Administrators*, 150 S.W.3d at 745; *Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534 (Tex. Ct. App. 1986) *abrogated by SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444 (Tex. 2008)).

> "[W]hen corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business purpose. Factors to be considered in determining whether the constituent corporations have not been maintained as separate entities include but are not limited to the following: common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation's employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations." *Paramount Petroleum Corp.*, 712 S.W.2d at 536.

i. Common employees.

ii. Common offices.

iii. Centralized accounting.

[1] The single business enterprise theory was later rejected by the Supreme Court of Texas, but the description of the theory is accurate.

iv. Payment of wages by one corporation to another corporation's employees.

v. Common business name.

vi. Services rendered by the employees of one corporation on behalf of another corporation.

vii. Undocumented transfer of funds between corporations.

viii. Unclear allocation of profits and losses between corporations.

c. **Some courts reject the single business enterprise theory.**

i. *See e.g.*, *SSP Partners*, 275 S.W.3d at 451-52 (rejecting the single business enterprise doctrine because, among other things, the theory does not require abuse of the corporate form or injustice); *see also Michnovez v. Blair, LLC*, 795 F. Supp. 2d 177, 187 (D.N.H. 2011) (observing that New Hampshire "appears to have rejected" the "single-enterprise theory"); *Verni ex rel. Burstein v. Harry M. Stevens, Inc.*, 903 A.2d 475, 497 (N.J. Super. Ct. App. Div. 2006) ("The single business enterprise or single entity rule has not been adopted in this state.").

ii. It does not appear that Wisconsin has adopted the single entity theory. See *Assisted Living Concepts, Inc. v. Siegel-Gallagher, Inc.*, 2012 WI App 52, ¶ 24 & n.6, 340 Wis. 2d 741, 813 N.W.2d 247 unpublished slip op. (declining to adopt a version of the single business enterprise theory and explaining that "Wisconsin follows the 'alter ego' doctrine for determining whether the pierce the corporate veil").

4. **Veil Piercing Among "Sister" Corporations.**

a. A "sister" corporation has the element of common shareholder identity.

b. Despite common shareholders, the "lack of ability of one corporation to control the conduct of its sister corporation precludes the application of the veil piercing doctrine." 1 Fletcher Cyc. Corp. § 43 (September 2019 update).

c. *Minno v. Pro-Fab, Inc.*, 905 N.E.2d 613, 617 (Ohio 2009) (rejecting an attempt to pierce the veil of one corporation to reach its sister corporation; discussed in greater detail below).

5. **Piercing the corporate veil to reach non-shareholders**

   a. **Some courts allow veil piercing in order to impose personal liability on non-shareholders under an "equitable ownership" theory even where the individual is not a director or officer.**

      i. *Buckley v. Abuzir*, 8 N.E.2d 1166, 1172-78 (Ill. App. Ct. 2014) (collecting cases and holding that veil piercing was available to reach an individual who was not a shareholder, officer, director, or employee of the corporation based on an equitable ownership theory).

         - In *Buckley*, the corporation was owned by the defendant's sister, and the defendant's brother-in-law was the president.

         - However, the complaint alleged that the defendant actually funded the corporation, made all its business decisions, and exercised ownership-like control.

         - The appellate court allowed the piercing claim to go forward.

      ii. *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1051 (2d Cir. 1997) (applying New York law and explaining that "New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an 'equitable owner', notwithstanding the fact that the individual is not a shareholder of the corporation").

         - A defendant argued that he could not be held liable under a piercing theory because "he is not a shareholder, officer, director, or employee."

         - The court rejected this argument because the defendant "exercised considerable authority over" the corporation "to the point of completely disregarding the corporate form and acting as though [the corporation's] assets were his alone to manage and distribute."

      iii. *Lunneborg v. My Fun Life*, 421 P.3d 187, 871-72 (Idaho 2018) (collecting cases and holding that "[s]tock ownership, while important, is not a necessary prerequisite to pierce the corporate veil—it is merely one factor to consider").

   b. **Some courts only allow veil piercing as to shareholders.**

      i. *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1351 (11th Cir. 2011) (applying Florida law and concluding that the state law on

piercing "does not permit a plaintiff to pierce the corporate veil against a non-shareholder director").

ii. *Thibodeau v. Cole*, 740 A.2d 40, 42 (Me. 1999) (even assuming that the plaintiff could pierce the corporate veil, he could not reach the defendant because the defendant "did not personally own shares" of the corporation).

iii. *Allred v. Exceptional Landscapes, Inc.*, 743 S.E.2d 48, 53-54 (N.C. Ct. App. 2013) (reversing a decision to pierce the corporate veil and hold an individual liable because "she was not a shareholder" of the corporation).

6. **Contract vs. Tort actions.**

a. Courts are usually more reluctant to pierce the corporate veil in the contract context. 1 Fletcher Cyc. Corp. § 41.85 (September 2019 update).

i. In a contract case, the party seeking relief "is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity and is expected to suffer the consequences of the limited liability associated with the corporate business form." 1 Fletcher Cyc. Corp. § 41.85 (September 2019 update).

- *Southeast Texas Inns, Inc. v. Prime Hosp. Corp.*, 462 F.3d 666, 680 & n.16 (6th Cir. 2006) (citing Fletcher and stating "[t]he very reasonable question must be met and answered why one who contracted with the subsidiary and received the promise which he bargained for but who has been disappointed in the fulfillment by the subsidiary of its commitment should be allowed to look to the parent").

- *A.L. Dougherty Real Estate Mgmt. Co. v. Su Chin Tsai*, 98 N.E.3d 504, 517 (Ill. App. Ct. 2017) ("In breach of contract cases, 'courts apply an even more stringent standard to determine when to pierce the corporate veil than in tort cases.'" (quoted source omitted)).

- However, commentators have observed that small creditors (e.g., trade creditors or employees) may not have the ability to fully investigate the corporation they are dealing with or negotiate guarantees if the corporation's creditworthiness is questionable. 1 Fletcher Cyc. Corp. § 41.85 (September 2019 update). *See also Labadie Coal Co. v. Black*, 672 F.2d 92, 100 (D.C. Cir. 1982) (questioning the idea that all contract creditors have "assumed the risk that the corporation may prove unable to meet its financial obligations").

b. Courts are usually more likely to disregard the corporate veil in tort cases because a tort victim does not have the opportunity to choose whether to deal with the corporation. 1 Fletcher Cyc. Corp. § 41.85 (September 2019 update).

i. *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 693 (5th Cir. 1985) (distinguishing contract and tort cases because in tort cases "the creditor has not voluntarily chosen to deal with the subsidiary; instead, the creditor relationship is forced upon it").

C) In Wisconsin

1. As in all jurisdictions, the general principle is of shareholder non-liability. *Milwaukee Toy Co. v. Industrial Comm'n*, 203 Wis. 493, 495, 234 N.W. 748 (1931).

a. "By legal fiction the corporation is a separate entity and is treated as such under all ordinary circumstances." *Id*.

2. However, Wisconsin courts have recognized that circumstances justifying piercing of the corporate veil are present when "applying the corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim." *Id*. at 496. Veil piercing is an "equitable" doctrine. *Id.*

a. The legal "the fiction of corporate entity is not to be lightly regarded." *Id.* at 496.

3. **Wisconsin uses the traditional theory of "mere instrumentality" or "alter ego"**

a. Basic test for piercing: (1) control; (2) injustice; and (3) causation.

i. "Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own" (control).

ii. "Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights" (injustice).

iii. "The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of" (causation).

Consumer's Co-op. v. Olsen, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988).

b. Both control and injustice must be present. *Id*. at 485 ("[I]t is apparent that just as control, absent a showing of injustice, would not justify exception to the general rule of corporate nonliability, injustice, absent the establishment of control, would not constitute adequate grounds to pierce the corporate veil." (footnote omitted)).

4. **Factors**

a. **Like other jurisdictions, in Wisconsin no single factor is determinative**.

i. Because piercing the corporate veil is an equitable remedy, "flexibility must be maintained." *Olsen*, 142 Wis. 2d at 485-86.

ii. "[I]t is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked had 'no separate mind, will or existence of its own' and was therefore the 'mere instrumentality or tool' of the shareholder." *Id*. (quoted source and internal marks omitted).

b. **Undercapitalization.**

i. This factor applies in both contract and tort cases; however, a creditor's ability to investigate might give rise to the defense of waiver and/or estoppel.

ii. "[U]ndercapitalization is not an independently sufficient ground to pierce the corporate veil." *Olsen*, 142 Wis. 2d at 482.

- "In order for the corporate veil to be pierced, in addition to undercapitalization, additional evidence of failure to follow corporate formalities or other evidence of pervasive control must be shown." *Id*. at 482-83.

- A gross inadequacy of capitalization could constitute an injustice sufficient to meet the requirements of the second prong of the veil-piercing test. *Id*. at 491.

iii. When is adequate capitalization measured?

- The adequacy of capitalization "is to be measured as of the time of formation of the corporation." *Id.* at 486.

- A corporation that was adequately capitalized when formed but which subsequently suffers financial reverses is not undercapitalized. *Id*.

iv. Test: "[A] corporation is undercapitalized when there is an 'obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking.'" *Id*. at 488 (quoted source omitted).

- Subordination may be required when it is established by expert testimony that the stated capitalization was inadequate to give the corporation a reasonable business chance to operate successfully in view of the nature and size of the business involved. *Gelatt v. DeDakis (In re Mader's*), 77 Wis. 2d 578, 607, 254 N.W.2d 171 (1977).

- In *Olsen* the court found that the $7,000 initial capital contribution for the business "was not, and could not be reasonably viewed as, an obvious inadequacy of capital as measured by the slight size of the initial undertaking." *Olsen*, 142 Wis. 2d at 491.

v. There is no continuing requirement to maintain an adequate level of capitalization. *Id*. at 486.

vi. However, a significant expansion of a corporation's operations might require an additional infusion of capital. *Id*. at 486.

- "Conversely, where a corporation commences business with capital then adequate, and later substantially expands the size or nature of the business with an attendant substantial increase in business hazards, the corporation might be deemed inadequately capitalized unless there is an infusion of additional risk capital by shareholders." *Id*. at 487.

- *See In re Mader's,* 77 Wis. 2d at 610 (court comments that the initial stated capital, although adequate at the time of the inception of the corporation, might not have been sufficient when a second store was opened)

c. **Failure to observe corporate formalities.**

i. Similar to undercapitalization, failure to observe corporate formalities is insufficient standing alone to justify piercing the corporate veil. *Olsen*, 142 Wis. 2d at 491; *Ruppa v. American States. Ins. Co*., 91 Wis. 2d 628, 645, 284 N.W.2d 318 (1979) (court found unpersuasive the fact that the defendant saddle club had no regular meeting place and its only asset was a bank account).

ii. Informality in corporate proceedings is not significant in the context of a small closely-held corporation. *Olsen*, 142 Wis. 2d at 488-90.

iii. "[M]ere failure upon occasion to follow all the forms prescribed by law for the conduct of corporate activities will not justify [disregard of the corporate entity]." *Id.* at 490 (quoted source omitted; alterations in original).

iv. The Court in *Olsen* found there was appropriate adherence to corporate formalities:

> In the case at bar, stock was issued, officers were elected, meetings of the board of directors were frequently held, and all business was undertaken in the corporate name. Moreover, there was no indication of improper commingling of personal and corporate assets. Those financial transactions between [the shareholder] and the corporation were approved, though informally, by the board of directors and were undertaken for the purpose of infusing, rather than improperly withdrawing, capital.
>
> *Id.* at 488.

d. **Facts warranting disregard of the corporate entity.**

i. *Sprecher v. Weston's Bar, Inc.*, 78 Wis. 2d 26, 38, 253 N.W.2d 493 (1977).

- The individual defendants made no serious attempt to hold corporate meetings or to maintain records of corporate meetings.
- the corporation had no substantial assets.
- the individual defendants took out in salary basically all the corporate assets.

ii. *Webke v. Richardson & Sons, Inc*., 83 Wis. 2d 359, 364-65, 265 N.W.2d 571 (1978).

- The shareholder used the corporate checking account as his personal account.
- The shareholder did not take wages but withdrew funds without making additional to the corporate account for sums withdrawn.

5. **Waiver and Estoppel.**

a. Contract vs. tort.

i. "The volitional nature of a contractual relationship presents a cognizable distinction between contract and tort cases; however, this distinction is more appropriately recognized as one which may justify the application of the doctrines of estoppel and waiver than as to preclude the invocation of the equitable remedy of piercing the corporate veil in a contract case." *Olsen*, 142 Wis. 2d at 481.

ii. In *Olsen*, the creditor's opportunity to investigate the capital foundation of the corporation gave rise to both waiver and estoppel. *Id.* at 493-95.

iii. *Olsen* appears to decline crafting a hard and fast rule that it is more difficult to pierce the corporate veil in contract cases than in tort cases. *See* 1 Fletcher Cyc. Corp. § 41.85 (September 2019 update) (explaining that many jurisdictions are more reluctant to pierce the veil in contract cases).

b. Waiver is the intentional relinquishment of a known right. *Olsen*, 142 Wis. 2d at 492-93.

i. "Evidence sufficient to establish waiver must establish that 'the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his rights or facts upon which they depended.'" *Id*. at 492 (quoted source omitted).

ii. Intent to waive may be inferred as a matter of law from the conduct of the parties. *Id.*

c. Estoppel is action or nonaction on the part of one against whom estoppel is sought that induces reliance by another to his detriment. *Id.* at 492-93.

i. The reliance established in support of equitable estoppel must be reasonable. *Id*. at 493.

d. Do waiver and estoppel only apply in the case of a change in the character of the corporate business after an initial capitalization has been found to be adequate? *See* 1 Fletcher Cyc. Corp. § 41.33 (September 2019 update) (explaining that, although capitalization is usually measured at the time of formation, "if an adequately capitalized corporation later substantially expands the size or nature of its business with an attendant substantial increase in business risks, the corporation might be deemed inadequately capitalized unless there is an infusion of additional risk capital by shareholders').

6. **Reverse Piercing.**

   a. Wisconsin has recognized the concept of reverse veil piercing. *See Olen v. Phelps*, 200 Wis. 2d 155, 546 N.W.2d 176 (Ct. App. 1996).

   b. Our courts characterize it as applying the typical alter ego doctrine in reverse. *See Olen*, 200 Wis. 2d at 163.

   c. In *Olen*, the court of appeals applied reverse piercing to impute a corporation's ownership of building to the shareholder for fraudulent conveyance purposes. *Id.* at 163-64.

   d. Factors considered in *Olen*:

      - The individual "was PAS's [the corporation] sole shareholder and director." (control)

      - "PAS handled all decisions on an informal basis and *did not keep minutes* of its meetings." (failure to observe corporate formalities)

      - "Phelps *treated PAS funds as his*, and *commonly directed PAS funds to satisfy both corporate and personal debts*." (comingling of personal and corporate assets)

      - "He *treated the corporate assets as his own*." (comingling of personal and corporate assets)

      - "He *used PAS funds to make the mortgage payments on both the firm's office building and his own properties*." (comingling of personal and corporate assets)

      Olen, 200 Wis. 2d at 163 (emphasis added).

7. **Wisconsin has not adopted the single entity theory, and the theory was rejected in an unpublished decision.** *See Assisted Living Concepts, Inc. v. Siegel-Gallagher, Inc.*, 2012 WI App 52, ¶ 24 & n.6, 340 Wis. 2d 741, 813

N.W.2d 247 unpublished slip op. (declining to adopt the single business enterprise theory and explaining that "Wisconsin follows the 'alter ego' doctrine for determining whether to pierce the corporate veil").

8. **LLCs.**

   a. Like many jurisdictions have done, the Wisconsin LLC statutes provide the common law corporate standard be used for piercing the corporate veil in the LLC context. *See* Stephen B. Presser, Piercing the Corporate Veil § 4:2 (October 2019 update) (explaining that "some state statutes do explicitly require that the common law corporate standard be used for piercing the veil of limited liability for LLCs").

      i. Wis. Stat. § 183.0304(2) ("[N]othing in this chapter shall preclude a court from ignoring the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders in this state and under circumstances that are not inconsistent with the purposes of this chapter.").

   b. Additionally, the Wisconsin LLC statutes require fewer formalities, and therefore the piercing analysis may differ from that of a corporation as noted *supra*.

      i. Specifically, entities like LLCs may offer greater flexibility and therefore lessen the risk that the corporate veil could be pierced due to failure to follow formalities. *See Gottsacker v. Monnier*, 2005 WI 69, ¶ 19, 281 Wis. 2d 361, 697 N.W.2d 436 (explaining that the drafters of the Wisconsin LLC law "emphasized the importance of flexibility and freedom of contract, which is reflected throughout the provisions of" that statutory chapter).

9. **Parent-subsidiary alter ego.**

   a. Although primarily addressing corporate separateness in the context of personal jurisdiction, Wisconsin courts have recognized veil piercing in the parent-subsidiary context for purposes of determining personal jurisdiction over the parent company based upon the control by the parent entity over the subsidiary. *See, e.g.*, *Conservatorship of Prom v. Sumitomo Rubber Indus., Ltd*. 224 Wis. 2d 743, 791, 592 N.W.2d 657 (Ct. App. 1999) (plaintiff failed to show that foreign parent corporation controlled subsidiary for purposes of disregarding corporate identity and attributing actions of subsidiary to parent to establish jurisdiction over parent company); *Rasmussen v. General Motors Corp*., 2011 WI 52, ¶ 37, 335 Wis. 2d 1, 803 N.W.2d 623. *See also, Insolia v. Phillip Morris, Inc.*, 31 F.Supp. 2d 660 (W.D. Wis. 1998).

i. The mere existence of the parent-subsidiary relationship between two corporations is not sufficient to provide a court with jurisdiction. *See Tiger Trash v. Browning-Ferris Indus., Inc*., 560 F.2d 818, 823 (7th Cir. 1977). *See also, Cemetery Servs., Inc. v. Wisconsin Dept. of Regulation & Licensing*, 221 Wis. 2d 817, 826-27, 586 N.W.2d 191 (Ct. App. 1998) (analyzing relationship between entities in determining whether statutes prohibiting cemeteries from having a financial interest in a funeral establishment were violated).

ii. Rather, the record must establish that the parent corporation had control over the subsidiary corporation. *See Cemetery Servs.*, 221 Wis. 2d at 826.

iii. *Cemetery Services* listed 15 factors, by way of example, that a court may consider in assessing control, as it relates to corporate integrity; however, all factors are not relevant in all cases. *Id.*at 826-27. The court examined whether there was:

> 1) common stock ownership;
> 2) overlapping directors and officers;
> 3) combined use of corporate offices;
> 4) capitalization of the subsidiary by the parent;
> 5) financing of the subsidiary by the parent;
> 6) control of the subsidiary's stock by the parent;
> 7) use of the subsidiary's property by parent;
> 8) inter-corporate loans;
> 9) parental incorporation of the subsidiary;
> 10) consolidated tax returns;
> 11) independent decision making by the subsidiary;
> 12) independent decision making by the directors of the subsidiary;
> 13) observance of formal corporate legal requirements;
> 14) contracts between the subsidiary and parent; and
> 15) fraud or injustice to third-parties.
>
> *Id*. (citations omitted).

b. In alter-ego cases, "Wisconsin courts have focused most directly on the amount of control that one corporation exercises or has the right to exercise over the other; whether both corporations employ independent decision-making; whether corporate formalities were observed; whether the corporations operated as one corporation; and whether observing the corporate separateness would facilitate fraud." *Rasmussen*, 335 Wis. 2d 1, ¶ 37.

i. "Control sufficient to cause a court to disregard separate corporate identities is the *sine qua non* of the alter-ego theory for piercing the corporate veil." *Id*., at ¶ 49.

II. CASES INVOLVING VEIL PIERCING IN THE COVERAGE CONTEXT

A) Third parties may attempt to use veil piercing to get to another person's or entity's insurance policy.

1. ***Minno v. Pro-Fab, Inc.***, 905 N.E.2d 613 (Ohio 2009)

a. **Facts:**

i. Two corporations shared common individual shareholders, but neither owned an interest in the other (sister corporations).

ii. One of the corporations was sued when the plaintiff was injured on a work site.

iii. The plaintiff alleged that the other corporation was also liable because it was the alter ego of the first corporation.

iv. The motivation to hold the second corporation liable was to access its insurance policy; the first corporation did not carry general liability insurance.

b. **Holding:**

i. The court categorically rejected piercing solely based on a corporation's status as a sister entity. *See id.* at 468 ("[W]e hold that a plaintiff cannot pierce the corporate veil of one corporation to reach its sister corporation.").

ii. The court explained that the critical shortcoming of any theory of "sister" corporation veil piercing is the absence of control.

- "In contrast to a shareholder's ownership of a corporation or a parent corporation's ownership of another corporation, the common shareholder ownership of sister corporations does not provide one sister corporation with the inherent ability to exercise control over the other."

- The court noted that "the corporations are separately incorporated and neither corporation has an ownership interest in the other," and

therefore "[u]nder this arrangement of the corporate structures [the corporations] are, for legal purposes, sister corporations, and the doctrine of piercing the corporate veil is therefore inapplicable."

2. ***In re Nahas***, 161 B.R. 927 (Bankr. E.D. Pa. 1993).

   a. **Facts:**

      i. Bankrupt debtors owned property that a shopping center used.

      ii. A corporation ran the shopping center and was the named insured on a fire insurance policy for the property.[2]

      iii. Among other arguments in support of the conclusion that the fire insurance proceeds were part of the bankruptcy estate, the trustee maintained that the court should pierce the corporate veil between the debtors and their corporation.

   b. **Holding:**

      i. The court refused to pierce the corporate veil.

      ii. Corporate formalities were observed, and there was no comingling of business and personal funds.

      iii. Additionally, although the debtors' declarations in the bankruptcy case indicated they held no insurance on the premises, the court found that this was not misleading because the debtors were not the named insureds or intended beneficiaries.

B) Insureds (or those closely related to insureds) may attempt to use piercing to enlarge coverage under their policies.

1. ***Roepke v. Western Nat. Mut. Ins. Co.***, 302 N.W.2d 350 (Minn. 1981).

   a. **Facts:**

      i. The sole shareholder of a corporation was killed in a car accident involving a vehicle owned by the corporation.

      ii. The corporation owned the vehicle involved in the accident and five other vehicles.

      iii. The corporation was the sole named insured on the policy.

[2] Whether the corporation or the individual debtors were the intended beneficiaries of the policy was disputed, but the court ultimately concluded that the corporation was the beneficiary under the policy.

iv. Under Minnesota law, stacking of policies was only allowed for those insurance coverages applicable at a single priority level.

v. Plaintiffs sought to stack the no-fault insurance coverages on the six vehicles, including the one the decedent was operating.

vi. Whether stacking was allowed depended on how the decedent was characterized; if he was covered as an employee of the corporation, then stacking was not allowed; If the decedent was covered as a named insured, then stacking would be allowed.

b. **Facts relevant to piercing:**

i. The decedent was the president and sole shareholder of the corporate named insured.

ii. The decedent used the corporate vehicles as his own for family purposes.

c. **Holding:** Under these extremely weak facts, and possibly influenced by the sympathetic nature of the plaintiffs, the court pierced the corporate veil and held that the decedent shareholder was an insured under the policy.

i. The court noted that the piercing facts, "coupled with the fact that no shareholder or creditor would be adversely affected, persuade us that the purpose of the no-fault act … is best fulfilled by piercing the corporate veil and by holding that decedent was an 'insured' under the corporate policy."

ii. Curiously, the court did not give any consideration to the adverse effect on the insurer, which would be liable for increased coverage.

iii. The court mercifully limited its ruling "to the facts peculiar to this case."

2. ***Mays v. Transamerica Ins. Co.***, 799 P.2d 653 (Or. Ct. App. 1990).

a. **Facts:**

i. This was a pollution case.

ii. An insurer issued a policy to a corporation operating a paint manufacturing business.

iii. Plaintiff was a shareholder in the corporation and owned the property the paint business was operated on.

iv. The federal government entered into a consent decree with the plaintiff concerning toxic waste that had been discharged on the property by the paint manufacturing business.

v. Plaintiff sued the insurance company, arguing the corporate veil should be pierced so that she was an insured under the policy along with the corporation.

b. **Holding:**

i. The court declined to pierce the corporate veil because (1) federal law did not impose any personal liability on the shareholder based on her status as an owner of the polluting corporation and (2) she did not exercise the degree of control over the corporation that "could cause a shareholder to lose the usual limitation of liability."

3. ***Mangum v. Maryland Cas. Co.***, 500 S.E.2d 125 (S.C. Ct. App. 1998).

a. **Facts:**

i. A corporation had six license plates registered under its garage policy, and it was the named insured.

ii. The corporation's two shareholders—a husband and wife—were not named insureds under the garage policy.

iii. One of the shareholders' children was operating a vehicle owned by the corporation and insured under the garage policy and was involved in a fatal accident.

iv. The issue was whether the UIM coverages could be stacked, which depended on whether the shareholders were Class I insureds.

v. In order to qualify as Class I insureds, the shareholders must be either a named insured (they weren't) or own the vehicle involved in the accident (they didn't).

vi. The shareholders argued that as "sole shareholders of the corporation, … they [were] Class I insureds under the corporation's policy because they are, in essence, the corporation."

b. **Holding:**

i. The court rejected the shareholder's "reverse" veil piercing argument.

ii. The court first noted that what was being argued was actually a reverse veil piercing argument.

iii. There was not a lot of analysis, but in the absence of any facts showing abuse of the corporate form, it does not appear that detailed analysis was needed.

C) Insurance companies may attempt to use piercing to apply a policy exclusion.

1. ***McKissick v. Auto-Owners' Ins. Co.***, 429 So. 2d 1030 (Ala. 1983).

a. **Facts:**

i. Insurer issued an auto policy to majority stockholder of a corporation and his wife in their individual capacities.

ii. The policy contained an exclusion for "any employee of the insured arising out of and in the course of his employment by the insured."

iii. An employee of the corporation was injured in a bizarre accident involving that employee and the stockholder.

iv. This was a duty to defend case, and the insurer brought a declaratory action, arguing that the employee-of-the-insured exclusion applied.

v. The insurer's theory would have required the court to pierce the corporate veil and conclude that the employee of the corporation was actually the employee of the stockholder in his individual capacity.

b. **Key facts relevant to the piercing analysis**:

i. The stockholder was the president of the corporation.

ii. The stockholder owned 98% of the stock.

iii. The stockholder admitted to controlling the daily operation of the business.

iv. No minutes of any shareholders' or directors' meetings appeared in the record.

v. The was no evidence of comingling of personal and corporate funds.

c. **Holding**:

i. Under these facts, the court rejected the insurer's attempt to pierce the corporate veil.

ii. However, the court left the door open for this sort of piercing argument to be raised in the future: "We do not hold, however, that an insurance company would in all cases be prevented from showing that an employee of a corporation was, in fact, an employee of an individual, but to so hold would require sufficient proof that the corporation was a mere sham."

2. ***Mid-Century Ins. Co. v. Gardner***, 11 Cal. Rptr. 2d 918 (Cal. Ct. App. 1992).

a. **Facts:**

i. A shareholder was involved in an accident with an uninsured driver.

ii. At the time of the accident, the shareholder was driving a vehicle owned by the corporation.

iii. The insurance company issued policy to shareholder, who was the named insured.

iv. The insurance company sought a declaration that it owed no benefits under its policy, arguing that an exclusion applied.

v. However, the exclusion applied only to vehicles owned by the shareholder or a family member.

vi. Among other arguments, the insurance company maintained that the court should pierce the corporate veil and deem the corporate vehicle as belonging to the shareholder such that the exclusion applied.

b. **Key facts relevant to piercing:**

i. The shareholder and his wife owned all the stock.

ii. The shareholder was the manager and controlled the operations of the corporation.

iii. The shareholder received a salary, which varied based on his living needs.

iv. There was no change in the day-to-day operations of the company after incorporation.

v. The vehicle registration was listed in the shareholder's name, but this was done by the dealership.

c. **Holding:**

i. The appellate court reversed the trial court's conclusion that the shareholder owned the vehicle involved in the accident and declined to pierce the corporate veil.

ii. The court noted that there was no evidence that the shareholder "generally treated corporate assets as his own or disregarded the separate nature of the business."

iii. The court explained that "[a]bout the only factor to which the [insurance company] can point is [the shareholder's] domination of ownership and control," but "this factor is not significant in isolation."

iv. The court further observed that "[t]here is no evidence [the shareholder] manipulated the insurers to the nefarious end of evading the [insurance company]'s contractual exclusion of coverage on other owne-but-not-insured-with-it vehicles."

3. ***Hennings v. State Farm Fire and Cas. Co.***, 438 N.W.2d 680 (Minn. Ct. App. 1989).

a. **Facts:**

i. An insurance company issued a homeowner's policy to an individual.

ii. The individual was involved in a boating accident while occupying a boat owned by a corporation the individual had a 50 % interest in.

iii. The insurance company attempted to take advantage of a policy exclusion for watercraft owned or rented by the insured by piercing the corporate veil and treating the corporation's boat as being owned by the individual.

b. **Holding:**

i. The court rejected the insurer's attempt to pierce the veil because the individual only owned 50 % of the stock; the corporation was not the individual's alter ego because control was absent.

ii. As other courts have done, the ***Hennings*** court did not foreclose an insurance company from using the alter ego doctrine to apply a policy exclusion that would otherwise be inapplicable.

4. ***Minnesota Bond Ltd. v. St. Paul Mercury Ins. Co.***, 695 P.2d 579 (Or. Ct. App. 1985) *reversed on other grounds by* 706 P.2d 942.[3]

    a. **Facts:**

        i. A corporation operated four businesses at a single location and obtained fire insurance on the premises.

        ii. The corporation was the named insured.

        iii. A 50% shareholder maliciously set fire to the premises.

        iv. The other shareholder did not participate in, or in any way ratify the wrongful acts of the arsonist.

        v. The insurance company argued that the actions of the arsonist should be imputed to the corporation and bar recovery.

    b. **Holding:**

        i. The court held that the corporation could recovery under the policy because it did not participate in the arson, and the court declined to pierce the corporate veil.

        ii. The court explained "if an officer or shareholder exercises *absolute control* in the conduct of the corporation's business, his actions are imputed to the corporation in the same way that the actions of one partner or coinsured are imputed to another partner or coinsured."

        iii. "Without evidence that the other stockholders acquiesced in the arsonist's conduct, the corporation is innocent of wrongdoing and should be allowed to recover for its loss."

    c. **Dissent:**

        i. The dissent would have pierced the corporate veil and precluded recovery.

        ii. The dissent opined that corporate formalities were not observed, there were no bylaws, no stock was issued, the board of director's never had

[3] The Supreme Court of Oregon bypassed the question of whether "a corporation can be barred from recovery of insurance benefits when a 50 percent shareholder-officer intentionally destroys corporate property by fire" and concluded an exclusion in the policy applied. *Minnesota Bond Ltd. v. St. Paul Mercury Ins. Co.*, 706 P.2d 942, 943 (Or. 1985).

a formal meeting, and the businesses owned by the corporation were managed separately as if the parent corporation did not exist.

iii. The dissent further insisted that the two owners comingled personal and corporate funds.

iv. Overall, the dissent's analysis looked more like a traditional piercing analysis, while the majority focused on the relative innocence of the other shareholder.

D) Parties attempting to use piercing to have a third party treated as the named insured.

1. ***Allstate Ins. Co. v. Citizens Ins. Co.***, 325 N.W.2d 505 (Mich. Ct. App. 1982)

a. **Facts:**

i. The plaintiff insurer issued a no-fault insurance policy to a corporation with a single shareholder.

ii. The corporation owned three automobiles that were used by the sole shareholder and his family, who didn't own any personal cars.

iii. The policy provided coverage to the shareholder, the shareholder's spouse, and the shareholder's relatives domiciled in the same house while occupying a *corporate* car.

iv. The shareholder's son was injured while a passenger in a vehicle owned by a third party.

v. The third-party vehicle was insured by the defendant insurer.

vi. The plaintiff insurer paid the son's medical expenses and sued the defendant insurer as an equitable subrogee.

vii. The defendant insurer argued that the shareholder should be regarded "as the insured person," not the corporation, which would expand coverage under the plaintiff insurer's policy.

b. **Holding:** The court declined to pierce the corporate veil, and it held that the plaintiff insurer's policy did not cover the accident.

i. The court noted that the corporate veil should not be pierced absent fraud, illegality, or injustice, and there were no such allegations made.

ii. The court also noted that the corporation and its shareholder were not even parties to the action between the insurers "so even had they been involved in some illegality, equity would not be served by piercing the corporate veil in this case."

iii. Important in the coverage context, the court explained that the plaintiff insurer "undertook a limited risk" by agreeing to provide coverage to corporate employees and their families if they were injured "*while occupying a corporate car*."

iv. The court concluded that if it were to "rewrite the policy in this case so that it provides blanket no-fault coverage to those individuals while in *any* car, we would be greatly expanding the zone of risk." (Emphasis added.)

v. In other words, the court appeared to be reluctant to expand coverage *even if the sole shareholder engaged in conduct that would justify piercing the corporate veil as to the shareholder*.

2. ***Auto Club Ins. Ass'n v. Michigan Mut. Ins. Co.***, 494 N.W.2d 822 (Mich. Ct. App. 1992).

a. Applied its previous holding in ***Allstate*** to a slightly different set of facts.

b. **Facts:**

i. This was a priority dispute between insurers.

ii. An employee of a corporation was injured while refueling a vehicle the corporation owned during the course of his employment.

iii. The plaintiff insurance company insured a vehicle owned by the employees wife, while the defendant insurance company insured the company vehicle.

iv. The plaintiff insurer paid the employee no fault benefits and then filed suit against the defendant insurer, arguing that the corporation's policy covered the accident.

v. Because the employee was not "occupying" the company vehicle at the time of the accident—he was refueling the vehicle when the gasoline fumes caught fire—he was not insured under the corporation's no-fault policy with the defendant.

vi. The plaintiff insurer argued in the alternative that the court should pierce the corporate veil and find that the employee was a "named person" in the corporation's policy.

c. **Holding:** The court held that veil piercing was unavailable to make the employee a named insured.

i. "[I]n this case there has been no allegation of any fraud, illegality, or injustice by any member of the corporation, nor is the corporation a party to this action."

ii. Accordingly, per ***Allstate***, veil piercing was unavailable.

iii. Beyond this, the court offered little explanation, but it does perhaps indicate a reluctance to hold insurers liable merely because the corporate veil has been pierced.

E) Some cases categorically reject piercing as a means of enlarging insurance coverage in certain circumstances.

1. ***Estate of Cartledge v. Columbia Cas. Co.***, 2011WL5884255 (E.D. Cal. 2011).

a. **Facts:**

i. This case involved two corporations doing business under a shared fictitious name.

ii. The plaintiff sued the first corporation, and then argued that the second corporation's policy should cover the judgment against the first.

iii. Among other arguments, the plaintiff insisted that the court should disregard the corporate forms of the two corporations, which would render the first corporation an insured under the second corporation's policy.

iv. One individual was the CEO of both corporations

b. **Holding:**

i. Court rejected the piercing argument because the complaint was "devoid of factual allegations that would be necessary to support" a piercing argument.

ii. These facts are obviously deficient.

iii. Moreover, citing California law, the court stated that "in the absence of inequitable conduct *on the part of the insurer*, parties may not use the alter ego doctrine to re-write an insurance policy to add insureds." (Emphasis added.)

iv. Veil piercing cannot "be used to increase an insurer's contractual obligations under an insurance contract with a corporation."

v. Because the insurer did not play "any role in any abuse of corporate privileges [the individual] 'may' have engaged in," the court held that the policy offered no coverage.

2. ***United States Fire Ins. Co. v. National Union Fire Ins. Co.***, 165 Cal. Rptr. 726 (Cal. Ct. App. 1980).

a. **Facts:**

i. The facts and insurance policies were quite complicated, so what follows is an extraordinarily simplified version of the facts.

ii. This case involved a coverage dispute between two insurers about an airplane accident.

iii. Both companies insured the same corporation, but only the plaintiff insurance company insured the pilot—a shareholder in the corporation—in his individual capacity.

iv. The differences in the insureds resulted in different priority between the insurers.

v. The plaintiff who insured the pilot/shareholder would have to pay out first, while the defendant company insuring only the corporation—which was only vicariously liable—was only secondarily liable.

vi. The primary insurance company argued that the corporation was merely the alter ego of the pilot, and therefore the pilot was an insured under the defendant insurer's policy.

b. **Holding:**

i. The court held that the pilot was not an insured under the defendant's policy, even if the pilot/shareholder failed to maintain the corporation as a separate entity.

ii. The court found it "unnecessary to resolve" whether the first element of piercing the corporate veil—the absence of corporate separateness—was met.

iii. The court held that even if the corporation "failed to achieve any separate existence, no fraud or other inequitable result will follow."

iv. The court remarked that "[t]he alter ego doctrine is applied to avoid inequitable results not to eliminate the consequences of corporate operations," and the doctrine "may not be applied so as to prejudice the rights of an innocent third party who has dealt with the corporation as such."

v. Critically, the court held that "the fraud or inequity, the elimination of which legitimately invokes the doctrine [of alter ego], must be that of the party against whom the doctrine is invoked," and that party must have had something to do with the abuse of corporate privilege.

vi. The defendant insurance company had nothing to do with the formation or operation of the corporation, and therefore could not have its liability expanded under alter ego principles.

vii. Moreover, the defendant insurance policy *specifically* excluded the pilot/shareholder.

3. ***Cherry v. State Farm Mut. Auto Ins. Co.***, 590 S.E.2d 925 (N.C. Ct. App. 2004).

a. **Facts:**

i. The estate of a person killed in an auto accident sued the insurer of a corporation—the corporation was owned and operated by one of the people involved in the accident—arguing that commercial policy covered the accident.

ii. The policy provided coverage for accidents arising out of the ownership, maintenance, or use of an automobile owned by the named insured—the corporation.

iii. The vehicle involved was not owned by the insured corporation.

iv. The plaintiff asked the court to pierce the corporate veil of the corporation and construe the policy as providing coverage to the owner of the corporation as an insured.

b. **Holding:** The court flatly refused to invoke piercing to allow the plaintiff to recover under the corporate policy.

i. The court observed that "Plaintiffs have *not asserted* [the shareholder] has dominated or controlled" the corporation "for the purpose of imposing the legal liability of [the corporation's] obligations on [the shareholder] and thereby reach" the shareholder's assets.

ii. Instead, the plaintiffs were asking to court to disregard the corporate separateness of the shareholder and the corporation *for the purpose of reaching the corporate policy*, which was improper.

iii. "Granting plaintiffs' request would be tantamount to rewriting the terms of the subject policy by requiring [the insurer] to cover someone other than the named insured."

F) Policy language may establish coverage for an insured's liability as an alter ego, regardless of the jurisdiction's piercing rules as applied to insurers.

1. ***Certain Underwriters at Lloyd's, London v. Nance***, 506 F. Supp. 2d 700 (D.N.M. 2007).

a. **Facts:**

i. The case involved two corporations, one in New York and the other in New Mexico.

ii. Underwriters issued an indemnity agreement to the New York corporation, which was listed as the "Assured."

iii. The New Mexico corporation was not listed as an "Assured."

iv. The agreement provided that Underwriters would indemnify the New York corporation for all sums it became legally obligated to pay as a result of its own actions OR "by any person for whose negligent acts, errors or omissions the Assured is legally responsible."

v. The procedural facts are quite complicated, but relevant here, a third party obtained a default judgment against the New Mexico corporation and sought coverage under the Underwriters indemnity agreement with the New York corporation.

vi. In a separate suit, Underwriters sought a declaration that it had no obligation to indemnify.

vii. One of the central issues was whether the New Mexico corporation was the alter ego of the New York corporation, and what effect that conclusion had on Underwriters' duty to indemnify.

b. **Holding:** (1) the alter ego doctrine cannot create additional coverage for persons not covered by the policy and (2) assuming the New Mexico corporation was the alter ego of the New York corporation, the "legally responsible" language gave rise to a duty to indemnify the New York corporation.

i. The court assumed that the alter ego doctrine applied.

ii. The court rejected the theory that the alter ego doctrine meant that the New Mexico corporation was transformed into an Assured under the indemnity agreement.

- The court specifically noted that under New Mexico law, the party being assigned liability under an alter ego theory must "be morally culpable."

- In the absence of any culpability on the party of Underwriters, the court declined to rewrite the agreement to cover the New Mexico corporation.

iii. Although it rejected the proposition that the alter ego doctrine could expand Underwriters' indemnity obligations, the court concluded that Underwriters may be liable for the default judgment against the New Mexico corporation under the language of the agreement.

- The court noted that the third party who obtained a default judgment against the New Mexico corporation could hold the New York corporation "liable in this action, if at all, only under a theory that [the New York corporation] was an alter ego of [the New Mexico corporation]."

- If the third party was successful in pursuing the New York corporation under an alter ego theory, then the New York corporation would be "legally responsible" for the default judgment, and the Underwriters agreement would grant indemnity.

iv. **This case has two important implications:**

(1) Alter ego, which is based on equity, cannot enlarge an insurer's obligations absent some inequitable conduct attributable to that insurer.

(2) Even though alter ego cannot enlarge coverage obligations, to the extent an insurance policy provides coverage for all damages that

the insured is legally responsible to pay, the insurer may be on the hook for damages *its insured* incurs under an alter ego theory.

G) Policy exclusions for fraud and intentional conduct may preclude coverage in certain veil-piercing scenarios.

1. ***Thrift Fed. Sav. & Loan Ass'n v. Overton***, 563 N.E.2d 289 (Ohio 1990).

   a. **Facts:**

      i. An insurer agreed to cover losses caused by the fraudulent or dishonest acts of the *employees* of an escrow company.

      ii. However, the policy excluded losses caused by the fraudulent or dishonest acts of the insured escrow company.

      iii. The owner/operator of the escrow company embezzled escrow funds, which resulted in a judgment against the escrow company.

      iv. A judgment creditor of the escrow company sought coverage under the escrow company's policy.

      v. The insurer responded that the fraud exclusion applied because the escrow company was the alter ego of the owner/operator who engaged in the fraudulent conduct.

   b. **Holding:**

      i. The supreme court accepted the appellate court's conclusion that the escrow company was the alter ego of the owner/operator.

         - The judgment creditor had "admitted that, for all practical purpose" that the individual and the escrow company were the same.

         - The supreme court held the judgment creditor to this apparent concession.

      ii. Given that the escrow company was the alter ego of the owner/operator who had engaged in the embezzlement, the fraud exclusion in the policy applied.

H) Special policy considerations may influence whether a court disregards the corporation form for insurance purposes.

1. ***Miller v. Harco Nat. Ins. Co.***, 552 S.E.2d 848 (Ga. 2001).

   a. **Facts:**

      i. A plaintiff involved in a car accident obtained a default judgment against a corporation.

      ii. The plaintiff sought to enforce the judgment in federal court in another state against the corporation, its sole shareholder, and the shareholder d/b/a as a sole proprietorship.

      iii. The defendant insurance company insured only the sole proprietorship.

      iv. Ultimately, the sole shareholder was found liable for the judgement against the corporation under the doctrine of alter ego.

      v. The federal court certified several questions to the Georgia Supreme Court including (1) whether there was a distinction between a suit against an individual doing business as a corporate entity and a suit against the corporation and (2) where the individual insured is found liable on a theory of piercing the corporate veil, whether the insurer is liable even if no independent coverage exists.

   b. **Facts relevant to veil piercing:** the federal court had already determined that the sole shareholder was liable under the alter ego doctrine.

   c. The case addressed veil piercing in the context of motor carrier insurance.

      i. Motor carrier insurance was more broadly construed than ordinary motor vehicle coverage.

      ii. Georgia construes motor carrier coverage as a "surety bond which creates liability in the insurer *regardless of the insured's breach of the conditions of the policy***.**" (Emphasis added.)

      iii. The insurer stands in the shoes of the motor carrier and is *liable in any instance* of negligence where the motor carrier is liable.

   d. **Holding:**

      i. The Georgia Supreme Court affirmed that there is a distinction between a suit against an individual and that individual's corporation.

ii. "If an insurer contracts to provide insurance coverage to a sole proprietor, the courts cannot enlarge the contract to include as a named insured the wholly distinct legal entity of a corporation, even if the sole proprietor owns a majority of the stock thereof."

iii. "Because corporations and their shareholders are separate and distinct entities, insurance coverage for final judgments against the latter cannot ordinarily be enlarged to include final judgments against the former"

iv. Despite the general rule of corporate separateness, in the context of motor carrier coverage—with its broader obligations—the court found that alter ego liability was sufficient to create coverage for the corporation.

- "[I]t is not appropriate to apply this limitation [the corporate veil] in the rare case where the corporation is not a separate entity, but rather is an alter ego of its controlling stockholder, *at least where the business involved is a motor carrier*." (Emphasis added.)

- The latter part of the statement indicates that this reasoning was primarily applicable in the motor carrier insurance context where an insurer might be liable outside the terms of its policy.

- However, some of the court's statements indicated a broader acceptance of creating insurance coverage with the alter ego doctrine. *See e.g., id.* ("By definition, two entities are not legally distinct when they are alter egos.").

Given the publication deadline, the information contained in this outline is current as of December 2, 2019. The outline should not be relied upon as an exhaustive list of all cases reported on the topics listed. The author recognizes the significant contributions of James Sosnoski, an associate with the firm, who assisted in the preparation of the outline.