University of Illinois Law Review

1996

1996 U. Ill. L. Rev. 1059

LENGTH: 35434 words

ARTICLE: THE INTERSECTION OF STATE CORPORATION LAW AND EMPLOYEE COMPENSATION PROGRAMS: IS IT CURTAINS FOR VEIL PIERCING?

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LEXISNEXIS SUMMARY:
... In this article, Professors Muir and Schipani address a unique problem that may arise from the intersection of the doctrine of limited liability for corporate shareholders and the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute that regulates privately sponsored retirement benefits programs. ... With some variation among the states, the factors state courts consider in deciding whether to pierce a corporate veil to override shareholders' limited liability include: (1) whether the corporation was used as the alter ego of the shareholder, (2) whether the corporation was inadequately capitalized, and (3) whether the corporation was organized to perpetrate a fraud or wrong. ... As in cases concerning the CERCLA liability of individual shareholders, courts considering whether the parent corporation may be held liable for the subsidiary's action frame the issue as involving either direct liability under the statute or veil piercing theory. ... However, more detailed consideration of the considerable body of preemption jurisprudence indicates that ERISA preemption should not result in automatic nullification of state-law claims to pierce the corporate veil that are brought in conjunction with a claim for a substantive violation of Title I of ERISA. ... In the same way that state partnership law would hold partners personally liable for unmade benefit plan obligations as an obligation of the partnership, so too would a claim to pierce the corporate veil hold a shareholder responsible, in appropriate circumstances, for unmade benefit plan obligations or judgments flowing from substantive ERISA violations. ...

TEXT:
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As the oldest members of the baby boom generation enter their fifties and begin thinking seriously about retirement, legal issues relating to the security of retirement income are likely to grow in number and importance. In this article, Professors Muir and Schipani address a unique problem that may arise from the intersection of the doctrine of limited liability for corporate shareholders and the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute that regulates privately sponsored retirement benefits programs. Under some circumstances, limited liability may have the effect of shielding culpable shareholders of closely held corporations from liability for ERISA violations. Plan participants may then have to resort to the primarily state-law doctrine of "piercing the corporate veil" in order to recoup their damages. However, ERISA contains a sweeping preemption clause which may prevent aggrieved plan participants from resorting to state-law doctrine. Whether and to what extent ERISA's preemption clause has this effect on corporate veil piercing is the focus of this article.

Professors Muir and Schipani begin with an overview of both ERISA and the doctrine of corporate veil piercing in the state-law context. The authors then explain the various ways in which veil piercing may be applied in federal law contexts, particularly with respect to ERISA. The question of whether ERISA's preemption clause prevents use of veil piercing in ERISA cases is then considered in light of the recent U.S. Supreme Court decision in Peacock v. Thomas, which at first glance **[*1060]** seems to stand for this proposition. Professors Muir and Schipani conclude, however, that allowing veil piercing under certain circumstances is not only permissible under ERISA, but consistent with the goals of the preemption clause.

I. Introduction

The limited liability of corporate shareholders n1 is well established in the law. n2 The rise of new forms of business entities, such as limited liability companies n3 and limited liability partnerships, n4 confirms both **[*1061]** the importance and the general acceptance of limited liability in attracting capital. n5 However, if granted without exception, limited liability could lead to abuse of the corporate form at the expense of individuals and entities, such as employees, creditors, and injured consumers, who look to corporations to satisfy contractual obligations or tort claims. In order to avoid such abuses, corporate law jurisprudence has developed an exception to the general principle of limited liability that has become known as the doctrine of "piercing the corporate veil." n6 This doctrine enables a claimant to reach through the cur- **[*1062]** tain of protection typically accorded to corporate shareholders and to hold shareholders personally liable for the acts of the corporation. n7

Operating on a seemingly separate plane, the Employee Retirement Income Security Act of 1974 n8 (ERISA) established sweeping federal regulation of privately sponsored noncash and deferred compensation programs. n9 The statutory scheme is extensive in its application, n10 and the U.S. Supreme Court itself has recognized ERISA's "comprehensive and reticulated" n11 nature. Given the scope of this regulation and the tremendous increase in asset values held by employee benefit programs, n12 it should not be surprising that the courts have been troubled by ERISA's relationship to a myriad of other federal and state laws. n13 And, as evidenced by the U.S. Supreme Court's **[*1063]** 1996 decision in Peacock v. Thomas, n14 the intersection of ERISA with the corporate law doctrine of veil piercing is one area of critical import to benefit plan sponsors, as well as to plan participants and beneficiaries. n15

Although corporate law jurisprudence has uniformly accepted the concept of piercing the corporate veil, n16 the doctrine has eluded attempts to reduce it to a single formula. n17 In addition to the issues that arise from the ephemeral nature of a piercing claim, the notion of applying the doctrine of piercing the corporate veil in the context of ERISA raises special concerns for shareholders of corporations that sponsor employee benefit plans. Because it broadly defines the term "employer," n18 sets forth a functional definition of who constitutes an ERISA fiduciary, n19 and, in certain situations, permits liability to be extended to companies under common control, n20 ERISA already provides numerous opportunities for claimants to recover from entities or individuals other than their direct employers.

Adding the specter of personal liability as a result of a piercing claim to this array of provisions would further extend ERISA's reach. The extraordinary monetary amounts which can be at stake in an ER- **[*1064]** ISA action n21 only increase the risk to shareholders. And, given the voluntary nature of the sponsorship of employee benefit programs, n22 an unreasonable extension of personal liability could affect the willingness of private employers to maintain noncash and deferred compensation programs for their employees.

However, from the perspective of employees, of collective bargaining representatives, and even of competing companies, piercing the corporate veil may be the only way in some instances to ensure that a corporation honors its benefit promises. In this context, piercing the corporate veil seems consistent with ERISA's stated goal of protecting "the interests of participants in employee benefit plans and their beneficiaries." n23 And, where a shareholder causes a corporation to act purposively to avoid benefit obligations or to circumvent a court judgment in favor of ERISA claimants, the case for holding the shareholder accountable becomes even stronger. n24

This article analyzes the application of the corporate law doctrine of piercing the corporate veil in a suit brought under Title I n25 of ERISA. To provide a foundation for the specific analysis that follows, part II begins with a brief explanation of the structure and scope of ERISA. Part II also undertakes a detailed analysis of the court decisions that culminated in the Supreme Court's opinion in Peacock v. Thomas. n26 Part III examines the doctrine of piercing the corporate veil in its best-known context - state corporation law. It also evaluates the manner in which the doctrine has been applied in the context of federal regulatory law outside the arenas of employment and collective bargaining. Part IV then considers these constructs in the framework of federal employment law. It analyzes the plenitude of non-Peacock contexts where a party to an ERISA case might seek to pierce a corporate veil or otherwise to extend liability beyond the nominally liable party. It also looks at personal liability, including the application of the doctrine of piercing the corporate veil, in the context of other federal employment and collective bargaining statutes.

Part V considers whether current ERISA jurisprudence precludes application of the doctrine of piercing the corporate veil in cases brought to enforce rights under Title I of ERISA. ERISA contains the most expansive preemption clause of any federal statute. n27 The **[*1065]** authors conclude, however, that the existing preemption doctrine does not preclude a claim for piercing the corporate veil in an appropriate case. Furthermore, the authors argue that permitting use of state-law piercing doctrine in ERISA enforcement actions is consistent with ERISA's goal of protecting benefit plans from the inconsistencies of state law. Thus, preemption is not necessary to prevent inconsistent regulation.

II. The Scope of Personal Liability in Privately Sponsored BenefitPrograms

A. History and Structure of Benefit ProgramRegulation

Direct federal regulation of employee benefit plans can be traced to at least 1914, when the Treasury Department confirmed the right of employers to deduct, as compensation, the cost of pension payments. n28 Subsequent enactments limited discrimination in the provision of benefits, n29 mandated disclosure of certain plan features and investments, n30 and prevented the diversion of contributions made to pension plans for unionized employees. n31 However, it was not until ERISA's enactment that a single piece of comprehensive legislation attempted to regulate private employee benefit plans. n32

1. The Extent of Federal Regulation

ERISA regulates both pension plans and welfare benefit plans. In ERISA parlance, a pension plan is any program which defers income at least until the termination of employment and most typically is designed to provide individuals with income upon retirement. n33 In contrast, a welfare benefit plan under ERISA is any "plan, fund, or program" n34 that provides certain other types of benefits, including health benefits.

Most of the nontax regulation affecting the establishment and operation of an employee benefit plan can be found in Title I of ERISA. There, detailed provisions impose a variety of reporting and disclosure requirements in favor of the federal government and of plan participants and beneficiaries. n35 Title I also sets forth minimum participation and vesting levels, n36 and governs plan funding. n37 Although informed **[*1066]** by traditional trust law, n38 ERISA contains a specialized definition of who is a fiduciary for its purposes, n39 establishes fiduciary standards, n40 and prohibits transactions between and among parties-in-interest. n41

In addition, Title I provides for administration and enforcement of its requirements. n42 The remedial scheme is set out at ERISA Section 502. n43 Section 502 sets forth a detailed listing of categories of relief and plaintiffs eligible to bring federal claims under ERISA. n44 Potential plaintiffs include not just plan participants, n45 but also employers, n46 the Secretary of Labor, n47 and even states. n48 Finally, Title I of ERISA contains an explicit preemption clause n49 that one eminent commentator has described as the "most expansive preemption clause found in any federal statute." n50 That preemption clause, found in ERISA Section 514, provides: "The provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ...." n51 ERISA defines state law broadly to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." n52 And, the courts **[*1067]** have taken a broad view of what constitutes an employee benefit plan. n53

Congress did include some statutory exceptions to this generally broad preemption provision. In general applications, n54 the most important of these exceptions is found in the "savings clause," n55 which prevents ERISA preemption of state-law regulation of insurance, banking, and securities. n56 In turn, the "deemer clause" n57 limits the savings clause by providing that employee benefit plans and trusts shall not be deemed to be institutions that would be regulated by state insurance, banking, or securities laws. n58

At the time of ERISA's enactment, Title II n59 set forth amendments to the Internal Revenue Code (IRC). n60 The tax regulation has grown over time, and many of the tax provisions substantially parallel provisions of Title I. n61 Compliance with the tax provisions is necessary in order to achieve tax-favored status for any employee benefit plan. n62 Title III n63 designated agency authority at the time of ERISA's enactment. n64

Title IV n65 governs the termination of pension plans, created the Pension Benefit Guaranty Corporation (PBGC), and outlines the PBGC insurance program. In addition, one section of Title IV is devoted to specialized regulatory provisions for plans cosponsored by labor unions and employers. n66 Such jointly sponsored plans are known as "multiemployer plans" and require separate regulation because of unique incentives and disincentives associated with funding and participation in these plans. n67 Most of these requirements were **[*1068]** introduced into ERISA through the Multiemployer Pension Plans Amendments Act of 1980 (MPPAA). n68

There are, however, some limitations to all of this regulation. ERISA applies only to private employee benefit plans. Church plans and governmental plans, for example, are exempt from most of ERISA. n69 Plans for a small group of an employer's top executives, known as "top hat plans," receive an exemption from much of ERISA. n70 This exemption extends to the reporting and disclosure requirements so long as the plan files a simple statement soon after its inception. n71

2. The Regulators

The Department of Labor (DOL), the Internal Revenue Service (IRS), and the PBGC share responsibility for the administration and enforcement of ERISA. n72 The statute itself contributes to some of the interpretative and enforcement problems that this tripartite division of labor creates, because the same or similar regulatory requirements often occur under both the labor title, Title I, and in the IRC provisions, originally Title II. n73

The DOL has primary authority over the regulation found in Title I of ERISA. This includes interpretive authority over the reporting and disclosure requirements, as well as over the fiduciary and prohibited transactions provisions of ERISA. n74 The DOL has the authority to bring civil enforcement actions for most violations of Title I, including fiduciary and reporting infractions. n75 **[*1069]**

The PBGC regulates the termination of pension plans n76 and oversees the federal insurance program, n77 which applies to the benefits of defined benefit pension plans. n78 During its 1995 fiscal year, the PBGC paid approximately $ 763 million in retirement benefits to individuals whose pension plans were unable to make promised payments. n79 The PBGC also monitors pension plan underfunding and works with employers to increase the funding security of their plans. n80 In addition, the PBGC bears responsibility for administration of the MPPAA. n81

The IRS is charged with ensuring that plans comply with the complex legislative and administrative provisions governing eligibility for favorable federal tax treatment. n82 The role of the IRS in issues governing disclosure and plan administration appears to be increasing as Congress looks more and more frequently to employee benefit plans as sources of revenue to support unrelated programs. For example, in 1992 Congress imposed new regulations on distributions from qualified employee benefit plans n83 to pay for additional unemployment insurance benefits. n84

3. Benefit Program Sponsorship

As the baby boom generation approaches what has traditionally been retirement age, the financial security of retirement programs in this country has begun to receive increased attention. The positions of **[*1070]** commentators on this issue range from calls for increased study of pension issues n85 to declarations that the sky is falling. n86 What can be stated for certain is that the types of pension plans being sponsored by private employers are changing and that millions of Americans currently do not participate in any formal retirement plan.

In 1975, the year after the enactment of ERISA, the vast majority of workers covered by privately sponsored pension plans were covered by defined benefit pension plans. n87 Studies of various time periods beginning in the late 1970s and continuing through the mid- to late-1980s indicate that employers began to shift their sponsorship from defined benefit to defined contribution plans. n88 This shift continued through 1990, the most recent date for which detailed analysis is available. n89 Still, the 1995 Annual Report of the PBGC estimated that about thirty-three million workers participated in single-employer, defined benefit pension plans. n90

The reasons for the changes in plan sponsorship are the subject of considerable disagreement among researchers. n91 However, there seems to be general agreement that ERISA's regulation of employee benefit plans in general, and defined benefit plans in particular, has contributed to this phenomenon. n92 As an example of the costs of regulation, one recent study concluded that for every fourteen hundred dollars an employer spends to fund defined benefit plan benefits, the employer will incur eight hundred dollars in administrative costs. n93

Particularly strong advocates of the theory that federal regulation has affected plan sponsorship include Professors Robert Clark and Ann McDermed who have performed detailed empirical studies on employer sponsorship of qualified benefit plans. Their studies indicate that regulatory changes constitute the primary cause of the increase in employer preference during recent years for defined **[*1071]** contribution over defined benefit plans. n94 In addition, new data show that structural changes in the economy do not account for the shift in employer preferences. n95

B. Legislative History

Although ERISA comprehensively regulates privately sponsored employee benefit plans, the legislation leaves in place the voluntary nature of employee benefit plan sponsorship. No federal legislation, including ERISA, requires an employer to sponsor a pension or health care program for its employees. And, if an employer chooses to sponsor a benefit plan, ERISA guarantees the employer the right to modify or terminate the benefit plan at almost any time. n96

ERISA's legislative history supports this concept of voluntary and flexible employer-sponsored benefit plans. Legislative hearings on pension plans disclosed numerous stories of destitute workers and spurred the development of ERISA. n97 Yet, floor debate during the consideration of ERISA emphasized the need to balance protections for plan participants with the goals of encouraging employers voluntarily to sponsor benefit plans. For example, Congressman Ullman, Chairman of the Ways and Means Committee, argued:

Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy. However, since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. n98 **[*1072]**

In a similar vein, other comments during the legislative process acknowledged that, to the extent government regulation increased benefit plan costs, the result would be to encourage termination of existing plans and discourage formation of new plans. n99 And, the 1974 Committee Report summarized the issue by stating: "The primary purpose of [ERISA] is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system." n100

In contrast to the generally extensive nature of the legislative history underlying much of ERISA, n101 the record is more sparse regarding the statute's preemption provision. The language of that provision came from the Conference Committee and matched neither the House nor Senate bills. n102 The record is devoid of any challenges to the revised language; however, statements made by Senator Javits, one of the sponsors of ERISA, give some indication of the goals undergirding the revised language. Some concern had developed that the House version, which limited preemption to specified areas regulated by ERISA, might result in "endless litigation over the validity of State action." n103 Furthermore, there was a fear that the lack of a broad preemption clause would "open[] the door to multiple and potentially conflicting state laws." n104 The latter fear had some basis in fact, because the states, perhaps having become impatient with the many years of congressional debate that preceded ERISA's enact- **[*1073]** ment, n105 were beginning to pass piecemeal legislation regulating employee benefit plans. n106

Even at the time, though, there was some anxiety that the preemption provision would not appropriately balance state and federal interests. Accordingly, the Conference Committee called for the Congressional Pension Task Force to analyze the effect of ERISA preemption, n107 and plans for the Task Force were incorporated in the legislation. n108 However, no such analysis was ever undertaken for the simple reason that Congress failed to establish a task force. n109 As a result, although relatively minor exemptions have been added over the years, n110 the basic language of ERISA's preemption provision remains unchanged from the version enacted in 1974.

C. Peacock v. Thomas

The genesis of the litigation which culminated in the Supreme Court's recent decision in Peacock v. Thomas n111 can be traced to a commitment made by Tru-Tech, Inc. to its employees in late 1981. n112 After Tru-Tech purchased part of Rockwell International's Draper Division, n113 Tru-Tech promised salaried employees a pension plan similar to the one they had at Rockwell. n114 Tru-Tech hoped to use the pension plan as an inducement to encourage the employees to remain employed at Tru-Tech after the acquisition. n115 However, after announcing the pension plan and making initial contributions, Tru-Tech later ran into severe financial difficulties. n116 In order to recoup the moneys it had contributed to the pension plan, Tru-Tech attempted to negate a plan amendment, which arguably had been adopted in order **[*1074]** to comply with IRS qualification requirements. n117 A plan clause permitted the plan to be rescinded if it did not receive a favorable qualification determination. n118 Taking advantage of this clause, Tru-Tech rescinded the plan and received a refund of its contributions. n119

A class of former salaried employees sued Tru-Tech after being notified in 1985 that the promised pension plan had failed to meet the IRS's requirements for qualification and the plan would not pay them any benefits. n120 The district court decided that Tru-Tech had breached its fiduciary duty to the plan participants and awarded them their expected plan benefits together with interest. n121 The plaintiffs received an award of $ 217,628.93, plus attorney's fees, against Tru-Tech. n122 The court did not explicate the precise nature of Tru-Tech's breach of fiduciary duty; however, the corporation's rescission of the vesting amendment in order to recover plan contributions for its own benefit may have breached ERISA's exclusive benefit rule. n123 The plaintiff class also named as a defendant D. Grant Peacock, the chairman of Tru-Tech's board of directors. n124 Applying ERISA's definitions, the district court found him not to be a fiduciary for purposes related to contributions or the amendment, and thus, the court determined he had no liability to the plaintiffs. n125

The plaintiff class appealed the portion of the decision finding no fiduciary status and, thus, no personal liability for Peacock. n126 In a relatively brief and unpublished decision, the Fourth Circuit Court of Appeals affirmed the lower court's decision. n127 However, in 1992 the plaintiffs had to return to court to seek a judgment against D. Grant **[*1075]** Peacock because Tru-Tech had dissolved without ever paying the outstanding judgment in favor of the plaintiffs. n128

Although some inconsistencies exist in the record of ownership of Tru-Tech, it appears that Peacock held a controlling interest between 1988 and 1990. n129 In their claim to hold Peacock personally liable, plaintiffs introduced numerous items of evidence indicating that Peacock had manipulated Tru-Tech receivables and taken other actions to avoid payment of the earlier judgment. n130 In addition, in its discussion of the background facts, the court referred to Peacock as acting as the "alter ego" of Tru-Tech. n131 In its finding of facts, the district court specifically determined that Peacock intermingled funds and personnel between Tru-Tech and Peacock's other business. n132 Ultimately the court stated:

The primary considerations in determining whether to pierce the corporate veil under ERISA are the amount of respect paid by the shareholders themselves to the corporations' separate corporate entity, the fraudulent intent of the dominating shareholder, and the degree of injustice that would be visited on the litigants by recognizing the corporate entity. n133

Applying this standard, the court decided that Peacock's actions had been sufficiently egregious to justify piercing the corporate veil under the alter ego theory. n134

Once again faced with an appeal in this case, in Thomas II the Fourth Circuit, although indicating that ERISA preempts state veil piercing law, n135 affirmed the award of personal liability against Peacock. n136 In a nearly unanimous n137 opinion, the Supreme Court reversed the Fourth Circuit. n138 However, the Supreme Court rested its decision solely upon a lack of federal court jurisdiction because of the unique posture of the former employees' veil piercing claim. Plaintiffs had sought recovery from the federal courts on a theory of veil piercing only after being unsuccessful in their attempts to enforce the ERISA judgment against Tru-Tech. n139 Plaintiffs brought this claim in a **[*1076]** separate suit, alleging a civil conspiracy to avoid the initial judgment and fraudulent conveyances, along with the veil piercing claim. n140

In addressing the jurisdictional issue, the Supreme Court held that ancillary jurisdiction does not extend to this type of lawsuit, where the state-law claim is brought in a suit separate from the original enforcement action and where no independent basis exists to support federal jurisdiction for the state-law claim. n141 However, the Court distinguished situations where "ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction." n142 The clear import of the Court's reasoning is that federal court jurisdiction exists in the latter type of case. n143

Plaintiffs argued that ERISA's remedial section, which provides standing for claims for equitable relief, supports federal court jurisdiction in a veil piercing action. n144 The Court rejected this notion because the veil piercing claim itself did not allege that Tru-Tech or Peacock violated either ERISA or the terms of an ERISA plan, and the statute supports relief only for such violations. n145 And although the Supreme Court did not dismiss the notion that a veil piercing claim may be brought in conjunction with a claim for a substantive ERISA violation, it also did not determine that a veil piercing claim is permissible in such circumstances. n146 However, the Court did provide some guidance in considering the possibility of veil piercing under ERISA in its statement that "piercing the corporate veil is not itself an independent ERISA cause of action, "but rather is a means of imposing liability on an underlying cause of action."' n147 Before undertaking a detailed examination of how ERISA's unique regulatory provisions may affect a veil piercing claim, and thus the relationships between shareholders and the corporations that sponsor noncash and deferred compensation programs, the next two parts explore necessary foundational and jurisprudential concepts of personal liability in corporate law generally, and in federal employment law specifically. **[*1077]**

III. Traditional Doctrines of Personal Liability

A. Limited Liability

Although not without its critics, n148 the doctrine of limited liability has become a cornerstone of traditional corporate law doctrine. n149 Corporate shareholders, whether individuals or other legal entities, are considered distinct from the corporate enterprise they own n150 and, in general, are not held personally accountable for corporate obligations. n151

The doctrine of limited liability is not all encompassing, however. It should be noted that the doctrine applies to shareholders, not to other corporate actors such as officers and directors. Directors and officers, in their capacities as such, do not have a capital investment at risk. n152 Thus, because the doctrine of limited liability refers to the amount of the investment, by definition, it applies only to investors. **[*1078]**

Officers and directors, like shareholders, are not held liable for corporate obligations. Agency law provides that if these corporate officials act properly within the scope of their authority, they are not held personally liable for acts taken on behalf of the corporation. n153 But this does not mean that officers and directors are without any liability exposure. Also according to agency law, agents are personally liable for acts taken outside of their authority n154 and for any torts they commit. n155 In addition, corporate law imposes the fiduciary duties of **[*1079]** due care and loyalty upon these officials. n156 The duty of care requires a director or an officer to act as the reasonably prudent person would under similar circumstances with respect to corporate matters, n157 and the duty of loyalty requires her to put corporate interests ahead of personal interests. n158 Thus, although as a general rule officers and di- **[*1080]** rectors are not held personally accountable for corporate obligations, they may be held personally accountable for actions taken outside of the scope of their agency authority, for the commission of any torts, and for failure to fulfill their fiduciary duties to the corporation and shareholders.

B. Exception to the Doctrine of Limited Liability: Piercing the CorporateVeil

Even though shareholders are generally not liable for corporate obligations, there is an important exception to the doctrine of limited liability. In certain circumstances, to reach an equitable result, the courts have found it necessary to pierce the corporate veil which typically provides the liability shield. As a result, shareholders are held personally liable for corporate obligations. n159 With some variation among the states, the factors state courts consider in deciding whether to pierce a corporate veil to override shareholders' limited liability include: (1) whether the corporation was used as the alter ego of the shareholder, (2) whether the corporation was inadequately capitalized, and (3) whether the corporation was organized to perpetrate a fraud or wrong. n160 State courts differ regarding whether fraud is a required element, n161 and although inadequate capitalization is a factor **[*1081]** to be considered, courts generally do not require a finding of inadequate capitalization before application of the veil piercing doctrine. n162

Similarly, the federal courts also consider whether the corporation was used as the alter ego or mere instrumentality of the shareholders in determining whether to pierce the corporate veil. n163 The elements to be examined in federal court include: (1) whether unity of ownership exists such that two affiliated corporations or a corporation and its shareholders have ceased to be separate entities, and (2) whether recognition of the two as separate actors would encourage fraud or lead to inequitable results. n164 There also are numerous differences among the federal courts regarding the factors used and the significance placed on any one factor. n165

It also should be noted that research has disclosed no case in which a state or federal court has held individual shareholders of a publicly held corporation liable for corporate obligations, whereas both state and federal courts have found individual shareholders of closely held corporations so liable. n166 The state and federal courts also have found it necessary to further refine the analysis when con- **[*1082]** sidering whether to pierce the veil of a subsidiary corporation in order to reach the assets of the parent. n167

Unfortunately, application of the tests for piercing the corporate veil is not necessarily straightforward in any given case. In fact, as noted by Professors Easterbrook and Fischel, "there is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law." n168 Professor Thompson notes the difficulties of the form and language the courts use to decide these cases. n169 For example, many courts will pierce the corporate veil if the corporation is found to be the alter ego or instrumentality of the shareholders. These courts often arrive at their conclusions without explanation of the factors considered in the analysis. n170

There are, however, situations in which the doctrines of limited liability and veil piercing should perhaps be reconsidered. For example, although it may be reasonable to grant shareholders the protections of limited liability when the injury complained of is breach of contract, limited liability may seem unjust when used as a shield against claimants who have suffered tort injury. n171 That is, tort claimants are involuntary plaintiffs who have not agreed to do business with the corporate entity, whereas contract claimants should know that the entity they are contracting with enjoys the protections of limited liability. Contract claimants therefore have the option of seeking personal liability through other means, such as through use of personal guaranties. Some commentators have thus argued for abolition of the doctrine of limited liability as applied to tort victims. n172 The courts, however, have not adopted this line of reasoning. n173 **[*1083]**

The facts of the Peacock n174 decision raise a number of these corporate law issues in the ERISA context. As noted in part II.C above, although Peacock had no direct liability to plaintiffs as a fiduciary under ERISA, the lower courts still found him personally liable to plaintiffs in a separate action on a corporate law veil piercing theory. n175 In order to analyze the corporate law issues as they apply in the Peacock scenario and in the ERISA context in general, it is first necessary to examine the traditional corporate law rules of veil piercing under both state and federal law, giving special consideration to issues involving: (1) the differences in legal treatment between shareholders of closely held corporations versus shareholders of publicly held corporations, n176 (2) distinctions made in the analysis depending on whether the shareholder is an individual or a corporation, n177 and (3) consideration of tort versus contract claimants. n178 These issues are explored in subpart B.2.b.iii below.

1. Piercing the Corporate Veil: State Law

As noted above, there are generally three factors state courts apply when deciding whether to override the presumption that shareholders are not liable for corporate obligations: (1) whether the corporation was used as the alter ego of the shareholder, (2) whether the corporation was inadequately capitalized, and (3) whether the corporation was organized to perpetrate a fraud or a wrong. n179 There are, however, variations among the states regarding the articulation and application of the factors in a veil piercing case. New York, for example, maintains a relatively strict standard for veil piercing. n180 In determining whether to pierce the corporate veil, New York courts consider (1) whether there has been compliance with corporate formalities (regardless of the relationship between compliance and the injury), n181 (2) whether a shareholder has controlling interests in multiple corporations and whether those corporations are operated as separate enterprises, n182 (3) whether the corporation was adequately capitalized at the outset to provide for foreseeable creditors' claims, n183 **[*1084]** and (4) whether the corporation was used to commit a fraud. n184 None of the four factors on its own justifies piercing the corporate veil in New York. n185 Rather, some combination of the factors is necessary, and fraud must be present. n186

It is generally true throughout state-law jurisprudence that a corporation is considered the alter ego n187 of the shareholder if there is such unity of ownership and interest that the corporation has effectively ceased to operate as a separate entity, and if recognition of the corporation would lead to fraud or an inequitable result. n188 Furthermore, the instrumentality theory might be applied if the shareholder is found to have exercised excessive control over the corporation while engaging in inequitable conduct. n189 Activities commonly cited in support of application of the alter ego or instrumentality theories are: (1) conduct of business without completion of the corporate organization **[*1085]** formalities, issuance of shares, or receiving of consideration for shares; (2) lack of meetings held by shareholders and directors; (3) shareholder participation as partners in decision making; (4) failure of shareholders to distinguish between personal and corporate property, funds, etc.; and (5) failure to maintain corporate and financial records. n190

California, however, has been rather liberal in its application of the doctrine. The California courts, for example, appear to be the only state courts to have considered undercapitalization as an independent ground for piercing the corporate veil. n191 In contrast, Texas has partially codified its veil piercing law to provide that actual fraud must be present in contract cases. n192 The Texas statute also explicitly states that failure to follow corporate formalities is an improper ground for imposing liability. n193 Similarly, it is relatively difficult to pierce the corporate veil in Delaware. n194 The Delaware courts will entertain an action to pierce the corporate veil "only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it." n195 **[*1086]**

2. Piercing the Corporate Veil: Federal Law

a. In General

In general, federal veil piercing law appears on its face to be more liberal than state doctrine. The decision of the Supreme Court in Anderson v. Abbott n196 has permitted federal courts to pierce the veil simply upon a finding that the corporate form would permit a federal statutory violation to survive without a remedy. n197 Some federal courts have also required evidence of intent to circumvent the statute before disregarding the corporate form. n198

For example, at first glance, the First Circuit appears to have followed this lead and articulated a rather liberal federal veil piercing **[*1087]** standard. n199 In Brookline v. Gorsuch, the court ruled that the corporate form can be ignored if the purpose of the applicable federal statute places no "importance on the corporate form." n200 This test purports to allow federal courts to pierce the veil even absent a showing of corporate abuse, in the interest of "public convenience, fairness and equity," n201 if the applicable federal statute failed to specifically protect the corporate entity.

Nevertheless, courts following the Brookline analysis generally consider a number of factors when deciding whether to pierce the corporate veil. These factors include evidence of: (1) inadequate capitalization in light of corporate purpose, (2) extensive control by shareholders, (3) intermingling of corporate property with that of owner, (4) failure to observe corporate formalities, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers and directors. n202 No one factor is necessary or sufficient to justify liability, and the ultimate decision remains an equitable one. n203 Interestingly, although the Brookline test initially ap- **[*1088]** pears more liberal than state veil piercing standards, the factors are essentially the same factors considered by state courts in determining whether the corporation should be held to be the alter ego or mere instrumentality of the shareholder. n204 Thus, the factors actually considered by Brookline and other federal courts vary little from those articulated in state courts. n205

Moreover, in many federal courts, the decision whether to pierce the corporate veil collapses into consideration of the following two factors: (1) the degree of unity of interest between the corporation and its shareholders and (2) the presence of fraud or an inequitable result. n206 The Third Circuit, for example, applies a similar two-pro- **[*1089]** nged test for piercing the veil. According to the Third Circuit, to pierce the corporate veil, the plaintiff must show complete financial and managerial domination of the corporate entity by a shareholder or another corporation, and that failure to pierce the veil would result in fraud, illegality, injustice, or a defeat of public policy. n207 Other federal courts, however, disregard the second factor, and pierce the veil regardless of proof of fraud or an inequitable result if the subsidiary or corporation is found to lack practically any appearance of separateness. n208

In many situations, however, the federal courts have found it unnecessary to resort to veil piercing because the shareholder has engaged in activities resulting in direct liability under the federal statute. n209 For example, shareholders may be held liable for their corporation's violations of the federal environmental statutes or the federal securities laws if the shareholders have either engaged in acts directly prohibited under the statutes or in activities leading a court to pierce the corporate veil. Veil piercing issues as they arise in the context of federal environmental and securities legislation are discussed below. **[*1090]**

b. Specific Statutory Applications

i. CERCLA

Courts deciding cases pursued under the Comprehensive Environmental Response, Compensation, and Liability Act n210 (CERCLA) have confronted the issue of whether to hold a shareholder liable for corporate CERCLA violations. Yet, as noted above, it has not always been necessary for courts deciding issues presented under CERCLA to resort to consideration of whether the facts justify piercing the corporate veil. Thus, CERCLA jurisprudence includes a line of cases in which veil piercing analysis became unnecessary because the defendant could be more accurately characterized as an owner, operator, generator, or transporter of hazardous waste, as defined by the statute, n211 and thus directly liable for the violation. n212

Although there are a number of cases considering potential CERCLA liability of individual shareholders, research has disclosed only one case in which a court has employed veil piercing analysis to find an individual shareholder liable for a CERCLA violation. In United States v. Mottolo, n213 the court pierced the corporate veil and held the individual shareholder liable for corporate environmental violations. The shareholder in Mottolo admitted that, after his sole proprietorship incurred CERCLA liability, he incorporated his business to avoid that liability. n214 The court thus pierced the corporate veil and held the individual shareholder liable for the corporate violation. The shareholder was not permitted to use the corporation as his alter ego to escape liabilities he had previously incurred as a sole proprietor. n215

In all other CERCLA cases alleging the liability of an individual shareholder, the issue was decided by considering whether the individ- **[*1091]** ual was directly liable under the terms of the statute. n216 Moreover, no shareholder has been held liable for corporate CERCLA violations simply by virtue of stock ownership. n217 Shareholders held directly liable under the terms of the statute also held positions as officers, and it was their activities as officers in the management of the corporation's waste disposal practices that exposed them to liability. n218

A substantial body of CERCLA case law concerning issues of shareholder liability involves the potential liability of a parent corporation for the CERCLA violations of its subsidiary. As in cases concerning the CERCLA liability of individual shareholders, courts considering whether the parent corporation may be held liable for the subsidiary's action frame the issue as involving either direct liability under the statute n219 or veil piercing theory. n220 Those courts considering whether the parent corporation should be held directly liable under the statute for the violations of the subsidiary evaluate whether the parent actively participated in the management of the subsidiary, n221 and the amount of control the parent exercised over the subsidiary's waste management practices. n222

Similarly, courts deciding whether to pierce the corporate veil to hold the parent responsible for the subsidiary's actions have considered whether the parent corporation actively controlled or dominated **[*1092]** the offending subsidiary. n223 Although the Fifth Circuit did not find the facts sufficient to warrant piercing the veil in Joslyn Manufacturing Co. v. T.L. James & Co., n224 it referenced twelve factors to be considered in determining whether a parent controlled the subsidiary. These factors include whether:

(1) the parent and the subsidiary have common stock ownership;

(2) the parent and the subsidiary have common directors or officers;

(3) the parent and the subsidiary have common business departments;

(4) the parent and the subsidiary file consolidated financial statements and tax returns;

(5) the parent finances the subsidiary;

(6) the parent caused the incorporation of the subsidiary;

(7) the subsidiary operates with grossly inadequate capital;

(8) the parent pays the salaries and other expenses of the subsidiary;

(9) the subsidiary receives no business except that given to it by the parent;

(10) the parent uses the subsidiary's property as its own;

(11) the daily operations of the two corporations are not kept separate; and

(12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings. n225

Moreover, regardless of whether the court analyzes the case under a veil piercing theory, or considers whether to hold the parent directly liable for the subsidiary's violation under the terms of the statute, the results are similar. That is, in either case, liability depends on the parent's active participation in the enterprise of the subsidiary. n226

ii. Federal Securities Laws

The federal securities laws also avoid some of the underlying requirements of corporate law veil piercing in defining the persons and entities to be held primarily and secondarily liable under the 1933 n227 **[*1093]** and 1934 n228 Acts (the Acts). The Acts impose liability on both a defined class of persons and upon others in the related control group. n229 Thus, because of the direct liability of controlling persons under the statutes, courts generally do not need to decide whether to pierce the corporate veil to hold shareholders liable. n230 Rather, those persons and entities who might be held accountable under a veil piercing analysis are instead held directly liable under the terms of the statutes.

In those limited circumstances where the courts have considered veil piercing analysis under the securities laws, they have noted that the governmental interest in preventing the unlawful use of securities prevails over strict adherence to corporate form. n231 For example, in SEC v. Elmas Trading Corp., n232 the court stated that in the interests of public convenience, fairness, and equity, federal courts applying the veil piercing rule will look closely at the purpose of the federal statute involved to determine whether it places importance on the corporate form. n233 The court then found that the government's interest in preventing the unlawful manipulation and use of securities under the Securities and Exchange Act required it to apply a rather flexible federal approach, one that would give less respect to the corporate form than would application of the strict common-law alter ego doctrine of veil piercing. n234

In 1994, however, the U.S. Supreme Court issued a decision that may put many common-law claims brought concurrently with the securities laws into question. In Central Bank of Denver v. First Interstate Bank of Denver, n235 the Court held that "a private plaintiff may not maintain an aiding and abetting suit under 10(b)." n236 The Court reasoned that the Acts should not impose liability beyond the person **[*1094]** who actually engages (even indirectly) in a prohibited activity and reach to cover those who simply assist them. n237 It thus follows that because the Acts do not directly provide for alter ego liability under common-law principles, future courts following the reasoning of Central Bank might not allow imposition of such liability. n238 According to the Court in Central Bank, "the fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere." n239 **[*1095]**

However, as the Supreme Court recognized in Peacock, a piercing claim does not constitute an independent cause of action. n240 Instead, when a claim to pierce a corporate veil is joined with a substantive claim grounded in the federal securities laws, the piercing claim simply acts as a method of determining the identity of the parties who are financially responsible for any judgment rendered in the case. n241 In this way, a piercing claim differs from an aiding and abetting claim, which the Central Bank Court viewed as a separate substantive claim not authorized by the Acts. n242 Lifting the state-granted shield on shareholder liability need not be viewed as adding a substantive cause of action to the Acts. Instead, it may be viewed as deferential to the state-law determinations of corporate existence and limited liability.

iii. Piercing the Corporate Veil: Special Considerations

Piercing the corporate veil to hold shareholders liable for corporate obligations is an unusual remedy. n243 The doctrine of limited liability is so firmly entrenched in traditional corporate law jurisprudence that courts are generally reluctant to override it. n244 But, **[*1096]** as discussed in parts III.B.1 and III.B.2 above, both state and federal courts will disregard the corporate entity to hold shareholders accountable for corporate obligations in certain circumstances where the interests of equity so require. n245

Nevertheless, a few special considerations as they relate to these general principles should be noted. First, although the veil piercing doctrine would theoretically apply to both publicly and closely held corporations, in fact it has not been. Second, even though veil piercing notions apply equally to individual as well as corporate shareholders, the courts have enumerated several additional factors to be considered in the parent-subsidiary context. And finally, commentators have argued that the doctrine of limited liability should not be applied equally to tort and contract claimants. These special considerations are discussed in subparts a through c below.

(a) Differences in Treatment Among Individual Shareholders of Closely Held and Publicly Held Corporations

The only context in which the courts seem willing to pierce the corporate veil involves the liability of shareholders of closely held corporations. n246 In Professor Robert Thompson's empirical study of all veil piercing cases reported by Westlaw through 1985, no case was found in which the court pierced the veil of a publicly held corporation. n247 Although there theoretically is no reason why a court should not pierce the veil of a publicly held corporation, as a practical matter, it is nearly impossible to envision a situation that would warrant such a result. It would presumably be difficult for a diverse group of investors to organize to set up the corporation as a fraud or to use it as their alter ego. n248

In contrast, it is easy to see how the shareholders of a closely held corporation may run afoul of the protections of limited liability. An individual would not find it difficult to set up a corporation to perpetrate a fraud or to use it as a mere instrumentality to avoid liability **[*1097]** already incurred. n249 Similarly, it would not be difficult for a few shareholders of a closely held corporation to act in concert to commit a fraud or inequity that would cause a court to pierce the corporate veil. Moreover, the shareholders of closely held corporations often serve as officers and directors, and thus have more opportunity to engage in activities that may negate the protections provided by the corporate form. n250 Consistent with this analysis, Professor Thompson found that shareholders who did not also serve as officers or directors were less likely than their officer or director counterparts to be held liable for corporate obligations under a veil piercing analysis. n251

(b) Corporations as Shareholders

Similarly, courts also recognize that, as in the case of the corporation owned by individuals, there are circumstances warranting liability of the parent corporation for acts of the subsidiary. n252 Moreover, according to Easterbrook and Fischel, courts are more likely to pierce the corporate veil to reach corporate rather than individual shareholders. n253 However, according to Thompson's empirical study, courts pierce the corporate veil more often when the shareholder is an indi- **[*1098]** vidual than when the shareholder is a corporation. n254 Either way, the doctrine also applies to parent corporations.

Liability of a parent corporation for obligations of its subsidiary depends mostly on whether the parent exercised active control of or domination over the subsidiary. State courts have delineated a number of factors to be considered in determining whether the parent dominated the subsidiary. These factors include consideration of whether:

(a) The parent corporation owns all or most of the capital stock of the subsidiary.

(b) The parent and subsidiary corporations have common directors or officers.

(c) The parent corporation finances the subsidiary.

(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

(e) The subsidiary has grossly inadequate capital.

(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.

(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

(i) The parent corporation uses the property of the subsidiary as its own.

(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

(k) The formal legal requirements of the subsidiary are not observed. n255

It is not necessary that every factor be found before a court will resort to veil piercing. n256 Instead, the overall relationship between the parent and subsidiary is considered. n257

Another state court framed the inquiry more simply, noting that the parent corporation may be held liable under a veil piercing theory: (1) where the parent company perpetrates a fraud on or causes a se- **[*1099]** vere injustice to another party through control of its subsidiary (the so-called alter-ego theory) and (2) where the parent directs the business activities of the subsidiary to such a degree that the latter becomes the agent of the parent. n258

For the most part, federal courts applying the federal common law of veil piercing to reach a parent corporation employ factors similar to those used in the state courts. n259 The overall consideration is whether the parent corporation exercised such domination or pervasive control over the actions of the subsidiary that the parent should also be held liable for the statutory violation. n260

(c) Tort Versus Contract Claimants

As noted above, n261 the doctrine of limited liability for shareholders is not without controversy. Commentators have argued that, particularly in the case of tort claimants, the doctrine provides incentives for corporations to not fully consider tort liability and to assume too much risk. n262 Furthermore, some of these risks do not manifest them **[*1100]** selves until some time into the future. By the time the hazard is discovered, the tort victim may find that the corporation has long been dissolved and its assets distributed, leaving the victim without recourse. n263 Moreover, it has been asserted that the doctrine of limited liability is unfair, and in many cases economically unsound, in its application to tort victims. n264 This is in part because tort victims are involuntary creditors, with no opportunity to assess the risks of doing business with the corporate entity. n265

Insurance has played a key role in the discussion of this issue. Liability insurance is widely available for most businesses. If a firm underinsures for tort liability, and the shareholders enjoy the protections of the doctrine of limited liability, then the costs of underinsurance are borne by tort victims. If corporate shareholders incurred unlimited liability, however, they presumably would insist that firms purchase full insurance coverage for tort liability. n266 It might be argued, therefore, that enforcing unlimited liability against shareholders for corporate tort claims would merely lead firms to purchase adequate insurance, rather than subjecting shareholders to additional risk. n267

In contrast, critics of the doctrine of limited liability generally do not argue that shareholders of corporations should bear unlimited liability for contract claims. n268 The difference is that the parties to a contract are able to allocate the risk among themselves. The parties thus have a choice regarding whether to enter into the transaction with the corporate entity. Assuming a party to a contract with a corporation is able to assess the risks of the transaction prior to a potential injury and decline to participate, one may argue that this voluntary association should be subjected to the doctrine of limited liability. n269 If, how- **[*1101]** ever, the party contracting with the corporation did not have the opportunity to decline to participate, it has been argued that limited liability should not apply. n270

IV. Personal Liability in EmploymentPrograms

This article focuses on the availability of a corporate veil piercing claim in an action brought under Title I of ERISA. The Peacock case offers one specific illustration of how the specter of personal liability may attach in conjunction with a claim under Title I of ERISA. But upon careful analysis, even that nominally narrow focus proves illusory. The foregoing discussion explained that under traditional concepts of corporation law, personal liability may accrue to corporate shareholders. Also, although a particular obligation may appear nominally to inure upon a specific corporation, state and federal corporation law concepts may extend the liability to related entities.

To an even greater degree than other federal statutes such as CERCLA, ERISA's myriad regulatory requirements n271 provide a number of potential settings where a variety of parties may attempt to reach through the curtain of protection typically accorded to corporations. Therefore, part IV begins by analyzing the application of personal liability in the area where such liability may be most frequently litigated, which is in the context of multiemployer plans, n272 and then examines a variety of other frameworks where the standard protections accorded to corporate shareholders may be lost in an ERISA action. n273 Finally, part IV briefly looks at the application of the doctrine of piercing the corporate veil in other federal employment and labor law statutes. n274

A. Multiemployer Plans

As explained above, n275 ERISA contains a number of specific provisions regulating multiemployer plans. One of the advantages of multiemployer plans is that, by permitting members of a union to earn pension credit while working for any employer who is signatory to a collective bargaining agreement (CBA) with the union, n276 the plans **[*1102]** avoid some of the portability problems that plague other types of pension plans. n277 Multiemployer plans are especially prevalent in industries, such as construction, where unionized workers receive assignments from a hiring hall or otherwise frequently change employers. n278

Another unique feature of multiemployer pension plans is that, from the perspective of contributing employers, the plans most closely resemble defined contribution plans, but they most closely resemble defined benefit plans in the nature of the benefits paid to retirees. n279 Despite these advantages, this disparity can create significant funding problems for the plans. Prior to the enactment of MPPAA, when a plan contained insufficient assets to pay projected benefits, an incentive existed for employers to engage in a "race to the exit" n280 in order to leave the burden of underfunding (1) on the employers who remained or (2) on the PBGC. MPPAA sought to eliminate this incentive by requiring employers who terminate their participation in a multiemployer plan to pay their fair share of plan underfunding. n281 Given the number of variables and the significance of the monetary amounts at issue, perhaps it should not be surprising that the provisions for making this determination are almost mind-numbingly complex n282 and have generated a significant amount of litigation. n283 **[*1103]**

1. Common Control

Although participation in a multiemployer plan typically is predicated upon an entity's obligation under a CBA, n284 withdrawal liability may extend much further. According to ERISA, each "trade[] or business[] ... under common control" n285 with the withdrawing employer is responsible for payment of the withdrawal liability. The language in the provision dates back to ERISA's enactment, and the legislative history explicitly states that the intent undergirding such extensive liability was to ensure that ERISA's substantive "provisions cannot be avoided by operating through separate corporations instead of separate branches of one corporation." n286

In interpreting the scope of the MPPAA language, the PBGC defers n287 to the definition of "common control" contained in the IRC. As a result, the courts have drawn upon the IRC n288 and corresponding regulations n289 for assistance in determining the scope of withdrawal liability. n290 However, when multiemployer plan trustees rely upon this provision to extend liability to an enterprise other than the nominal employer, in addition to being under "common control," the enterprise must also be a "trade or business." n291

In the typical case where the definition of "trade or business" is at issue, an employer that directly participates in a multiemployer plan is wholly owned by a sole shareholder or closely held by a small group. The shareholder also has other investments that the shareholder holds as a partner, n292 joint venturer, n293 or outside any formal organizational structure. n294 The determination of whether the other **[*1104]** investments of the shareholder constitute a trade or business becomes critical because such a determination not only results in the extension of liability to the partnership, joint venture, or other enterprise, it also results in personal liability to the shareholder. In these instances the personal liability is premised not upon shareholder status, but upon the basis that the individual is an owner of a liable enterprise, and the noncorporate status of that enterprise results in the attachment of personal liability. n295

2. Definition of Employer

Multiemployer plans also have relied upon ERISA's statutory definition of an employer to argue that liability for delinquent contributions or withdrawal liability n296 extends to corporate shareholders or officers. This theory generally is premised upon the notion that ERISA's vague definition of who constitutes an employer n297 should be analogized to the definition in the Fair Labor Standards Act (FLSA), n298 which permits the imposition of personal liability. n299 A number of circuits have rejected this theory because neither the statutory language nor the legislative history of ERISA supports such automatic liability. n300 **[*1105]**

In contrast, other circuits have assumed that ERISA's definition of employer may sweep broadly enough to include individual shareholders or officers who are not the nominal signatories to a CBA. n301 However, those same circuits still decline to impose automatic liability for delinquent contributions owed to a multiemployer plan because of the statutory language, which refers to an "employer who is obligated to make contributions." n302 Where individuals are not a party to the CBA, the individuals are not "obligated to make contributions" n303 and, thus, do not automatically incur personal liability. n304

3. Piercing the Corporate Veil

The circuits that have addressed the question have indicated they may be willing to hold individual shareholders personally liable through veil piercing claims in actions for delinquent contributions or withdrawal liability. n305 However, as is true in the traditional contexts, n306 there is little consensus as to the standards to be applied in a veil piercing action. For example, in Alman v. Danin, n307 the First Circuit upheld a determination of personal liability where the lower court had analyzed three factors: (1) the shareholders' lack of respect for the corporate form, (2) bad faith on the part of the shareholders, and (3) the injustice that would have accrued to the pension plan if the corporate form would have been upheld. While still on the First Circuit Court of Appeals, Justice Breyer interpreted this as a federal alter ego test, which looked in part to state law for its substance. n308 On the other hand, it appears that at least some of the circuits would rely on state law for the applicable veil piercing standards. n309 This latter posi- **[*1106]** tion accords with that of the PBGC, which has indicated that a shareholder's personal liability for ERISA awards is typically determined under state law. n310

In actual application, courts have relied upon the doctrine of piercing the corporate veil in order to find the sole owner of a corporation liable for the corporation's multiemployer plan withdrawal liability. n311 In addition, the application of both the common control provision n312 and the doctrine of piercing the corporate veil has resulted in the imposition of personal liability on the sole shareholder of a corporation that was under common control with a corporation that owed withdrawal liability even though the shareholder had no ownership interest in the latter corporation. n313 And, using an alter ego theory, multiemployer funds have been able to recoup delinquent plan contributions from corporations that are interrelated with actual signatories to a CBA. n314

B. Other ERISA Contexts

1. Fiduciary Breaches

ERISA Section 409 (Section 409) n315 makes specific provisions for the liability of those who breach ERISA's fiduciary provisions. It requires a breaching fiduciary to reimburse the plan for any losses caused by the fiduciary's breach and to repay any gains wrongfully received by the fiduciary. n316 The statute specifically provides that fiduciaries "shall be personally liable" n317 for their breaches. ERISA also subjects fiduciaries to "other equitable or remedial relief as the court may deem appropriate." n318

This broad language has provided the courts with a clear basis to award a wide variety of remedies to successful plaintiffs in fiduciary duty cases. Instances of personal liability have occurred. One court held plan fiduciaries personally liable for failure to comply with a plan's investment guidelines. n319 In another case, former plan participants successfully alleged personal liability against ERISA fiduciaries who amended a plan's valuation procedure in order to value account **[*1107]** benefits after the 1987 "Black Monday" stock market decline. n320 Recently, a company president was held personally liable for a fiduciary breach when he failed to investigate suspicions about the commingling of plan funds and assured participants regarding the plan's rate of return. n321

For some time though, the courts struggled with fiduciary claims brought on behalf of a plaintiff other than an ERISA plan. The statutory right to recover under Section 409 runs only in favor of plans. n322 As a result, in Massachusetts Mutual Life Insurance Co. v. Russell, n323 the Supreme Court determined that Section 409 does not provide individual claimants with the right to recover extracontractual damages on their own behalf. Instead, defendants must pay any awards directly to the appropriate ERISA plan. n324

After Massachusetts Mutual, some circuits permitted individuals to bring fiduciary suits for recovery on their own behalf so long as those suits are grounded solely on one of ERISA's general remedial provisions and not on Section 409. n325 Other circuits decided that the Massachusetts Mutual opinion permitted only those fiduciary suits that are brought on behalf of a plan. n326 In Varity Corp. v. Howe, n327 the Supreme Court resolved this issue and determined that ERISA does permit plan participants and beneficiaries to bring individualized claims for equitable relief. However, unlike Section 409, the remedial section that provides the basis for these claims does not make explicit provision for personal liability. n328

2. Suits by Regulatory Agencies

Both the DOL and the PBGC have relied upon the doctrine of piercing the corporate veil in attempts to extend liability in ERISA cases. In Reich v. Compton, n329 the Third Circuit rejected the DOL's **[*1108]** effort to apply the alter ego doctrine to establish a prohibited transaction between a multiemployer plan and a company that the DOL alleged to be the alter ego of the union sponsor of the plan. The plan had loaned the alleged alter ego $ 800,000 at a below-market rate of interest. n330 The borrower then used the proceeds of the loan to construct a building that the union used as its headquarters. n331 According to the Third Circuit's analysis, ERISA does not specifically prohibit this type of three-way transaction, and it would be inappropriate to utilize corporate law doctrine, such as the alter ego doctrine, to impose liability where otherwise none would exist. n332

In one case brought by the PBGC, the alleged alter ego was two ownership layers away from the benefit plan sponsor, Reserve Mining. n333 The PBGC attempted to hold Armco, Inc. liable for $ 21.4 million in pension plan underfunding by Reserve Mining. n334 According to an earlier, unrelated decision by the Eighth Circuit, n335 Armco allegedly acted as the alter ego of First Taconite, Inc. n336 First Taconite, in turn, was the general partner of the partnership that owned Reserve Mining. n337 Less than three months after the PBGC filed the original suit, Armco agreed to a settlement of $ 27.5 million, which strengthened the funding of Armco's own pension plan as well as reimbursed the PBGC for underfunding in the First Taconite plan. n338

The same provisions that hold control group members liable for withdrawal liability incurred by a former member of a multiemployer plan also apply to the termination of a single employer plan. n339 And, as in the multiemployer context, n340 application of these provisions can cause a variety of difficulties, especially in bankruptcy. Because the PBGC becomes responsible for underfunded terminated plans, it often seeks to hold solvent control group members liable for funding deficiencies. In this context, one question that has caused difficulty has been the allocation of liability between control group members in bankruptcy and those members that remain solvent. One panel of the First Circuit likened the statutory provisions providing for control **[*1109]** group liability to the doctrine of piercing the corporate veil and imposed liability on solvent members of the group. n341

3. Cases Against Foreign Corporations

The increasing globalization of business operations has created a variety of interpretive problems under ERISA. n342 Not surprisingly, in at least one case where a U.S. subsidiary of a foreign parent corporation failed to fulfill its benefit obligations to retired and disabled former employees, those former employees and their labor union sought relief from the parent. n343 The parent argued that the court had no personal jurisdiction over it. n344 One of the theories propounded by the plaintiffs in response was that, because the court had jurisdiction over the subsidiary, the court should pierce the corporate veil of the parent, and, having done that, the court would have personal jurisdiction over the parent. n345 The plaintiffs also argued that the parent was the alter ego of the subsidiary and thus the two constituted an integrated enterprise. n346 Although the First Circuit rejected all of these arguments, on a subsequent appeal it found that application of the traditional minimum contacts test resulted in personal jurisdiction over the parent. n347

4. Settlement Agreements

Finally, in one of the more unusual cases involving an alter ego claim, one corporation attempted to use the alter ego doctrine as a defense to ERISA liability. The saga began when Navistar n348 sold its Wisconsin Steel Division to two wholly owned subsidiaries of Envirodyne Industries, Inc. n349 The subsidiaries were grossly undercapitalized, given that the terms of the deal required them to assume responsibility for more than sixty-two million dollars in unfunded pen- **[*1110]** sion liabilities for the Wisconsin Steel Division. n350 Three years later, the two subsidiaries filed for bankruptcy. n351

As a result of the bankruptcy, the PBGC took over the pension plan n352 and paid a portion of the benefits promised by the plan. n353 However, a number of individuals had been promised benefits that exceeded the PBGC guarantees under the Wisconsin Steel Division plan. n354 To recover some of the difference between the promised benefits and the guarantees, the beneficiaries entered into a settlement with the subsidiaries and Navistar. n355 In an attempt to recover the rest of the difference, the beneficiaries sued Envirodyne. n356

Among other arguments, Envirodyne argued that it was the alter ego of its subsidiaries and, therefore, the settlement agreement that released the subsidiaries also released Envirodyne. n357 The Seventh Circuit rejected this argument, saying that the "alter ego doctrine is a sword, not a shield, the basis for a cause of action, not a defense." n358

C. Federal Employment and Labor Law Statutes

The jurisprudence relating to the application of the doctrine of piercing the corporate veil reflects the same controversy and confusion in the context of federal employment and labor statutes as already discussed in the context of other federal legislation. n359 However, because ERISA often looks to the jurisprudence developed under other federal employment statutes, this subsection looks at personal liability for corporate shareholders under a number of those statutes. n360 **[*1111]**

1. Title VII, ADEA, and ADA

Nondiscrimination in employment provisions can be found in a variety of federal statutes, depending upon the characteristics being protected. Title VII of the Civil Rights Act of 1964 n361 (Title VII) protects against employment discrimination based upon "race, color, religion, sex, or national origin." n362 The Age Discrimination in Employment Act n363 (ADEA) prohibits employment discrimination based upon an individual's age. n364 And the Americans with Disabilities Act n365 (ADA) makes it illegal to discriminate in the employment of a disabled individual. n366

Case law discussing application of the doctrine of piercing the corporate veil to these federal discrimination statutes is sparse. However, district courts have indicated that individual corporate shareholders could be held liable, in appropriate circumstances, as a result of a veil piercing claim. n367 In addition, Title VII contains an explicit provision limiting its preemption of state law. n368 That provision has been construed to save most state laws that touch upon employment discrimination. n369 As a result, it does not appear likely that Title VII would preempt the application of a claim to pierce the corporate veil simply because such a claim might be based upon state law. n370

As in other areas of federal statutory law, the reason underlying the relative paucity of veil piercing claims in federal discrimination cases may be attributable to the possibility of holding individuals liable on other grounds. For example, Title VII, ADEA, and the ADA all contain equivalent definitions of who is an employer for purposes **[*1112]** of the statutes. n371 And, the courts are split over whether that definition should be construed as permitting the imposition of personal liability upon supervisory or management employees. n372

2. FLSA

In some respects, the analysis of personal liability under the Fair Labor Standards Act (FLSA) n373 is similar to the analysis which occurs under the federal nondiscrimination statutes. Among other things, the FLSA establishes a federal minimum wage, n374 sets maximum hours of work, n375 and regulates child labor. n376 All of these regulations are applicable only to certain employees. n377 The FLSA contains a provision which establishes the federal law as a floor but which does not preclude state laws that establish higher standards. n378 Accordingly, on the theory that the FLSA's preemptive effect is quite narrow, it appears the jurisprudence would permit a claim to pierce the corporate veil to be raised in conjunction with a claim brought under the FLSA. n379

However, the circuits have broadly construed the FLSA's definition of the term "employer," n380 often making a veil piercing claim unnecessary. It is widely established that in actions brought under the FLSA, a corporate official who exerts control over the operations of the corporation may be personally liable for statutory violations. n381 And, the jurisprudence makes it clear that this standard is not predicated upon the doctrine of piercing the corporate veil. n382 **[*1113]**

3. NLRA

For purposes of veil piercing, the most relevant labor relations statute is the National Labor Relations Act n383 (NLRA). Unlike ERISA, n384 the NLRA does not contain a general preemption provision. n385 Following the traditional development of preemption analysis for statutes without an explicit preemption clause, n386 the jurisprudence has established that the NLRA preempts state law that conflicts with the NLRA n387 or where Congress intended the NLRA to "occupy the field and close[] it to state regulation." n388 However, the determination of whether state or federal veil piercing standards would apply in claims brought under the NLRA does not appear to rest so much upon a preemption analysis as upon the standards' consistency with the goals expressed in the federal legislation. n389

In addition to veil piercing claims, liability for NLRA purposes may be extended through either the single employer doctrine n390 or the alter ego doctrine. n391 Although these doctrines, particularly the alter ego doctrine, utilize principles from state common-law doctrines for piercing the corporate veil, they developed as provisions to assist in the interpretation and application of the statute. n392 Thus, as with the other areas of federal employment law regulation, a variety of avenues may lead to personal liability.

D. Summary

The Peacock v. Thomas case offers one situation in which to study the importation of the corporate law doctrine of piercing the **[*1114]** corporate veil into ERISA. However, as recognized by the Supreme Court, the posture of Peacock was unique in that it bifurcated the veil piercing claim from the substantive ERISA claim. n393 It was ultimately this bifurcation which led to the Supreme Court's rejection of federal court jurisdiction. n394 However, Peacock is far from the only context where personal liability may accrue in ERISA-related actions. In fact, ERISA contains a number of specific statutory provisions that can result in personal liability. Beyond that, as seen above, n395 ERISA's complex regulatory provisions provide an abundance of opportunities for a wide variety of plaintiffs - and defendants - to argue that a corporate veil should be pierced. Other federal employment and collective bargaining laws also offer some opportunities, in addition to piercing the corporate veil, for the extension of liability to corporate shareholders or related business entities. What remains to be addressed is whether a piercing claim can survive ERISA's wide-ranging regulation.

V. ERISA's Unique Barriers to a Veil PiercingClaim

As illustrated by the Peacock case, application of the doctrine of piercing the corporate veil in the context of claims brought under Title I of ERISA has created unique problems of interpretation for the federal courts. This article argues that in large part the problems are attributable to two particular statutory provisions which are peculiar to ERISA, each of which has engendered significant interpretive problems outside the piercing analysis. Part V analyzes these two ERISA provisions, the extraordinarily broad preemption provision and the detailed remedial provision, n396 and concludes that concerns about the incompatibility of ERISA with a claim to pierce the corporate veil are largely illusory. n397

A. The Regulation

As noted above, n398 ERISA's preemption clause is both explicit and sweeping in its breadth. Yet, the breadth of the preemption clause might not have caused the controversy which has erupted n399 but for the narrow construction accorded to ERISA's remedial provisions. **[*1115]** Although an initial perusal might give one the impression that the remedial scheme exceeds the preemption clause in scope, n400 that has not been the result of the jurisprudence. Instead, the decisional law has construed the remedial provisions narrowly and as being the exclusive cause of action under ERISA. The history of this construction is traceable as far back as the Supreme Court's decision in Massachusetts Mutual Life Insurance Co. v. Russell. n401 There the Court stated that the reticulated nature of the remedial provision could be attributed to careful congressional development of its provisions and should be enforced as written. n402 The Supreme Court reinforced this narrow view of ERISA remedies in its 1993 decision in Mertens v. Hewitt Associates n403 where the court narrowly construed the types of relief available as equitable relief under Section 502(a)(3). The effect of the decisional law has been a jurisprudence which preempts much state law but does not necessarily offer a corresponding federal law remedy. n404

ERISA's preemption provision has generated a voluminous amount of litigation. In late 1992, Justice Stevens noted that the LEXIS reporting system held more than 2,800 ERISA preemption cases. n405 The Supreme Court itself has interpreted ERISA's preemption provision numerous times, n406 beginning with Alessi v. Raybestos- **[*1116]** Manhattan, Inc. n407 In Alessi, the Court first looked to traditional federal preemption doctrine and reiterated the importance of respecting the preservation of separate spheres of authority for the national and state governments. n408 Second, the Supreme Court reminded litigants that congressional intent plays a key factor in determining the scope of a preemption provision. n409 From the legislative history, the Court has determined that a primary goal of ERISA preemption is to protect plans from inconsistent state regulation and the inefficiencies that can result from such inconsistent regulation. n410

In one early opinion, the Court explained that a "law "relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." n411 However, the Court also acknowledged, in one of those Supreme Court footnotes which has played a key role in the development of jurisprudence, n412 that even ERISA preemption is not without bounds. In what has become almost a mantra to the lower courts, n413 the Supreme Court noted that a state law or action may be "too tenuous, remote, or peripheral" n414 to meet the "relates to" test. As subsequently developed by the Court, it appears that state laws which "relate to" an ERISA plan because they make "reference to" such a plan will automatically fall prey to preemption. For example, a District of Columbia statute required em- **[*1117]** ployers to maintain health care coverage for employees who collect workers' compensation benefits. n415 Because the statute specifically referred to employer-provided health insurance coverage, which is regulated by ERISA, the Court held that the statute was preempted on that basis alone. n416

The analysis is more complex where a state law is alleged to relate to an ERISA plan because the state law has a connection with a plan. Clearly, the "connection with" standard is to be construed broadly. The Court has indicated that an indirect effect on a plan may result in preemption and that a law will not be saved from preemption simply because the law was not specifically intended to affect plans. n417 In addition, even a law that is "consistent with ERISA's substantive requirements" may be preempted. n418 However, it is with respect to this prong of the preemption test that the "tenuous, remote, or peripheral" standard also applies and may extricate the state law from the net of ERISA preemption.

The Supreme Court has not enunciated a specific test for determining when a state law or action is tenuous, remote, or peripheral enough to avoid being caught in the web of ERISA preemption. n419 However, in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance, n420 its last preemption decision, the Court upheld a New York state statute which imposed surcharges on the hospitalization rates of patients who were covered by particular insurers but which did not impose surcharges on the rates of patients covered by a traditional Blue Cross and Blue Shield indemnity plan. The differences in the surcharges had an indirect effect on the cost structures of employee benefit plans. n421 This effect assertedly meant the state law had a connection with such plans and resulted in ERISA preemption. n422 However, the Court feared that acceptance of this logic would result in the preemption of all state regulation that indirectly affected hospital or insurance rates. n423 Accordingly, the Court rejected this theory as being inconsistent with its earlier decisions finding ERISA preemption to be limited by the "tenuous, remote, or peripheral" standard. The Court also cited the lack of any evidence **[*1118]** that Congress intended ERISA to "displace general health care regulation, which historically has been a matter of local concern." n424

In a case with some parallels to actions relying upon state corporation law to pierce the corporate veil, the Supreme Court considered whether ERISA preempts state-law collection statutes. In Mackey v. Lanier Collection Agency & Service, Inc., n425 a collection agency attempted to rely upon general provisions in a Georgia garnishment statute to collect money judgments from the vacation and holiday benefits of a number of plan participants. The plan trustees argued that ERISA preempted the entire state statute, including both the general provisions and a specific provision that protected ERISA plan funds from garnishment except as the garnishments related to alimony or child support. n426 A bare majority of the Supreme Court held that ERISA preempted the specific provision because that provision expressly referenced ERISA plans, n427 thus subjecting it to the "reference to" prong of the preemption analysis. n428

The general garnishment provisions required a different analysis. The plan trustees argued that the burdens imposed upon them in complying with garnishment orders were sufficient to cause the statute to "relate to" an ERISA plan and, thus, fall to the preemption ax. n429 However, the Court recognized that although ERISA's remedial scheme establishes a variety of situations in which monetary relief is available against benefit plans, ERISA does not contain any enforcement mechanisms. n430 The Court concluded that the necessary implication of this scheme is that Congress meant to leave undisturbed the state mechanisms for collection. n431 The Court also noted that Congress had expressly protected pension plan benefits from garnishment in ERISA's antialienation provision, n432 indicating that Congress had preempted state-law enforcement mechanisms where it wanted to and had chosen to leave open the rest of the field. n433

The dissent, written by Justice Kennedy and joined by three other Justices, argued that ERISA did preempt the general provisions of the Georgia garnishment statute because "state garnishment laws necessarily relate to employee benefit plans to the extent they require such plans to act as garnishees, which is a substantial and onerous obligation." n434 The dissent relied heavily upon the reach of ERISA's an- **[*1119]** tialienation provision, which it viewed as limiting all garnishments except the few explicitly permitted under the statutory exceptions. n435 However, the dissent did not challenge the majority's view that ERISA permits the use of state-law enforcement mechanisms to collect ERISA judgments. n436 Instead, it distinguished instances where the burdens of the state-law collection mechanism fall on benefit plans from situations where an ERISA plan is the debtor so that the burden of compliance with state law falls upon a third party. n437

B. Application to State CorporationLaws

The struggle to define the contours of ERISA's preemption clause has carried over to those situations where state corporation law is a factor in a legal action involving an ERISA claim or an ERISA entity. Perhaps it should not be surprising, given the breadth both of corporation law and of ERISA, that these intersections occur in a variety of contexts.

For example, a considerable body of case law has developed to address the disputes that occur over entitlement to severance benefits. n438 Much of that case law involves issues such as when a privately established severance plan constitutes an ERISA regulated plan, n439 the permissibility of modifications to severance promises, n440 and the effect on severance plan entitlement of working for a successor employer. n441 In some instances, states have enacted legislation requiring employers to make severance payments.

In Fort Halifax Packing Co. v. Coyne, n442 the Supreme Court upheld a Maine statute that required employers who close a plant in Maine to make a lump-sum severance payment. Fort Halifax Packing Company had closed a plant and challenged the severance requirement on the basis that ERISA preempted the requirement. n443 By its terms, ERISA's preemption provision preempts only state law that relates to an "employee benefit plan." n444 In Fort Halifax, the Supreme Court determined that, because of the nonrecurring, single **[*1120]** payment nature of the Maine requirement, the payment would not constitute an employee benefit plan. n445

Without an employee benefit plan for the statute to relate to, there could be no preemption. n446 In addition, the Court once again noted that "in any pre-emption analysis, "the purpose of Congress is the ultimate touchstone."' n447 According to the legislative history of ERISA, Congress intended the preemption provision to protect employers from the administrative difficulties and costs that result when state regulation differs from federal requirements. n448 Largely because of the statute's simple definition of eligibility and single payment feature, the Court determined that the Maine statute did not raise these administrative concerns. n449

Perhaps noting this favorable Supreme Court precedent, Massachusetts included a severance pay requirement in an antitakeover statute which it enacted under the umbrella of state corporation law. n450 The statute protected employees who lost their jobs within the two years following a change in the control of their employer. n451 In order to be eligible for a severance payment, the employees had to have at least three years of service with the original employer and had to meet the state's standards for receiving unemployment benefits. n452 Although the severance payment was made as a lump-sum payment, the amount depended upon each individual employee's salary and years of employment. n453

The First Circuit struck down the severance pay provision as preempted by ERISA. n454 It may seem ironic n455 that ERISA would invalidate part of a state antitakeover statute after an Indiana antitakeover statute survived a Commerce Clause challenge. n456 However, the First Circuit's decision was a direct result of the application of standard ERISA preemption jurisprudence.

Following the analysis established in Fort Halifax, the First Circuit evaluated whether or not the Massachusetts statute required aff- **[*1121]** ected employers to establish an ERISA plan. n457 The court decided that the two-year time period during which covered reductions in employment could occur meant that the potential payer must maintain employment records and make eligibility determinations over a lengthy time frame. n458 The requirement of eligibility for state unemployment compensation obligated the payer to make another set of determinations, some of which necessitated the exercise of judgment, such as the reason for the former employee's termination of employment. n459 In total, these provisions meant that any potential payer had to establish an ongoing set of administrative procedures in order to comply with the statutory requirements. n460 After analyzing these requirements in the context of other decisions that addressed the extent of administrative burdens necessary to constitute an ERISA plan, the First Circuit decided the Massachusetts statute impermissibly required the establishment of an ERISA plan. n461

The analysis undertaken by the First Circuit illustrates the manner in which standard preemption analysis can result in ERISA's preemption of state corporate law. At the end of its analysis, the court denied the request of various amici that the court give weight to the "benign purposes" of the Massachusetts statute. n462 And, from the standpoint of applying preemption analysis, the First Circuit was correct in denying this request. n463 According to the Supreme Court, where a state statute "relates to" an employee benefit plan, ERISA will preempt the statute in spite of a benign purpose. n464

Rarely in a piercing claim brought in conjunction with an ERISA action would one expect to see a contention that a benefit plan does not exist. Instead it is likely that participants or plans would allege a breach of one of ERISA's many substantive provisions by a corporate benefit plan sponsor, and, in the absence of sufficient corporate assets, would seek to hold the corporate shareholders personally liable for any judgment rendered against the corporate plan sponsor. In such an instance, a variety of parties will be acting in a multiplicity of roles.

As a result, the jurisprudence must recognize the different roles that corporate actors may play in ERISA plans, and the way in which **[*1122]** ERISA bifurcates those roles. Typically, the examination of an individual's or an entity's status occurs in cases where an employer is a fiduciary but is treated as acting outside the fiduciary role for certain decisions that affect an employee benefit plan. For example, an employer may act as a plan administrator, in which case the employer must comport with ERISA's fiduciary standards in making decisions about benefit eligibility. n465 One of those standards requires the employer to make its decisions in the best interest of the plan's participants and beneficiaries. n466 However, in making decisions as a plan sponsor, such as the extent of benefits to be offered n467 or whether to terminate a plan, n468 the employer acts in its capacity as an employer and may make the decisions in its own best interest.

In a few cases involving state corporation law, this distinction has been critical to the analysis and has resulted in the state law surviving an ERISA preemption challenge. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc. n469 was one such case. The plaintiff was the employee benefit plan, which had held a minority position in Corrigan stock. n470 The plan alleged that both (1) the "scheme" used by the defendant director, who was also the majority shareholder, and the corporation, to acquire stock from minority shareholders and (2) the failure of the defendants to liquidate the corporation breached fiduciary duties imposed by the state's common-law of corporations. n471 The defendants alleged that ERISA preempted the state's common law, which governed the fiduciary duties owed by a corporate director to a shareholder. n472

The Fifth Circuit began its preemption analysis by acknowledging the broad scope assigned by the Supreme Court to the "relates to" **[*1123]** provision of the preemption clause. n473 In accordance with the circuit's general interpretation of when a state law is too tenuous, remote, or peripheral to relate to an employee benefit plan, the court concentrated on the effect of the state law on relationships between principal ERISA entities. n474 Principal ERISA entities are: plans, employers, participants, beneficiaries, and fiduciaries. n475

From one point of view, the state corporate fiduciary law does affect relations between principal ERISA entities in cases such as Sommers Drug Stores. After all, an ERISA plan had sued an ERISA fiduciary. n476 However, this argument ignores the multiple roles played by the parties. In fact, in bringing its state-law claims for breach of fiduciary duty, the plan was acting in its role as a minority shareholder and its ERISA status was irrelevant. n477 In addition, the plan brought the state-law claim against the director alleging breach of his duties as a corporate director, and his ERISA status was irrelevant. n478 When viewed through this lens, it becomes clear that the state corporation law, which imposes fiduciary duties upon corporate actors, simply determined the obligations owed by a corporate director to a minority shareholder. Based on this analysis, the court concluded that the state corporate fiduciary law did not affect relations between primary ERISA entities and was not preempted by ERISA. n479

C. An Argument for the Survival of Veil PiercingClaims

The breadth of ERISA's preemption provision calls into question every state-law cause of action that affects benefit plans; vast numbers of state laws have fallen prey to ERISA preemption. In the context of veil piercing, the Supreme Court's decision in Peacock could give one pause. After all, according to that decision, ERISA does not support federal jurisdiction for a freestanding claim to pierce the corporate veil. n480 Instead, the Court's opinion indicates that claims to pierce the corporate veil must be attached to a substantive cause of action. n481 In a claim for an ERISA violation, this interrelationship between the federal statutory cause of action and the state-law piercing claim arguably will be sufficient to preempt the state-law piercing claim on the basis that it "relates to" a benefit plan. Not only are the two claims related, the piercing claim relies upon the ERISA claim to supply the piercing claim with the substantive cause of action and federal court **[*1124]** jurisdiction. And, in fact, the Fourth Circuit has concluded that "ERISA preempts any state law of veil-piercing." n482

However, more detailed consideration of the considerable body of preemption jurisprudence indicates that ERISA preemption should not result in automatic nullification of state-law claims to pierce the corporate veil that are brought in conjunction with a claim for a substantive violation of Title I of ERISA. State-law piercing doctrine does not refer explicitly to employee benefit plans, so claims based upon that doctrine do not fall automatically to the "reference to" prong of the preemption analysis. Moreover, piercing doctrine does not require the establishment and administration of an employee benefit plan, as did the Massachusetts antitakeover provisions.

Turning to the traditional "connection with" analysis, piercing claims may have some economic effect on employee benefit plans. To cite just one example, piercing claims may result in the recovery of promised benefits where the plan sponsor is unable to fund such benefits. n483 In fact, such a situation, where plan participants seek recovery from a corporate shareholder because the plan sponsor cannot fund benefits, may represent the prototypical case for piercing the corporate veil under ERISA. However, New York State Conference of Blue Cross & Blue Shield Plans v.

Travelers Insurance n484 teaches that an indirect economic effect on a benefit plan is insufficient by itself to result in preemption. In addition, application of the "tenuous, remote, or peripheral" standard requires a result that will not extend preemption to the outer limits implied by the "connection with" language. n485

The Supreme Court's decision in Mackey v. Lanier Collection Agency & Service, Inc. n486 lends further support to this analysis. In upholding the Georgia garnishment statute of general application, the Court indicated that ERISA does not contain any collection mechanisms and, as a result, ERISA cannot be held to preempt state-law collection mechanisms. n487 A piercing claim is somewhat analogous to a collection mechanism, such as a garnishment, because both are methods of recovering funds held by a person or entity other than the person or entity against whom the substantive judgment runs.

There are admittedly some differences between garnishments and piercing claims. In the garnishment setting, the funds are held by a third party. The piercing claim is slightly different because it shreds **[*1125]** the corporate veil which typically protects shareholders from the liabilities of their corporations. Furthermore, whereas garnishments do not impose liability on new parties, in some ways piercing claims do extend liability beyond the corporation by making the shareholders financially responsible for judgments rendered against their corporations.

However, piercing claims accomplish this extension of liability by refusing to acknowledge the distinction between the corporation and the shareholders. n488 In the same way that state partnership law would hold partners personally liable for unmade benefit plan obligations as an obligation of the partnership, n489 so too would a claim to pierce the corporate veil hold a shareholder responsible, in appropriate circumstances, for unmade benefit plan obligations or judgments flowing from substantive ERISA violations. It is unimaginable that Congress intended ERISA to preempt state partnership law. Similarly, it is unlikely that Congress intended ERISA to preempt state-law claims for piercing the corporate veil.

Furthermore, when brought in conjunction with a substantive claim under Title I of ERISA, claims for piercing the corporate veil can be analogized to the type of claim at issue in Sommers Drug Stores. Although the standards vary from jurisdiction to jurisdiction, n490 the heart of a piercing claim is predicated upon the relationship between the incorporated entity and a controlling shareholder. Although at least one of the parties to the substantive ERISA claim is likely to be a primary ERISA entity, this status is irrelevant to the underlying evaluation of factors such as respect for corporate formalities, maintenance of separate property and accounts, and fraudulent use of the corporate form necessary for the piercing claim. n491 Although the outcome of the analysis may affect an ERISA plan or redound to the benefit of a primary ERISA entity, the substance of the analysis focuses on the roles of shareholders and corporations in their traditional state-law roles. In fact, it is the compliance, or non- **[*1126]** compliance, with those traditional roles that forms the heart of the piercing analysis.

Historically, this regulation has been administered by the states and there is no indication in ERISA's legislative history that Congress intended ERISA to preempt this arena of traditional state concern. On the other hand, as recognized by the Supreme Court, n492 substantial legislative history indicates that Congress intended ERISA's preemption provision to protect plans from the burdens of inconsistent state regulation. Once one recognizes that a state-law claim to pierce the corporate veil focuses upon the relationship between corporations and shareholders, it becomes clear that this type of state regulation does not threaten employee benefit plans with inconsistent state regulation. Instead, the standards which are important in a piercing claim are standards which require appropriate use of, and respect for, the corporate form. Such standards apply to corporations and their shareholders, not to employee benefit plans. As such, permitting the use of state-law claims to pierce the corporate veil in conjunction with substantive ERISA claims does not threaten benefit plans with the specter of inconsistent state regulation.

To summarize, ERISA's preemption provision should not be construed to preempt a state-law claim for piercing the corporate veil when such a claim is brought as part of a suit alleging a violation of Title I of ERISA. ERISA preemption jurisprudence has resulted in the negation of a wide range of state laws, and even has invalidated at least one provision of a state corporation law. However, claims to pierce the corporate veil focus on the relationship between shareholders and corporations. This is an area of traditional state regulation and does not affect the central concern of ERISA preemption, that of avoiding the costs of inconsistent state regulation of employee benefit plans.

VI. Conclusion

The limited liability of corporate shareholders has become an accepted fixture in this country. However, the doctrine of piercing the corporate veil, based in state law, has become almost equally well established. The questions regarding the application and availability of veil piercing gain new vitality when viewed through the lens of the increasing federalization of employment law. And in this era when the baby boom generation approaches retirement age, perhaps the most important arena of federal employment law is that governing noncash and deferred compensation programs.

As the demands on privately sponsored health care and deferred compensation programs increase, plaintiffs are likely to seek ever **[*1127]** broader sources of recovery for their claims that relate to those programs. As that happens, the judicial system will continue to confront claims similar to those asserted in Peacock v. Thomas. n493 Accordingly, this article has examined the doctrine of piercing the corporate veil in both the traditional context of substantive state-law claims as well as the developing jurisprudence in the arena of federal legislation.

The breadth of ERISA's preemption clause, and the corresponding decisional law, threatens the utilization of veil piercing claims in association with substantive ERISA claims. Broad as it is, proper construction of ERISA preemption would permit the survival of veil piercing claims in appropriate circumstances. Use of veil piercing in substantive ERISA actions accords with the traditional corporate law rationales undergirding the doctrine. At the same time, permitting the use of veil piercing claims will not threaten the financial integrity of voluntarily sponsored benefit plans and is unlikely to subject those plans to inconsistent state regulation. ERISA preemption should not bring down the curtain on a veil piercing claim attached to a substantive ERISA claim.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityGeneral OverviewGovernmentsFiduciary ResponsibilitiesPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Donovan v. Dillingham Test

FOOTNOTES:

n1. In general, corporate shareholders are not held personally accountable for corporate obligations. 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations 25 (perm. ed. rev. vol. 1990, Supp. 1995); Harry G. Henn & John R. Alexander, Laws of Corporation and Other Business Enterprises 73 (3d ed. 1983). Although the doctrine is commonly known as the doctrine of limited liability, this term is misleading. The so-called limited liability of corporate shareholders is actually no liability. That is, barring application of an exception to the rule, shareholders have no liability, limited or otherwise, for corporate obligations. The phrase "limited liability" awkwardly describes the rather obvious feature of corporate ownership whereby shareholders are not entitled to recover their investment until satisfaction of the firm's obligations to outside creditors. The shareholder's liability is therefore said to be limited to the amount of her investment. But in reality, it is the shareholder's risk, rather than liability, that is limited. See Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, *52 U. Chi. L. Rev. 89, 101 (1985)* (noting that limited liability is a risk-sharing arrangement); Stephen B. Presser, Thwarting the Killing of the Corporation: Limited Liability, Democracy and Economics, *87 Nw. U. L. Rev. 148, 161-62 (1992)* (limiting liability may be justified by arguing that limiting risk promotes corporate investment); John A. Siliciano, Corporate Behavior and the Social Efficiency of Tort Law, *85 Mich. L. Rev. 1820, 1835 (1987)* (explaining that limited liability limits the risks faced by shareholders and investors); Joseph H. Sommer, The Subsidiary: Doctrine Without a Cause? *59 Fordham L. Rev. 227, 230 (1990)* (arguing that limited liability acts as an "insurance policy against insolvency that the firm's creditors provide to the firm's shareholders").

n2. See generally Henn & Alexander, supra note 1, 73; Adolph A. Berle, Jr., The Theory of Enterprise Entity, *47 Colum. L. Rev. 343, 343 (1947);* Presser, supra note 1; Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, *95 Harv. L. Rev. 853, 854 (1982).*

n3. See generally Steven C. Bahls, Application of Corporate Common Law Doctrines to Limited Liability Companies, *55 Mont. L. Rev. 43 (1994)* (providing general overview of limited liability companies); Susan P. Hamill, The Limited Liability Company: A Possible Choice for Doing Business?, *41 Fla. L. Rev. 721, 721-23 (1989)* (providing overview of tax advantages and business scenarios in which use of limited liability company is attractive); Jonathan R. Macey, The Limited Liability Company: Lessons for Corporate Law, *73 Wash U. L.Q. 433, 434-37 (1995)* (providing general description of limited liability companies); Larry E. Ribstein, The Deregulation of Limited Liability and the Death of Partnership, *70 Wash. U. L.Q. 417, 450-73 (1992)* (focusing on relative advantages of limited liability company over partnership form). Most states and the District of Columbia have adopted legislation permitting formation of limited liability companies. *Ala. Code 10-12-1* (1994); 1994 Alaska Sess. Laws 99; *Ariz. Rev. Stat. Ann. 29-601* (West Supp. 1995); *Ark. Code Ann. 4-32-101* to -1316 (Michie 1996); *Cal. Corp. Code 17000*-17700 (West 1996); *Colo. Rev. Stat. Ann. 7-80-101* to -1101 (West Supp. 1995); Conn. Gen. Stat. Ann. 7-80-101 (1993); *Del. Code Ann. tit. 6, 18-101* to -1105 (1993); D.C. Code Ann. 29-1301 to -1375 (1996); *Fla. Stat. Ann. 608.401-.514* (West Supp. 1996); *Ga. Code Ann. 14-11-100* to -1109 (1995 & Supp. 1996); *Idaho Code 53-601* to -692 (1994 & Supp. 1995); Ill. Comp. Stat. Ann. 180/1-1 to 60-1 (Michie Supp. 1996); *Ind. Code Ann. 23-18-11-1* to -18 (West 1994); *Iowa Code Ann. 490A.100-.1601* (West Supp. 1996); *Kan. Stat. Ann. 17-7601* to -7656 (1995); 1994 Ky. Acts 275; La. Rev. Stat. Ann. 12:1301-69 (West 1994 & Supp. 1996); 1993 Me. Laws 718; *Md. Code Ann., Corps. & Ass'ns 4A-101* to -1102 (Supp. 1995); *Mich. Comp. Laws Ann. 450.4101-.5200* (West Supp. 1996); *Minn. Stat. Ann. 322B.01-.960* (West 1995 & Supp. 1996); *Miss. Code Ann. 79-29-101* to -1201 (Supp. 1995); *Mo. Ann. Stat. 347.010-.740* (West Supp. 1996); *Mont. Code Ann. 35-8-101* to -1307 (1995); *Neb. Rev. Stat. 21-2601* to -2653 (1994); *Nev. Rev. Stat. Ann. 86.010* -.571 (Michie 1994); *N.H. Rev. Stat. Ann. 304-C:1-:85* (1995); *N.J. Stat. Ann. 42:2B-1* to -70 (West Supp. 1996); *N.M. Stat. Ann. 53-19-1* to -63 (Michie 1996); N.Y. Ltd. Liab. Co. Law 34-101 to -1403 (McKinney Supp. 1996); *N.C. Gen. Stat. 57C-1-01* to -10-03 (1993); *N.D. Cent. Code 10-32-01* to -155 (1995); *Ohio Rev. Code Ann. 1705.01* (Anderson 1994); Okla. Stat. Ann. tit. 18, 2000-2060 (West Supp. 1996); *Or. Rev. Stat. 63.951* (1995); 15 Pa. Cons. Stat. Ann. 8901-8998 (West 1995); *R.I. Gen. Laws 7-16-1* to -75 (1992 & Supp. 1995); 1994 S.C. Acts 448; *S.D. Codified Laws 47-34-1* to -59 (Michie Supp. 1996); Tenn. Code Ann. 48-201 to -248 (1994); *Tex. Rev. Civ. Stat. Ann. art. 1528n* (West 1996); *Utah Code Ann. 48-2b-101* to -157 (1994); *Va. Code Ann. 13.1-1000* to -1073 (Michie 1993 & Supp. 1995); *Wash. Rev. Code 25.15.005-.902* (Supp. 1996); *W. Va. Code 31-1A-1* to -69 (Supp. 1995); *Wis. Stat. Ann. 183.0102-.1305* (West Supp. 1995); *Wyo. Stat. Ann. 17-15-101* to -136 (Michie 1989).

n4. See generally Robert W. Hamilton, Registered Limited Liability Partnerships: Present at the Birth (Nearly), *66 U. Colo. L. Rev. 1065 (1995)* (tracing history and current status of limited liability partnerships). Limited liability partnerships are permitted in a majority of the states and the District of Columbia. *Ariz. Rev. Stat. Ann. 29-103* (West Supp. 1995); *Colo. Rev. Stat. Ann. 7-60-106* (West Supp. 1995); *Conn. Gen. Stat. Ann. 34-81A* (West Supp. 1994); Del. Code Ann. tit. 6, 1502 (1993 & Supp. 1994); D.C. Code Ann. 41-143 to -146 (Supp. 1996); Fla. Stat. Ann. 620.78 (West Supp. 1996); *Ga. Code Ann. 14-8-6* (Supp. 1996); Idaho Code 53-302 (Supp. 1995); Ill. Comp. Stat. Ann. 205/8.1 (Michie Supp. 1996); *Ind. Code Ann. 23-4-1-2* (West Supp. 1996); Iowa Code Ann. 486.44 (West Supp. 1996); *Kan. Stat. Ann. 56-345* (1994); *Ky. Rev. Stat. Ann. 275.015* (Banks-Baldwin 1994); *La. Rev. Stat. Ann. 9:3431(A)* (West Supp. 1996); *Md. Code Ann., Corps. & Ass'ns 9-801* (Supp. 1995); *Mich. Comp. Laws Ann. 449.44* (West Supp. 1996); *Minn. Stat. Ann. 319A.02* (West 1995); *Miss. Code Ann. 79-12-3* (1995); *Mo. Rev. Stat. 358.020* (1995); *Mont. Code Ann. 35-10-102* (1995); *N.J. Stat. Ann. 42:1-2* (West Supp. 1996); N.M. Stat. Ann. 54-1-2 (Michie 1996); *N.Y. Partnership Law 121-1500* to -1504 (McKinney Supp. 1996); N.C. Gen. Stat. 5-9-84.2 (Supp. 1994); *N.D. Cent. Code 45-22-01* (1995); *Ohio Rev. Code Ann. 1775.05* (Anderson 1994); *15 Pa. Cons. Stat. Ann. 8201* (West Supp. 1995); *S.C. Code Ann. 33-41-20* (Law. Co-op. 1994); S.D. Codified Laws 48 (Michie 1995); Tenn. Code Ann. 61-1 (1995); *Tex. Rev. Civ. Stat. Ann. art. 6132b*, 15 (West Supp. 1995); *Utah Code Ann. 48-1-41* (Supp. 1996); Va. Code Ann. 50-43-1 (Michie 1995).

n5. See Easterbrook & Fischel, supra note 1, at 90-91; Presser, supra note 1, at 155-56; *Siliciano, supra* note 1, at 1835; *Sommer, supra* note 1, at 230-31.

n6. See generally Joel Seligman, Corporations Cases and Materials 87 (1995); see also *Economy Mktg., Inc. v. Leisure Am. Resorts, Inc., 664 So. 2d 869, 870 (Ala. 1994)* (holding that in order to pierce the veil, a plaintiff must show that allowing the corporate form to stand would promote fraud or injustice); *Autonotritz del Golfo de Cal. v. Resnick, 306 P.2d 1, 4 (Cal. 1957)* (holding that failure to issue stock or provide adequate capitalization made corporation an alter ego of stockholders); *Tomaselli v. TransAmerica Ins. Co., 31 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994)* (noting that courts require a showing there is such a unity of interest that the separate personalities of the entity are nonexistent and that recognizing the corporate form would promote injustice); *Doughty v. CSX Transp., Inc., 905 P.2d 106, 111 (Kan. 1995)* (holding that in parent-subsidiary relationship, veil will be pierced when the two are so intertwined that "recognition of the subsidiary as a distinct entity would result in an injustice"); *Wilmot v. Bulman, 908 S.W.2d 139, 145 (Mo. Ct. App. 1995)* (requiring three-pronged test to pierce the veil in Missouri - plaintiff must show (1) complete and dominating control of corporate entity, (2) that control had been used to commit fraud or injustice, and (3) the control and breach of duty in (1) and (2) must have been used to proximately cause the injury or loss of the plaintiff); *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., 67 Ohio St. 3d 274, 289 (Ohio 1993)* (holding the test for veil piercing is (1) complete control over the corporation by those to be held liable and second, (2) exercise of complete control by those to be held liable in a way that "fraud or an illegal act" is committed against the person seeking to pierce, (3) causing that person injury or loss); *University Circle Research Ctr. Corp. v. Gailbreath Co., 667 N.E.2d 445, 448 (Ohio Ct. App. 1995)* (same); *Kansas Gas & Elec. Co. v. Ross, 521 N.W.2d 107, 112 (S.D. 1994)* (holding that courts should pierce when separateness of corporate identity is disregarded and such disregard causes injustice or fraud); *Stewart & Stevenson Servs., Inc., v. Service-Tech., Inc., 879 S.W.2d 89, 108 (Tex. Ct. App. 1994)* (noting fraud and inadequate capitalization are factors in determining whether corporation is an alter ego); *Schafir v. Harrigan, 879 P.2d 1384, 1389 (Utah 1994)* (stating that the two-pronged test in Utah for piercing requires both that (1) there is unity of interest and ownership such that the separate personalities of the corporation and individual are nonexistent, and (2) allowing the corporate form to stand would sanction fraud or promote injustice); *Laya v. Erin Homes, Inc., 352 S.E.2d 93, 98 (W. Va. 1986)* (listing these and additional factors).

n7. *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994)* (stating that courts should pierce when corporation is a sham and abuse of corporate form), aff'd, *115 S. Ct. 1920 (1995); Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 284 (3d Cir. 1983)* (explaining alter ego doctrine is a "tool of equity").

n8. Employee Retirement Income Security Act (ERISA) 1-4402, *29 U.S.C. 1001*-1461 (1994).

n9. See Dana M. Muir, Note, Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits, *87 Mich. L. Rev. 1034, 1034 (1989).*

n10. See infra text accompanying notes 33-71.

n11. *Nachman Corp. v. Pension Benefits Guar. Corp., 446 U.S. 359, 361 (1980).*

n12. Private and public pension plans held assets of approximately $ 4.6 trillion as of the end of 1993. John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 20 (2d ed. 1995). In contrast, in 1970 the assets in those plans totaled approximately $ 241 billion. Celia Silverman et al., EBRI Databook on Employee Benefits 190 (3d ed. 1995).

n13. As an example, prior to its decision in *Peacock v. Thomas, 116 S. Ct. 862 (1996),* the Supreme Court decided at least 13 cases analyzing the interplay between ERISA and other federal laws. *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 647 (1993)* (upholding the constitutionality of multiemployer provisions of ERISA); *Commissioner v. Keystone Consol. Indus., 508 U.S. 152, 159 (1993)* (applying same definition of "sale or exchange" to benefit plans as traditionally used in tax law); *Hazen Paper Co. v. Biggins, 507 U.S. 604, 608-14 (1993)* (addressing employee claims under federal age discrimination law and ERISA); *Patterson v. Shumate, 504 U.S. 753, 757-59 (1992)* (analyzing interaction between ERISA and bankruptcy law); *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-27 (1992)* (applying traditional definitions of employee in ERISA action); *Pension Benefits Guar. Corp. v. LTV Corp., 496 U.S. 633, 645-47 (1990)* (analyzing interaction between ERISA and bankruptcy law); *Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 375-76 (1990)* (including a comparison of ERISA and federal labor law); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 545-49 (1988)* (comparing obligations under ERISA and federal labor law); *Connolly v. Pension Benefits Guar. Corp., 475 U.S. 211, 227-28 (1986)* (upholding the constitutionality of multiemployer provisions of ERISA); *Pension Benefits Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 734 (1984)* (upholding the constitutionality of multiemployer provisions of ERISA); *Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86-89 (1982)* (comparing obligations under ERISA and federal labor law); *NLRB v. Amax Coal Co., 453 U.S. 322, 330-39 (1981)* (comparing obligations under ERISA and federal labor law); *International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566-70 (1979)* (comparing ERISA and federal securities law).

n14. *116 S. Ct. 862 (1996).*

n15. One measure of the number and variety of groups who claimed an interest in the Supreme Court's decision in Peacock is that seven entities filed amicus briefs in the case. See Brief of the National Association of Real Estate Investment Managers as Amicus Curiae in Support of Petitioner, Peacock (No. 94-1453); Brief of the Bricklayers & Trowel Trades International Pension Fund as Amicus Curiae in Support of Respondent, Peacock (No. 94-1453); Brief of the National Coordinating Committee for Multiemployer Plans as Amicus Curiae in Support of Respondent, Peacock (No. 94-1453); Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Respondent, Peacock (No. 94-1453); Brief of the American Association of Retired Persons and the National Employment Lawyers Association in Support of Respondent, Peacock (No. 94-1453); Brief of Amici Curiae Central States, Southeast & Southwest Areas Health and Welfare and Pension Funds in Support of Respondent, Peacock (No. 94-1453); Brief for the United States as Amicus Curiae Supporting Respondent, Peacock (No. 94-1453).

n16. See *Linn & Lane Timber Co. v. United States, 236 U.S. 574 (1915);* Phillip I. Blumberg, The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality 125-33 (1993); 1 Fletcher, supra note 1, 41.

n17. See infra text accompanying notes 179-209.

n18. See ERISA 3(5), *29 U.S.C. 1002*(5) (1994).

n19. See ERISA 3(21)(A), *29 U.S.C. 1002*(21)(A).

n20. See ERISA 4001(b)(1), *29 U.S.C. 1301*(b)(1).

n21. For example, one consolidated class action alleging violations of ERISA's noninterference clause settled in 1992 for $ 415 million. *McLendon v. Continental Group, Inc., 802 F. Supp. 1216, 1217, 1219 (D.N.J. 1992).*

n22. See infra text accompanying notes 96-100.

n23. ERISA 2(b), *29 U.S.C. 1001*(b).

n24. Just such an avoidance scheme allegedly lies at the heart of the Peacock case. See infra text accompanying notes 126-34.

n25. As enacted, ERISA consisted of four titles. See infra text accompanying notes 33-71.

n26. *116 S. Ct. 862 (1996).*

n27. Jay Conison, The Federal Common Law of ERISA Plan Attorneys, *41 Syracuse L. Rev. 1049, 1083 (1990).*

n28. Robert C. Clark & Ann A. McDermed, The Choice of Pension Plans in a Changing Regulatory Environment 67 (1990).

n29. Id. at 68-69; Edwin W. Patterson, Legal Protection of Private Pension Expectations 85-89, 96 (1960).

n30. Federal Welfare and Pension Plan Disclosure Act, *29 U.S.C. 301*-309 (repealed Jan. 1, 1975).

n31. *29 U.S.C. 186*(a) (1994).

n32. See Muir, supra note 9, at 1034.

n33. ERISA 3(2)(A)(i)-(ii), *29 U.S.C. 1002*(2)(A)(i)-(ii) (1994).

n34. ERISA 3(1), *29 U.S.C. 1002*(1).

n35. ERISA 101-111, *29 U.S.C. 1021*-1031.

n36. ERISA 201-211, *29 U.S.C. 1051*-1061.

n37. ERISA 301-308, *29 U.S.C. 1081*-1086.

n38. See *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989)* ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions ... "codify and make applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts."") (quoting H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649) (all brackets inserted by Firestone opinion); *Central States S.E. & S.W. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985)* ("Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility."); see also *Acosta v. Pacific Enters., No. 89-56170, 1992 U.S. App. LEXIS 639,* at *13 (9th Cir. Jan. 23, 1992) (explaining that ERISA does not detail each duty of a fiduciary, but relies generally upon trust law); H.R. Rep. No. 533, 93d Cong., 2d Sess. 11 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649); S. Rep. No. 127, 93d Cong., 2d Sess., 29 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4865.

n39. ERISA 3(21)(A), *29 U.S.C. 1002*(21)(A).

n40. See, e.g., ERISA 404-405, *29 U.S.C. 1104*-1105.

n41. ERISA 406-408, *29 U.S.C. 1106*-1108.

n42. ERISA 501-515, *29 U.S.C. 1131*-1145.

n43. ERISA 502, *29 U.S.C. 1132.*

n44. ERISA 502, *29 U.S.C. 1132.*

n45. See, e.g., ERISA 502(a)(1), *29 U.S.C. 1132*(a)(1).

n46. See, e.g., ERISA 502(a)(8), *29 U.S.C. 1132*(a)(8).

n47. See, e.g., ERISA 502(a)(2), *29 U.S.C. 1132*(a)(2).

n48. See, e.g., ERISA 502(a)(7), *29 U.S.C. 1132*(a)(7).

n49. ERISA 514, *29 U.S.C. 1144.*

n50. Conison, supra note 27, at 1083. For a later work by Professor Conison suggesting how the courts might apply a narrower interpretation to the preemption clause, see Jay Conison, ERISA and the Language of Preemption, *72 Wash. U. L.Q. 619 (1994).* Among the numerous advantages resulting from expansive preemption are opportunities for employers to provide uniform benefit plans across state lines, to avoid state premium taxes, to utilize uniform administrative procedures, and to hold off state minimum benefit requirements. Curtis D. Rooney, ERISA: Preemption Challenged by State Strategies and Health Care Reform, 7 Benefits L.J. 127, 128 (1994).

n51. ERISA 514, *29 U.S.C. 1144.*

n52. ERISA 514(c)(1), *29 U.S.C. 1144*(c)(1).

n53. See, e.g., *Kenney v. Roland Parson Contracting Corp., 28 F.3d 1254, 1257-58 (D.C. Cir. 1994)* (citing decisions from each of the circuits which have addressed the appropriate standard for determining the existence of an employee benefit plan).

n54. More specific exceptions include, for example, the exemption which permits Hawaii to provide for universal health care within the state. ERISA 514(b)(5), *29 U.S.C. 1144*(b)(5). For more information on the "Hawaii exception," including a discussion of the case law and legislative history of the exception, see David Gregory, The Scope of ERISA Pre-emption of State Law: A Study in Effective Federalism, *48 U. Pitt. L. Rev. 427, 474-75 (1987).*

n55. See, e.g., *Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 45 (1987).*

n56. ERISA 514(b)(2)(A), *29 U.S.C. 1144*(b)(2)(A).

n57. See, e.g., *Pilot Life Ins., 481 U.S. at 45.*

n58. ERISA 514(b)(2)(B), *29 U.S.C. 1144*(b)(2)(B).

n59. ERISA 1001-2008 (1974) (codified as amended in scattered sections of the I.R.C. (1988)).

n60. *26 U.S.C. 1*-9722 (1994).

n61. Compare ERISA 203, *29 U.S.C. 1053* with *I.R.C. 411*.

n62. See Langbein & Wolk, supra note 12, at 149-50.

n63. ERISA 3001-3043, *29 U.S.C. 1201*-1242.

n64. The original designation of agency authority was revised by Reorganization Plan No. 4. Reorganization Plan No. 4 of 1978, *92 Stat. 3790 (1978).*

n65. ERISA 4001-4402, *29 U.S.C. 1301*-1461.

n66. ERISA 4201-4235, *29 U.S.C. 1381*-1415.

n67. See infra text accompanying notes 272-83.

n68. Multiemployer Pension Plans Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, *94 Stat. 1208.* For a discussion of ERISA's regulation of multiemployer plans, see infra text accompanying notes 272-83.

n69. ERISA 4(b), 4021(b), *29 U.S.C. 1003*(b), 1321(b); see *Wollman v. Poinsett Hutterian Brethren, Inc., 844 F. Supp. 539, 542 (D.S.D. 1994)* (rejecting attempt by members of a religious colony to obtain federal court jurisdiction by alleging that they were colony employees and thus covered by ERISA).

n70. See ERISA 201(2), 301(a)(3), 401(a)(1), *29 U.S.C. 1051*(2), 1081(a)(3), 1101(a)(1).

n71. See ERISA 110, *29 U.S.C. 1030; 29 C.F.R. 2520.104-23 (1989).*

n72. The original designation of agency authority was revised by Reorganization Plan No. 4. Reorganization Plan No. 4 of 1978, *92 Stat. 3790 (1978).*

n73. See supra note 61.

n74. Reorganization Plan No. 4 of 1978, *92 Stat. 3790 (1978).*

n75. ERISA 502(a)(2) & (4), *29 U.S.C. 1132*(a)(2) & (4) (1994).

n76. *Pension Benefit Guar. Corp. v. Furlong Mfg. Co., 590 F. Supp. 740, 742 (E.D. Pa. 1984)* ("The PBGC is a wholly-owned United States Government corporation created ... to administer the mandatory, self-financing pension plan termination insurance program established by Title IV of ERISA."); *Pension Benefit Guar. Corp. v. Broadway Maint. Corp., 547 F. Supp. 629, 630-31 (S.D.N.Y. 1982)* ("Congress passed [ERISA] to provide an efficient and equitable mechanism for the termination of employee pension plans... The Pension Benefit Guaranty Corporation ... was established under ERISA and is responsible for the distribution of guaranteed pension benefits ...."), rev'd, *707 F.2d 647 (2d Cir. 1983).*

n77. See *Barbizon Corp. v. ILGWU Nat'l Retirement Fund, 842 F.2d 627, 631 (2d Cir. 1988)* (noting that the PBGC "is responsible for insuring multiemployer pension plans").

n78. See ERISA 4003, *29 U.S.C. 1303.* A defined benefit pension plan typically promises to pay a dollar amount at retirement, based upon a formula specified in the plan. See ERISA 3(35), *29 U.S.C. 1002*(35). The other standard type of pension plan is a defined contribution pension plan. In a defined contribution pension plan, the plan establishes a separate account on behalf of each individual participant. See ERISA 3(34), *29*

U.S.C. 1002(34). In a defined contribution pension plan, the employee bears the investment risk. In a defined benefit pension plan, the employer bears the investment risk. Muir, supra note 9, at 1034 n.4.

n79. 1995 PBGC Ann. Rep. 1 (1996).

n80. See id. at 17-19.

n81. See *Debreceni v. Merchants Terminal Corp., 889 F.2d 1, 6 (1st Cir. 1989); Solar v. Pension Benefit Guar. Corp., 666 F.2d 28, 29 (2d Cir. 1981)* (Coffrin, J., dissenting).

n82. See Reorganization Plan No. 4 of 1978, *92 Stat. 3790, 3791 (1978).* Stated in simplest terms, qualified pension plans receive three tax advantages. Employers may take current federal income tax deductions for contributions, employees are not taxed on the benefits until they receive distributions from the plan, and the corpus of the trust is not subject to federal taxation. See Langbein & Wolk, supra note 12, at 149-50. For a detailed explanation of the economic advantages that result from this tax treatment, see id. at 156-59.

n83. Revenue Provisions, Subtitle B, Pension Distributions, Pub. L. No. 102-318, 521, *106 Stat. 290, 300 (1992)* (codified at *I.R.C. 401(a)(31)* (Supp. IV 1994)).

n84. H.R. Conf. Rep. No. 650, 102d Cong., 2d Sess. 42-44 (1992).

n85. See, e.g., Alan L. Gustman et al., The Role of Pensions in the Labor Market: A Survey of the Literature, *47 Indus. & Lab. Rel. Rev. 417, 426-27 (1994).*

n86. See, e.g., James H. Smalhout, The Not-So-Golden Years, Wall St. J., June 29, 1995, at A14 ("Today the retirement prospects of 64 million Americans hang in the balance... Cleaning up this Godforsaken mess will become the political and moral struggle of our time."); see also Craig S. Karpel, The Retirement Myth 4 (1995) ("We're living in a time of global political and technological change so swift and sweeping that yesterday's rational retirement plan has become a parachute that won't open.").

n87. See Silverman et al., supra note 12, at 141.

n88. See *Clark & McDermed, supra* note 28, at 99; Angela Chang, The Trend away from Defined Benefit Pension Plans, in The Future of Pensions in the United States 112 (Ray Schmitt ed., 1993).

n89. See Silverman et al., supra note 12, at 144; see also Robert L. Clark et al., Firm Choice of Type of Pension Plan: Trends and Determinants, in The Future of Pensions in the United States, supra note 88, at 117, 117-21 (updating their work through 1988).

n90. 1995 PBGC Ann. Rep. 9 (1996).

n91. See, e.g., Chang, supra note 88, at 112.

n92. See id. at 111.

n93. Karpel, supra note 86, at 42.

n94. *Clark & McDermed, supra* note 28, at 91-106. But see Chang, supra note 88, at 112 (discussing studies that attribute the shift to other causes).

n95. *Clark & McDermed, supra* note 28, at 91-106.

n96. See, e.g., *Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995)* (regarding welfare benefit plans). However, through the establishment of contractual obligations, an employer may become obligated to continue benefits. See *UAW v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983),* cert. denied, *465 U.S. 1007 (1984).*

n97. Staff of Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at 90 (Comm. Print 1976) [hereinafter History] (statement of Sen. Williams) (describing how the Senate Subcommittee on Labor "listened to one heartbreaking story after another of dashed hopes, broken promises, and the bleak dispair [sic] of a poverty-stricken old age").

n98. 120 Cong. Rec. 4295 (1974), reprinted in History, supra note 97, at 3415 (remarks of Congressman Ullman, Chairman of the Ways and Means Committee); see also 119 Cong. Rec. 146 (1973), reprinted in History, supra note 97, at 204 (remarks of Senator Javits) ("The committee believes that the legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system."); 120 Cong. Rec. 4278 (1974), reprinted in History, supra note 97, at 3369 (remarks of Congressman Perkins, Chairman of the Committee on Education and Labor) ("It has not been easy to draft a law which protects individual pension rights and at the same time, recognizes the voluntary nature of pension plans."); 120 Cong. Rec. 4307 (1974), reprinted in History, supra note 97, at 3449-50 (remarks of Congressman Collier) (explaining that the provisions of ERISA "were carefully worked out to insure flexibility accommodating the individual characteristics of different plans and to balance the disincentives for wider coverage associated with increased costs against the need to provide greater protection"); 119 Cong. Rec. 30,004 (1973), reprinted in History, supra note 97, at 1601 (remarks of Senator Williams) ("This bill secures a promise of retirement security, and yet creates no impediments to the continued growth and expansion of private pensions.").

n99. See, e.g., 119 Cong. Rec. 130 (1973), reprinted in History, supra note 97, at 90 (remarks of Senator Williams) (explaining that "anticipated cost burdens to the plans" were minimal because any other approach would "work against the best interests of all parties").

n100. H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639.

n101. See 119 Cong. Rec. 146 (1973), reprinted in History, supra note 97, at 205-06 (remarks of Senator Javits) (stating that congressional materials regarding the proposed legislation "would fill this entire Senate Chamber").

n102. Compare ERISA 514(a), *29 U.S.C. 1144* (1994) (the version as enacted) with H.R. 2, 93d Cong., 1st Sess. 114 (1973) (the House version) and S. 4, 93d Cong., 1st Sess. 609 (1973) (the Senate version).

n103. 120 Cong. Rec. 29,942 (1974), reprinted in History, supra note 97, at 4770 (remarks of Senator Javits).

n104. 120 Cong. Rec. 29,942 (1974), reprinted in History, supra note 97, at 4770-71 (remarks of Senator Javits); see also 120 Cong. Rec. 29,933 (1974), reprinted in History, supra note 97, at 4745-46 (speaking of an intent "to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans").

n105. See Gordon L. Clark, Pensions and Corporate Restructuring in American Industry 4 (1993) (stating that Senator Javits "worked for pension reform for more than ten years"); Langbein & Wolk, supra note 12, at 62-63 (indicating that the 1963 closing of a Studebaker plant was a primary factor in spurring Congress to consider pension reform).

n106. See Leon E. Irish & Harrison J. Cohen, ERISA Preemption: Judicial Flexibility and Statutory Rigidity, *19 U. Mich. J.L. Reform 109, 114 n.15 (1985).*

n107. See 120 Cong. Rec. 29,942 (1974), reprinted in History, supra note 97, at 4771 (remarks of Senator Javits).

n108. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 3022(a)(4), *88 Stat. 829, 999 (1976).*

n109. See S. Rep. No. 299, 103d Cong., 2d Sess. 3 (1994); Irish & Cohen, supra note 106, at 115.

n110. See, e.g., Act of Jan. 14, 1983, Pub. L. No. 97-473, 301(a), *96 Stat. 2605, 2611-12 (1984)* (amending ERISA preemption to permit Hawaii to require state employers to provide health care coverage).

n111. *116 S. Ct. 862 (1996).*

n112. See *Thomas v. Tru-Tech, Inc., No. 87-2243-3, 1988 WL 212511*, at *2 (D.S.C. Nov. 28, 1988), aff'd, *900 F.2d 256 (4th Cir. 1990)*, enforced sub nom. Thomas v. Peacock, No. 7:91-3843-21, *1992 U.S. Dist. LEXIS 18749* (D.S.C. Oct. 28, 1992), aff'd in part, vacated and remanded in part, *39 F.3d 493 (4th Cir. 1994)*, rev'd, *116 S. Ct. 862 (1996).*

n113. *1988 WL 212511*, at *1.

n114. Id. at *6.

n115. Id.

n116. Id. at *5.

n117. See id. at *8.

n118. Id. at *2.

n119. Id. at *5.

n120. Id.

n121. Id. at *13.

n122. Id. at *14. The plaintiffs previously had settled their claim against Connecticut General Life Insurance Company, the administrator of the plan, for $ 30,000. The award against Tru-Tech was reduced by the amount of this settlement. Id.

n123. See ERISA 404(a)(1)(A)(i), *29 U.S.C. 1104*(a)(1)(A)(i) (1994). For a critique of the exclusive benefit rule, see Daniel Fischel & John H. Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, *55 U. Chi. L. Rev. 1105 (1988).*

n124. *1988 WL 212511,* at *11-12.

n125. Id.

n126. *Thomas v. Peacock, Nos. 89-2001, 89-2003, 1990 WL 48865,* at *1 (4th Cir. Apr. 3 1990), enforced sub nom. Thomas v. Peacock, No. 7:91-3843-21, *1992 U.S. Dist. LEXIS 18749* (D.S.C. Oct. 28, 1992), aff'd in part, vacated and remanded in part, *39 F.3d 493 (4th Cir. 1994),* rev'd, *116 S. Ct. 862 (1996).*

n127. *1990 WL 48865,* at *5. On appeal the plaintiffs argued that even if Peacock was not a fiduciary, he should be held liable for knowing participation in a breach of fiduciary duty. The Fourth Circuit dismissed this claim because the plaintiffs had failed to raise it in the district court. Id. at *4 n.2. The liability of ERISA nonfiduciaries has troubled the courts in recent years. In its five-to-four opinion in Mertens v. Hewitt Associates, a majority of the Supreme Court strongly indicated its belief that nonfiduciaries are not liable for participation in a fiduciary breach. See *113 S. Ct. 2063, 2067 (1993).* For a detailed discussion of other remedial issues dealt with in the Mertens opinion, see Dana M. Muir, ERISA Remedies: Chimera or Congressional Compromise?, *81 Iowa L. Rev. 1, 26-29 (1995).*

n128. Thomas v. Peacock, No. 7:91-3843-21, *1992 U.S. Dist. LEXIS 18749* (D.S.C. Oct. 28, 1992), aff'd in part, vacated and remanded in part, *39 F.3d 493 (4th Cir. 1994),* rev'd, *116 S. Ct. 862 (1996).* Plaintiffs also unsuccessfully sought to hold Tru-Tech's attorney, Alan Finegold, personally liable for the 1988 judgment. *1992 U.S. Dist. LEXIS 18749,* at *2, *37.

n129. *39 F.3d at 497.*

n130. *1992 U.S. Dist. LEXIS 18749,* at *6-13.

n131. Id. at *14.

n132. Id. at *16.

n133. Id. at *35.

n134. Id. at *36.

n135. *Thomas v. Peacock, 39 F.3d 493, 507 (4th Cir. 1994),* rev'd, *116 S. Ct. 862 (1996).*

n136. *Id. at 507.*

n137. Justice Stevens dissented from the Court's opinion. *Peacock v. Thomas, 116 S. Ct. 862, 869 (1996).*

n138. Id.

n139. *Id. at 866-67.*

n140. Id. Technically the veil piercing claim was added to his complaint by amendment. Id.

n141. See *id. at 867.*

n142. Id.

n143. See id.

n144. *Id. at 866.*

n145. *Id. at 866-67.*

n146. *Id. at 866* ("even if ERISA permits a plaintiff to pierce a corporate veil to reach a defendant not otherwise subject to suit under ERISA"). Id.

n147. *116 S. Ct. at 866-67* (citing 1 Fletcher, supra note 1, 41).

n148. See generally Phillip I. Blumberg, The Law of Corporate Groups 681-92 (1987 & Supp. 1996) (proposing elimination of limited liability in certain cases); Robert C. Clark, Corporate Law 35 (1986) (criticizing abuses of limited liability); Theresa A. Gabaldon, The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders, *45 Vand. L. Rev. 1387 (1992);* Paul Halpern et al., An Economic Analysis of Limited Liability in Corporation Law, *30 U. Toronto L.J. 117 (1980)* (suggesting unlimited liability for smaller, closely held corporations, in both tort and contract situations, and proposing that directors of large publicly held corporations be held personally liable to involuntary creditors); Henry Hansmann & Reinier Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, *100 Yale L.J. 1879 (1991)* (arguing that there may be no persuasive justifications for preferring limited liability over unlimited shareholder liability); David W. Leebron, Limited Liability, Tort Victims, and Creditors, *91 Colum. L. Rev. 1565 (1991)* (stating that the case for limited liability for corporate torts has been seriously overestimated); *Sommer, supra* note 1 (providing an economic explanation for limited liability); Robert B. Thompson, Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts for the Enterprise, *47 Vand. L. Rev. 1 (1994)* (suggesting that the arguments for limited liability have little significance in the parent-subsidiary context); Note, Should Shareholders Be Personally Liable for the Torts of Their Corporation?, *76 Yale L.J. 1190 (1967)* (supporting liability for closely held corporations). But see Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 40-62 (1991) (defending limited liability); Janet Cooper Alexander, Unlimited Shareholder Liability Through a Procedural Lens, *106 Harv. L. Rev. 387, 444 (1992)* (criticizing the Hansmann and Kraakman proposal to eliminate shareholder limited liability for torts due to procedural difficulties).

n149. See supra note 2 and accompanying text.

n150. 1 Fletcher, supra note 1, 25; Henn & Alexander, supra note 1, 368, at 27. But see Robert W. Hamilton, Corporations 14 (5th ed. 1994) (arguing that the entity status has almost nothing to do with shareholder limited liability). Hamilton notes that English law established the corporation as a separate entity prior to granting shareholders limited liability. Id. at 12-13; Phillip I. Blumberg, Limited Liability and Corporate Groups, *11 J. Corp. L. 573, 588 (1986)* (claiming that corporations were regarded as entities for durational and ownership transfer purposes long before their entity status was tied in with limited liability). In a similar vein, the Revised Uniform Partnership Act (RUPA) grants partnerships entity status yet holds partners personally liable for partnership obligations. Unif. Partnership Act (1994) 306, 6 U.L.A. 45 (West Supp. 1995).

n151. Hamilton, supra note 150, at 128; see also supra note 1 (discussing the shortcomings of the phrase "limited liability").

n152. Directors and officers certainly may own shares of stock. When they do, the doctrine of limited liability applies to them with respect to their role as stockholders. It does not, however, apply to them in their capacities as officers and directors.

n153. *United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 847 (W.D. Mo. 1984)* (explaining that corporate officers are not normally held personally liable for acts of corporation), aff'd in part, rev'd in part, *810 F.2d 726 (8th Cir. 1986)*, cert. denied, *484 U.S. 848 (1987); In re Joseph, 22 B.R. 319, 322 (Bankr. E.D.N.Y. 1982)* (claiming that officers and directors are protected when they act within the scope of their authority; for example, they are not held liable for inducing the corporation to break a contract); *Ong Hing v. Arizona Harness Raceway, Inc., 459 P.2d 107, 115 (Ariz. Ct. App. 1969)* (holding that directors are not personally liable for actions if made in good faith and with the best interest of the corporation in mind); *Ace Dev. Co. v. Harrison, 76 A.2d 566, 570 (Md. 1950)* (holding that when an officer as an agent of a company signs a contract for the corporation, the officer is not personally liable on that contract); *Alterio v. Biltmore Constr. Corp., 377 A.2d 237, 242 (R.I. 1977)* (holding officers and directors of a corporation liable for acts performed within the scope of their authority would "seriously impair the concept of limited liability through incorporation"); *State v. Richard Knutson, Inc., 537 N.W.2d 420, 425 (Wis. Ct. App. 1995)* (holding that acts of officers and directors as agents of the corporation within the scope of their authority are acts of the corporation); 1 Fletcher, supra note 1, 91 ("An agent is not liable for the acts of the corporation solely because of his or her agency ...."); David A. Rich, Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107, *13 B.C. Envtl. Aff. L. Rev. 643, 663 (1986)* ("Corporate officers generally are not personally liable for acts performed in their corporate capacity ...."). But see *State ex rel. Webster v. Missouri Resource Recovery, Inc., 825 S.W.2d 916, 925 (Mo. Ct. App. 1992)* (explaining that traditional rule is that officers and directors are not personally liable for torts of corporation - but that rule is eroding in environmental cases, especially when corporate official has played a direct role).

n154. See *In re Joseph, 22 B.R. at 322 n.2* (noting that officers and directors who convert goods for personal use may be held personally liable); *Ace Dev. Co., 76 A.2d at 571* (holding that officer may be held personally liable on contract signed on behalf of corporation if the matter is tainted by fraud); *State ex rel. Anthony J. Celebrezze v. Scioto Sanitation, Inc., No. 1932, 1991 WL 227801*, at *2 (Ohio Ct. App. Oct. 23, 1991) (holding that corporate officers may be held personally liable for fraud); *Ex parte Franklin D. Chambers, 898 S.W.2d 257, 267 (Tex. 1994)* (holding that sole officer/director is liable for his own "knowingly wrongful conduct"); *Kinkler v. Jurica, 19 S.W. 359, 360 (Tex. 1982)* (holding directors personally liable for their misconduct and "not as agents of the corporation"); *Richard Knutson, Inc., 537 N.W.2d at 425 n.6* (holding that officers are liable for "criminal acts committed in the name of the corporation"); *Restatement (Second) of the Law of Agency 329*, at 81 ("A person who purports to make a contract, conveyance or representation on behalf of another ... but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority ....").

n155. See *Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 902 (2d Cir. 1981)* (addressing liability of officer for tort); *Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902, 907 (1st Cir. 1980)* (holding officers liable for torts in which they had "personally participated" whether or not they were acts done within their authority); *Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978)* (holding that corporate officer is "individually liable for the torts he personally commits" and cannot hide behind the corporation); *Magic Toyota, Inc. v. Southeast Toyota Distrib., 784 F. Supp. 306, 315 (D.S.C. 1992)* (requiring a showing of "direct personal involvement" in tortious act for liability); *Rhone v. Energy N., Inc., 790 F. Supp. 353, 362 (D. Mass. 1991)* (holding that status is not sufficient to prove liability for corporate torts, but rather "personal involvement" must be shown); *Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 895 (D. Mass. 1991)* (defining standard of "active personal involvement" for individual liability in tort action); *Pocahontas First Corp. v. Venture Planning Group, Inc., 572 F. Supp. 503, 508 (D. Nev. 1983)* (holding that officer may be held personally liable for committing a tort while acting as an officer); *In re Joseph, 22 B.R. at 332 n.2* (holding that officers may be held personally liable for tortious acts such as fraud or trespass); *Ong Hing, 459 P.2d at 114-15* (holding that officers and directors committing the tort of inducing a breach of contract with no business justification may be held personally liable); *Central Benefits Mut. Ins. Co. v. RIS Admin. Agency, Inc., 638 N.E.2d 1049, 1054 (Ohio Ct. App. 1994)* (holding that corporate officers and directors may be held liable for torts committed by the corporation, with their participation or cooperation); Henry W. Ballantine, On Corporations 112, at 275 (rev. ed. 1946); 3*A Fletcher, supra* note 1, 1135.

n156. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179-84 (Del. 1986)* (discussing duty of loyalty to shareholders in a takeover situation as a duty that supersedes that to themselves and noteholders); *Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)* (holding that directors have "unyielding fiduciary duty" to the corporation and shareholders); Clark, supra note 148, at 34 (holding there is a duty owed to corporation by officers and directors); R. Franklin Balotti & Mark J. Gentile, Commentary from the Bar: Elimination or Limitation of Director Liability for Delaware Corporations, *12 Del. J. Corp. L. 5, 14 (1987)* (holding that directors must meet duties of due care and loyalty to their corporations or risk personal liability).

n157. See, e.g., *Stepak v. Addison, 20 F.3d 398, 403 (11th Cir. 1994)* (holding that directors owe duty of care to inform themselves adequately before making a business decision); *Hanson Trust PLC v. ML SCM Acquisitions Inc., 781 F.2d 264, 273 (2d Cir. 1986)* (holding that "a director, as a corporate fiduciary, ... must use at least that degree of diligence that an "ordinarily prudent' person" would use); *Resolution Trust Corp. v. Hess, 820 F. Supp. 1359, 1366 (D. Utah 1993)* (holding that directors must "exercise ordinary care, skill and diligence" in corporate matters) (quoting *FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1334 (Utah 1979)); Berkman v. Rust Craft Greeting Cards, Inc., 454 F. Supp. 787, 793 (S.D.N.Y. 1978)* (holding that corporate fiduciaries owe shareholders good faith and full disclosure over self-interest in a reelection situation); *Van Gorkom, 488 A.2d at 872* (holding that duty of care includes duty to be informed of reasonably available information); *Graham v. Allis-Chalmers Mfg., 188 A.2d 125, 130 (Del. 1963)* (holding that directors may rely on honesty of employees until something occurs that should put them on notice, without a violation of duty of care); *McLeod v. Lewis-Clark Hotel Co., 164 P.2d 195, 197-98 (Idaho 1945)* (holding that officers and directors are fiduciaries of the corporation and must do their jobs with the "diligence, care and skill" which "ordinarily prudent" persons would exercise in similar circumstances); *Neese v. Brown, 405 S.W.2d 577, 581 (Tenn. 1964)* (concluding that "ordinary or reasonable care and diligence" is the test for breach of duty of care) (citing with approval 3 William M. Fletcher, Fletcher's Private Corporations 1035 (rev. ed. 1947)); *FMA Accept. Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1334 (Utah 1979)* (holding that as long as officers and directors act in good faith and with reasonable care and skill they will not be liable for mistakes in judgment) (citing *Warren v. Robinson, 57 P. 287, 291 (Utah 1899));* Model Business Corporation Act (MBCA) 8.30(a) (concluding that director has duty to act in best interest of corporation). See generally Clark, supra note 148, at 123; Michael Bradley & Cindy A. Schipani, The Relevance of the Duty of Care Standard in Corporate Governance, *75 Iowa L. Rev. 1, 17-25 (1989);* Henry R. Horsey, The Duty of Care Component of the Delaware Business Judgment Rule, *19 Del. J. Corp. L. 971, 976 (1994);* Cindy A. Schipani, Integrating Corporate Law Principles with CERCLA Liability for Environmental Hazards, *18 Del. J. Corp. L. 1, 14-15 (1993);* Cindy A. Schipani, Should Bank Directors Fear FIRREA: The FDIC's Enforcement of the Financial Institutions Reform, Recovery and Enforcement Act, *17 J. Corp. L. 739, 745 (1992).*

n158. See, e.g., *Wardell v. Railroad Co., 103 U.S. 651, 658 (1880)* (concluding that directors' actions in own interest against interest of company violate duty to the company); *Hanson Trust, 781 F.2d at 274* (holding directors to standard of "honest judgment in the lawful and legitimate furtherance of corporate purposes") (quoting *Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979)); Abrams v. Koether, 766 F. Supp. 237, 255 (D.N.J. 1991)* (defining director self-interest as occurring in situations where directors "appear on both sides of a transaction or [gain] personal financial benefit") (internal quotes and cites omitted); *Revlon, 501 A.2d at 1250* (concluding that directors' self-interested decision in lock-up agreement caused violation of fiduciary duty of loyalty); *Pogostin v. Rice, 480 A.2d 619, 624 (Del. 1984)* (explaining that "directorial interest occurs whenever divided loyalties are present"); *Fliegler v. Lawrence, 361 A.2d 218, 221 (Del. 1976)* (citing *Del. Code Ann. tit. 8, 144* (1991) for the proposition that transactions or contracts between the company and one of its directors or officers are not automatically void); *Guth v. Loft, 5 A.2d 503, 510 (Del. 1939)* (holding that "corporate officers and directors are not allowed to use their position of trust and confidence to further their private interests"); *AC Acquisition Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 115 (Del. Ch. 1986)* (holding that "mere good faith will not preclude a finding of breach of loyalty" if the transaction is not "objectively or intrinsically fair"); *Neese, 405 S.W.2d at 580* (implying that directors and officers must not consider their own interests over those of shareholders); Clark, supra note 148, at 141; Bradley & Schipani, supra note 157, at 25-27; Corporate Director's Guidebook, *33 Bus. Law. 1591, 1599 (1978);* Charles Hansen, The Technicolor Case - A Lost Opportunity, *19 Del. J. Corp. L. 617, 624 (1994);* William F. Johnson, Note, Mills Acquisition Co. v. MacMillan, Inc.: Corporate Actions Now Require Sharper Supervision by Directors, *39 Am. U. L. Rev. 721, 729 (1990).*

n159. See supra note 7 and accompanying text.

n160. See supra note 6 and accompanying text.

n161. See, e.g., *Gershuny v. Martin McFall Messenger Anesthesia Prof. Ass'n, 539 So. 2d 1131, 1133 (Fla. 1989)* (holding that fraud or some illegal purpose is required); *Barkett v. Hardy, 571 So. 2d 13, 14 (Fla. Dist. Ct. App. 1990)* (declining to disregard corporate entity in spite of undercapitalization and failure to follow corporate formalities because no improper conduct present); *Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984)* (holding that fraud is not required for piercing corporate veil); *McLean v. Smith, 593 So. 2d 422, 426 (La. Ct. App. 1991)* (holding that veil can be pierced in absence of fraud); *Antigua Condominium Ass'n v. Melba Investors Atl., Inc., 501 A.2d 1359, 1364* (Md. Ct. Spec. App.) (holding "fraud or similar conduct" necessary), vacated, *517 A.2d 75 (Md. 1986); CMS Energy Corp. v. Attorney Gen., 475 N.W.2d 451, 456 (Mich. Ct. App. 1991)* (holding that actual fraud is unnecessary); *Paynesville Farmers Union Oil Co. v. Ever Ready Oil Co., 379 N.W.2d 186, 189 (Minn. Ct. App. 1985)* (holding that strict common-law fraud is unnecessary); *Klein v. Sporting Goods, Inc., 772 S.W.2d 173, 175 (Tex. Ct. App. 1989)* (holding that actual fraud is unnecessary to pierce); *Amfac Mech. Supply Co. v. Federer, 645 P.2d 73, 79 (Wyo. 1982)* (reversing trial court decision requiring fraud); Eric Fox, Note, Piercing the Veil of Limited Liability Companies, *62 Geo. Wash. L. Rev. 1143, 1169-70 (1994)* (noting that some courts have pierced the veil even absent fraud).

n162. *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994)* (noting that courts sometimes consider undercapitalization in decision to pierce), aff'd, *115 S. Ct. 1920 (1995); Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 284 (3d Cir. 1983)* (holding that inadequate capitalization is "an additional factor which court may consider"); *Poyner v. Lear Siegler, Inc., 542 F.2d 955, 958 (6th Cir. 1976)* (noting lack of precedent in Kentucky for piercing due to inadequate capitalization), cert. denied, *430 U.S. 969 (1977); Hess v. L.G. Balfour Co., 822 F. Supp. 84, 87 (D. Conn. 1993)* (holding that inadequate capitalization is an important factor in piercing the veil); *Bostwick-Braun Co. v. Szews, 645 F. Supp. 221, 226 (W.D. Wis. 1986)* (citing inadequate capitalization as a factor for veil piercing); *West v. Costen, 558 F. Supp. 564, 585 (W.D. Va. 1983)* (holding that inadequate capitalization may be a "ground" considered for piercing, but in and of itself is insufficient); see also Note, Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation, *45 S. Cal. L. Rev. 823, 845 (1972)* (arguing that allowing limited liability without adequate capitalization is basically allowing investors to abuse the privilege of limited liability).

n163. See, e.g., *United States v. Reading Co., 253 U.S. 26, 62-63 (1920)* (instrumentality test); *Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 570 (7th Cir. 1985)* (alter ego standard); Clark, supra note 148, at 71-74.

n164. *NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1051-52 (10th Cir. 1993)* (holding that the "corporate veil may not be pierced absent a showing of improper conduct") (citing 1 Fletcher, supra note 1, 41);

United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1095-96 (1st Cir. 1992) (holding that fraud is necessary to pierce); *FMC Fin. Corp. v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980)* (holding that court may pierce the corporate veil where recognition of separate corporate existence would "sanction a fraud"); Blumberg, supra note 148, at 118.

n165. See infra notes 196-212 and accompanying text.

n166. See infra notes 246-51 and accompanying text; see also David H. Barber, Piercing the Corporate Veil, *17 Willamette L. Rev. 371, 372 (1981)* (arguing that in theory, veil piercing applies to both closely held and publicly held corporations, but in practice, it has been applied only to closely held); Easterbrook & Fischel, supra note 1, at 109 n.37 (explaining that the most famous veil piercing cases involve closely held corporations).

n167. See infra notes 252-60 and accompanying text; see also Easterbrook & Fischel, supra note 1, at 110-11 (explaining that courts are more willing to pierce the corporate veil to reach corporate rather than individual shareholders). Application of the doctrine of limited liability to corporate groups has been criticized. See Phillip I. Blumberg, The Corporate Entity in an Era of Multinational Corporations, *15 Del. J. Corp. L. 283, 328 (1990).* See generally *Sommer, supra* note 1.

n168. Easterbrook & Fischel, supra note 1, at 89; see also *Cargill Investor Servs., Inc., v. Cooperstein, 587 F. Supp. 13, 14 (S.D.N.Y. 1984)* (noting that the law in the area of piercing the corporate veil is "hardly as clear as a mountain lake in springtime") (quoting *Brunswick Corp. v. Waxman, 599 F.2d 34, 35-36 (2d Cir. 1979));* Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, *76 Cornell L. Rev. 1036, 1036 (1991)* ("Piercing the corporate veil is the most litigated issue in corporate law and yet it remains among the least understood.") (footnote omitted).

n169. Thompson, supra note 168, at 1037.

n170. Id.

n171. Hansmann & Kraakman, supra note 148, at 1880 (concluding that "there may be no persuasive reasons to prefer limited liability over a regime of unlimited pro rata shareholder liability for corporate torts").

n172. See *Sommer, supra* note 1, at 268 (arguing for unlimited liability in tort claims). See generally Hansmann & Kraakman, supra note 148.

n173. Professor Thompson notes in his empirical study of veil piercing cases that the courts pierce the veil more often in contract cases than in tort cases. Thompson, supra note 168, at 1058. But see Easterbrook & Fischel, supra note 1, at 112 (asserting the opposite); Presser, supra note 1, at 167-68 (theorizing that the Thompson study may be "misleading" and concluding that, between 1985 and 1991, courts pierced the veil more frequently in tort than in contract cases).

n174. *Peacock v. Thomas, 116 S. Ct. 862 (1996).*

n175. The Supreme Court, however, dismissed the claims due to lack of jurisdiction. Id. See supra notes 111-47 and accompanying text for a discussion of the Peacock decision.

n176. See infra text accompanying notes 246-51.

n177. See infra text accompanying notes 252-60.

n178. See infra text accompanying notes 261-69.

n179. See supra note 6 and accompanying text.

n180. See *Bartle v. Home Owners Coop., 127 N.E.2d 832, 833 (N.Y. 1955); Lowendahl v. Baltimore & O.R. Co., 287 N.Y.S. 62, 72 (N.Y. App. Div. 1936),* aff'd, *6 N.E.2d 56 (N.Y. 1936).*

n181. *Bartle, 127 N.E.2d at 833.*

n182. *Walkovszky v. Carlton, 223 N.E.2d 6, 8-9 (N.Y. 1966).*

n183. *Simplicity Pattern Co. v. Miami Tru-Color Off-Set Serv., Inc., 619 N.Y.S.2d 29, 30 (N.Y. 1994); Walkovszky, 223 N.E.2d at 8.*

n184. *New York Ass'n for Retarded Children Inc. v. Keator, 606 N.Y.S.2d 784, 785 (N.Y. 1993)* (holding that court will pierce the veil only to "prevent fraud, illegality or to achieve equity"); *Bowles v. Errico, 558 N.Y.S.2d 734, 736 (N.Y. 1990)* (same).

n185. See *Austin Powder v. McCullough, 628 N.Y.S.2d 855, 856 (N.Y. App. Div. 1995)* (holding that shareholder must both dominate and commit fraud for veil to be pierced); *Walkovszky, 223 N.E.2d at 10* (holding that complaint did not allege sufficient facts to hold individual shareholder liable).

n186. See *Austin Powder, 628 N.Y.S.2d at 856* (listing various factors to consider in a decision to pierce); *Bowles, 558 N.Y.S.2d at 736.*

n187. See, e.g., *First Health, Inc. v. Blanton, 585 So. 2d 1331, 1334 (Ala. 1990)* (applying instrumentality test in contracts case); *Pyshos v. Heart-Land Dev. Co., 630 N.E.2d 1054, 1058 (Ill. App. Ct. 1994)* (applying alter ego doctrine); *Lopez v. TDI Servs., Inc., 631 So. 2d 679, 685 (La. Ct. App. 1994)* (applying alter ego doctrine); *Lowendahl v. Baltimore & O.R. Co., 287 N.Y.S. 62, 75* (N.Y. App. Div.) (adopting instrumentality test for veil piercing), aff'd, *6 N.E.2d 56 (N.Y. 1936); Postell v. B & D Constr. Co., 411 S.E.2d 413, 419* (N.C. Ct. App.), discretionary review denied, *417 S.E.2d 253 (N.C. 1992)* (applying instrumentality test in torts case).

n188. See *Automotriz del Golfo de California v. Resnick, 306 P.2d 1, 3 (Cal. 1957)* (finding that failure to issue stock or provide adequate capitalization made corporation an alter ego of individual stockholders); *Bein v. Brectel-Jochim Group, Inc., 8 Cal. Rptr. 2d 351, 355 n.8* (Cal. App. Dep't Super. Ct. 1992) (piercing the veil where shareholders fully owned and controlled corporation and "great injustice and irreparable damage" resulted); *Ross v. Coleman Co., 761 P.2d 1169, 1183 (Idaho 1988)* (holding that a parent was not liable for actions of a separately run subsidiary); *Central Benefits Mut. Ins. Co. v. RIS Adm'rs Agency, Inc., 638 N.E.2d 1049, 1054 (Ohio 1994)* (holding that fraud is not a required element for veil piercing); *Staubs v. Carlton Enters., Inc., No. 16372, 1994 WL 90373,* at *2 (Ohio Ct. App. Mar. 23, 1994) (holding that the corporate form may be disregarded when corporation has no separate mind of its own and is used to commit fraud or an illegal act); *Stewart & Stevenson Servs., Inc. v. Serv-Tech, Inc., 879 S.W.2d 89, 108 (Tex. Ct. App. 1994)* (listing above factors, among others); see also 1 Fletcher, supra note 1, 41.10, at 614; Lynda J. Oswald & Cindy A. Schipani, CERCLA and the "Erosion" of Traditional Corporate Law Doctrine, *86 Nw. U. L. Rev. 259, 286 (1992).*

n189. *Sunamerica Fin., Inc. v. 260 Peachtree St., Inc., 415 S.E.2d 677, 684* (Ga. Ct. App.) (holding that veil may be pierced when subsidiary is mere conduit of parent), cert. denied (Ga. 1992); *Swall v. Custom Automotive*

Servs., Inc., 831 S.W.2d 237, 239 (Mo. Ct. App. 1992) (holding that veil must be pierced when corporation is dominated by shareholders and used to perpetrate wrong or fraud); *Jeras v. East Mfg. Corp., 566 N.Y.S.2d 418, 420 (N.Y. App. Div. 1990)* (requiring "complete domination and control" of subsidiary to pierce veil); *Ohio Bureau of Workers' Comp. v. Widenmeyer Elec. Co., 593 N.E.2d 468, 471 (Ohio Ct. App. 1991)* (refusing to pierce when complete control was not used to commit fraud or a wrongful act); *Tigrett v. Pointer, 580 S.W.2d 375, 386-87 (Tex. Civ. App. 1978)* (involving sole shareholder preferring self as a creditor). Other courts also require a causal relation between the inequitable conduct and the plaintiff's loss. See, e.g., *Lowendahl, 287 N.Y.S. at 76.*

n190. See *Zisblatt v. Zisblatt, 693 S.W.2d 944, 950 (Tex. Ct. App. 1985); Roy E. Thomas Constr. Co. v. Arbs, 692 S.W.2d 926, 938 (Tex. Ct. App. 1985); Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987);* Robert W. Hamilton, Business Organizations 234 (1973).

n191. *Minton v. Cavaney, 364 P.2d 473, 475 (Cal. 1961).* But subsequent California courts have moved away from the Minton holding and instead consider undercapitalization a mere factor in veil piercing analysis. Patricia J. Hartman, Comment, Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?, *13 Pac. L.J. 1245, 1252 (1982).*

n192. Tex. Bus. Corp. Act Ann. art. 2.21A(2) (West Supp. 1996); see *Thrift v. Hubbard, 44 F.3d 348, 353-54 (5th Cir. 1995)* (requiring proof of actual fraud, not merely constructive fraud, in order to pierce the veil); *Western Horizontal Drilling, Inc. v. Jonnet Energy Corp., 11 F.3d 65, 68 (5th Cir. 1994)* (holding that actual fraud must be proven to pierce the veil in contract cases, but constructive fraud is sufficient in tort cases, according to Texas law); Promaxima Fitness, Inc. v. Keener, No. 01-92-00766-*CV, 1994 WL 167999,* at *2 (Tex. Ct. App. Apr. 28, 1994) (holding that plaintiff bears burden of proving actual fraud); *Farr v. Sun World Sav. Ass'n, 810 S.W.2d 294, 296 (Tex. Ct. App. 1991)* (holding that proof of actual fraud is required).

n193. Tex. Bus. Corp. Act Ann. art. 2.21A(3); see *Villar v. Crowley Maritime Corp., 990 F.2d 1489, 1496 (5th Cir. 1993)* (holding that merely proving failure to observe corporate formalities is not grounds to pierce in Texas), cert. denied, *510 U.S. 1044 (1994); Fidelity & Deposit Co. v. Commercial Casualty Consultants, Inc., 976 F.2d 272, 275 (5th Cir. 1992)* (same).

n194. See Thompson, supra note 168, at 1052 (finding in an empirical study that Delaware courts considered only 11 piercing cases during the test period and did not pierce the veil in any of them).

n195. *Pauley Petroleum, Inc. v. Continental Oil Co., 239 A.2d 629, 634 (Del. Ch. 1968)* (refusing to pierce the corporate veil, noting that the separate existence of the subsidiary served a legitimate business purpose and that there was no finding of fraud); see also *Harco Nat'l Ins. Co. v. Green Farms, Inc., No. CIV.A.1131, 1989 WL 110537* (Del. Ch. Sept. 19, 1989) (quoting *Pauley, 239 A.2d at 634,* and finding no evidence of fraud, nor facts justifying a finding that the corporation served as the shareholder's alter ego); Presser, supra note 1, at 169 (concluding that unless there is clear fraud, veil should not be pierced).

n196. *321 U.S. 349, 365 (1944)* ("No State may endow its corporate creatures with the power to ... defeat the federal policy ... Congress has announced ....").

n197. See *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 622 n.10 (1983)* (citing Abbott); *Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965)* (finding that federal statute would be subverted by recognition of corporate entity, regardless of intent); *MCI Telecommunications Corp. v. O'Brien Mktg., Inc., 913 F. Supp. 1536, 1541 n.3 (S.D. Fla. 1995)* (citing Abbott as holding that the corporate form will not be allowed to "'defeat a legislative policy'"); *Baldwin v. Matthew R. White Inv. Inc., 669 F. Supp. 1054, 1057 (D. Utah 1987)* (holding that a corporation's inability to satisfy statutory obligations justifies piercing); *United States v. Thomas, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981); United States v. Normandy House Nursing Home, Inc., 428 F. Supp. 421, 424 (D. Mass. 1977)* (finding that plaintiff has cause of action where goals of Medicare program may be circumvented by corporate form). But see Thompson, supra note 168, at 1049 (finding that federal courts pierce the veil 41.42% of the time, while state courts pierce 39.34% of the time, a statistically insignificant difference).

Anderson v. Abbott, 321 U.S. 349 (1944), involved a federal banking statute that specifically provided that shareholders of a national bank were individually liable for all of the bank's debts, contracts, etc., up to an amount equal to their investment, in addition to the amount already invested in the shares. Thus, shareholders of national banks organized under this statute were subjected to "double liability," rather than limited liability. *Id. at 359.* The issue in Abbott involved the liability of shareholders of a bank holding company, organized under the laws of Delaware to hold shares of a national bank, organized under the National Bank Act, *12 U.S.C. 63,* 64 (repealed 1959). The national bank failed, and pursuant to the federal Bank Act, the holding company had double liability. *Id. at 351-52.* The question in Abbott was whether the shareholders of the holding company were also subjected to double liability. *Id. at 354.* The Court held that they were, over the dissent of three justices. *Id. at 369.* The Court found that the investment in the holding company "was in substance little more than an investment in the shares of the Bank. The [holding company shareholders] were as much in the banking business as any stockholder of the Bank had ever been." *Id. at 363.* In determining liability under the federal statute, the Court would not permit formation of a holding company to circumvent the liability laid out clearly in the statute. The Court noted that it was "dealing with a principle of liability that is concerned with realities not forms." Id.

The Abbott test of veil piercing has been applied to a wide variety of federal statutes. See, e.g., *United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986)* (Department of Energy), cert. denied, *479 U.S. 1030 (1987); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110* (D. Vt.), aff'd, *487 F.2d 1393 (2d Cir. 1973)* (Rivers and Harbors Act), cert. denied, *417 U.S. 976 (1974); Normandy House, 428 F. Supp. at 421* (Medicare); *United States v. Reserve Mining Co., 380 F. Supp. 11, 28 (D. Minn. 1974)* (Water Pollution Control Act), modified, *514 F.2d 492 (8th Cir. 1975);* see also Wilson McLeod, Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil Under Federal Labor Law, *9 Hofstra Lab. L.J. 115, 136 (1991).*

n198. See, e.g., *United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1039-40 (N.D. Ohio 1981)* (suggesting that veil piercing should occur only when corporate form has been used to circumvent a federal statute). Other federal courts, however, have been reluctant to apply this test at all. See *United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1108 n.6 (D. Del. 1988),* aff'd, *879 F.2d 857 (3d Cir. 1989).*

n199. *Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981).*

n200. Id.; see also *Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 460* (7th Cir.) (claiming that there is a federal interest in piercing the veil to impose liability in cases analyzed under ERISA and that "the protection afforded by the corporate form might be undercut by the overriding federal legislative policy reflected in the particular statute" giving the cause of action), cert. denied, *502 U.S. 939 (1991); Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986)* (holding that because ERISA "cannot be said to attach great weight" to the corporate form, the veil should be pierced when a federal cause of action is asserted); *Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974)* (supporting piercing even without misuse of corporate form if statute does not protect the corporate entity and harm to public convenience exists); *Markham v. Fay, No. CIV.A.91-10821-Z, 1993 WL 160604,* at *3 (D. Mass. May 5, 1993) (holding that "federal alter ego standard will control only where there is an important federal policy at stake," because federal standard gives less deference to the corporate form); *John Boyd Co. v. Boston Gas Co., 775 F. Supp. 435, 441 (D. Mass. 1991)* (describing the general rule for veil piercing in federal cases as one that disregards the corporate form in the "interest[] of public convenience, fairness and equity" and that in applying this rule "federal courts will look closely to the purpose of the federal statute [in this case, CERCLA] to determine whether the statute places importance on the corporate form") (quoting *Brookline, 667 F.2d at 221); Dodd v. John Hancock Mut. Life Ins. Co., 688 F. Supp. 564, 571 (E.D. Cal. 1988)* (looking to purpose and language of ERISA in decision not to disregard the corporate entity); *SEC v. Elmas Trading Corp., 620 F. Supp. 231, 234 (D. Nev. 1985)* (examining the purpose of the Securities and Exchange Act to determine whether it places importance on the corporate form), aff'd, *805 F.2d 1039 (9th Cir. 1986); Schmid v. Roehm, 544 F. Supp. 272, 275 (D. Kan. 1982)* (piercing only where corporate misuse is present); *Arkansas Bank & Trust Co. v. Douglass, 885 S.W.2d 863, 870 (Ark. 1994)* (court will ignore the corporate form where it is being used to avoid a statute); Cindy A. Wolfer, Comment, Piercing the Corporate Veil Under CERCLA: To Control or Not to Control - -Which is the Answer?, *59 U. Cin. L. Rev. 975, 980 (1991)* ("When federal statutes impose liability for certain corporate misconduct, federal courts have also developed tests for piercing the corporate veil in order to meet federal interests ....").

n201. Wolfer, supra note 200, at 987 (citing *Capital Tel., 498 F.2d at 738).*

n202. *Brookline, 667 F.2d at 221;* see also *City of New York v. Exxon Corp., 112 B.R. 540, 547 (S.D.N.Y. 1990),* aff'd in part, *932 F.2d 1020 (2d Cir. 1991); In re Acushnet River & New Bedford Harbor, 675 F. Supp. 22, 33 (D. Mass. 1987); Lowen v. Tower Asset Mgmt., Inc., 653 F. Supp. 1542, 1552* (S.D.N.Y.), aff'd, *829 F.2d 1209 (2d Cir. 1987).*

n203. See, e.g., *In re Acushnet River, 675 F. Supp. at 33.* A few courts, however, have expressed willingness to pierce the veil to force shareholders to pay a statutorily mandated debt, absent any of the other factors. See, e.g., *United States v. Thomas, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981); United States v. Normandy House Nursing Home, Inc., 428 F. Supp. 421, 425 (D. Mass. 1977).*

n204. See supra notes 179-95 and accompanying text for a discussion of the factors articulated by state courts.

n205. Courts have pierced the veil under a wide variety of federal statutes following the reasoning of the Brookline court. These include, among others, cases decided under the Medicare legislation, *Thomas, 515 F. Supp. at 1351,* the *Fair Debt Collection Practices Act, West v. Costen, 558 F. Supp. 564, 587 (W.D. Va. 1983),* and environmental statutes, *United States v. Reserve Mining Co., 380 F. Supp. 11 (D. Minn. 1974)* (Federal Water Pollution Control Act), modified, *514 F.2d 492 (8th Cir. 1975); In re Acushnet River, 675 F. Supp. at 22* (CERCLA).

n206. See *Hystro Prods., Inc. v. MNP Corp., 18 F.3d 1384, 1388-89 (7th Cir. 1994); Bank of Cumberland v. Aetna Casualty & Sur. Co., 956 F.2d 595, 597* (6th Cir.), cert. denied, *506 U.S. 871 (1992); RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 545 (9th Cir. 1985); Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 569-70 (7th Cir. 1985); Wegerer v. First Commodity Corp., 744 F.2d 719, 725 (10th Cir. 1984); FMC Fin. Corp. v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980);* Blumberg, supra note 148, at 118.

For example, in *Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979),* the Ninth Circuit had occasion to consider whether to pierce the corporate veil to find the shareholders liable for failure of the corporation to comply with its obligations under a collective bargaining agreement. Although the partners incorporated the business in 1969, they neglected to advise the union of this. *Id. at 1108.* After considering the amount of respect given to the separate identity of the corporation by its shareholders, the court found that the corporation had indeed maintained corporate formalities. *Id. at 1112.* The evidence showed that the shareholders maintained separate corporate records, drew reasonable salaries, formally issued shares of corporate stock, and acquired the partnership assets on behalf of the corporation at the time of incorporation. Id. There was no evidence of abuse of the corporate form, such as the commingling of funds, use of corporate assets for personal purposes, or inadequate capitalization. Id.

Moreover, the Seymour court found no evidence of fraudulent intent in forming the corporation. Allegations of fraudulent intent in disregarding corporate obligations appeared irrelevant to the court. Rather, the relevant fraud must have involved misuse of the corporate form. *Id. at 1113.*

Similarly, the Tenth Circuit in *NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993),* failed to pierce the corporate veil despite allegations that the corporation served as an alter ego for the shareholder. The shareholder, Tina Clark, purchased Greater Kansas City Roofing (GKC) from her brother who had owned the business as a sole proprietorship, and then incorporated New GKC. *Id. at 1050.* Ms. Clark had no knowledge of GKC's prior unfair labor practices or of the outstanding judgment. Id. The NLRB attempted to collect the judgment against New GKC and Tina Clark, personally. Id.

The court found that Ms. Clark did indeed fail to adhere to corporate formalities. *Id. at 1055.* Among other things, she used the corporation's name and address to establish a credit card collection account for her escort service, she loaned personal funds to pay the corporate payroll without a formal loan agreement, and she did not execute corporate bylaws, stock accounts, or corporate records. *Id. at 1050.*

Nevertheless, the court did not find sufficient facts to warrant piercing the corporate veil. *Id. at 1055.* No evidence existed that Ms. Clark committed fraud in the formation of the corporation or in her use of the corporate form after incorporation. *Id. at 1054.* Specifically, no evidence existed showing that she incorporated New GKC to avoid the backpay award entered against GKC. Id. Moreover, Ms. Clark was not found to have used the corporate form to work an injustice. The court noted that GKC's financial difficulties existed before the formation of New GKC. Ms. Clark's disregard for corporate formalities did not cause New GKC to be any less able to respond to the backpay order. Id.

For other cases requiring a determination of injustice and fraud before the corporate veil will be pierced, see *American Bell Inc. v. Federation of Telephone Workers of Pennsylvania, 736 F.2d 879 (3d Cir. 1984)* (requiring more special and unusual circumstances beyond control of the subsidiary through the parent-subsidiary relationship before resorting to veil piercing); *Operating Engineers Pension Trust v. Reed, 726 F.2d 513, 515 (9th Cir. 1984)* (overturning decision of district court because there was no evidence at trial of fraudulent intent or injustice); *Audit Services, Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981)* (overturning decision of district court because there was no evidence of fraud or injustice); *Zubik v. Zubik & Sons, 384 F.2d 267 (3d Cir. 1967)* (finding undue advantage amounting to injustice), cert. denied, *390 U.S. 988 (1968); Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260 (D. Del. 1989)* (finding ample evidence existed of lack of corporate formalities, but no evidence of fraud and injustice).

n207. *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994),* aff'd, *115 S. Ct. 1920 (1995); Mass v. Bell Atl. Tricon Leasing Corp., 178 B.R. 626, 629 (M.D. Pa. 1995).* The Tenth Circuit has established a comparable two-part test requiring (1) both unity of interest and disregard of the corporate form to the extent that the personalities and assets of the corporation and the shareholder are indistinct and (2) evidence that allowing the corporate fiction to continue would sanction fraud. *Greater Kansas City Roofing, 2 F.3d at 1052.* This test was also articulated by the Seventh Circuit in *Hystro Products, Inc., 18 F.3d at 1388-89* (two-part test requiring: (1) "such a unity of interest and ownership" that separate entities of the corporation and the individual (or other corporation) no longer exist; and (2) allowance of the "legal fiction" of the corporation to stand would "sanction fraud or promote injustice") (citing *Van Dorn, 753 F.2d at 569-70).*

n208. See, e.g., *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 139-40 (2d Cir. 1991); United States v. Jon-T Chem., Inc., 768 F.2d 686, 691-94 (5th Cir. 1985),* cert. denied, *475 U.S. 1014 (1986); Edwards Co. v. Monogram Indus., Inc., 700 F.2d 994, 998-1002 (5th Cir. 1983).*

n209. See infra notes 212, 227-29 and accompanying text.

n210. Pub. L. No. 96-510, *94 Stat. 2767 (1980)* (codified as amended at *42 U.S.C. 9601*-9675 (1994)), as amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, *100 Stat. 1613.*

n211. *42 U.S.C. 9607*(a)(1)-(4).

n212. See, e.g., *United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir. 1990),* cert. denied, *498 U.S. 1084 (1991); United States v. TIC Inv. Corp., 866 F. Supp. 1173, 1178-79 (N.D. Iowa 1994)* (finding owner directly liable as an arranger under the statute and thus not considering plaintiff's veil piercing argument), aff'd in part, rev'd in part, *68 F.3d 1082 (8th Cir. 1995),* cert. denied, *117 S. Ct. 50 (1996); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1203-05 (E.D. Pa. 1989)* (holding parent corporation liable as an owner or operator); *Vermont v. Staco, Inc., 684 F. Supp. 822, 835 (D. Vt. 1988),* vacated in part, *No. 86-190, 1989 WL 2254428* (D. Vt. Apr. 20, 1989) (dismissing plaintiffs' claims under the Federal Water Pollution Control Act and Resource Conservation and Recovery Act for lack of jurisdiction); *Colorado v. Idarado Mining Co., 18 Envtl. L. Rep.*

(Envtl. L. Inst.) 20,578 (D. Colo. 1987), rev'd on other grounds, *916 F.2d 1486 (10th Cir. 1990),* cert. denied, *499 U.S. 960 (1991); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671-72 (D. Idaho 1986),* aff'd in part, rev'd in part, *810 F.2d 726 (8th Cir. 1986),* cert. denied, *484 U.S. 848 (1987).*

n213. *695 F. Supp. 615 (D.N.H. 1988);* see also Oswald & Schipani, supra note 188, at 297-99.

n214. *United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988).*

n215. Id.

n216. Oswald & Schipani, supra note 188, at 299-301; see also *Redwing Carriers v. Saraland Apartments, No. 95-6198, 1996 U.S. App. LEXIS 24003,* at *33 (11th Cir. Sept. 12, 1996) (noting that a shareholder may be directly liable under CERCLA if that shareholder in fact operated the facility at issue).

n217. Oswald & Schipani, supra note 188, at 300.

n218. Id. at 301.

n219. Id. at 301-15; see also *John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 408 (1st Cir. 1993); Riverside Market Dev. Corp. v. International Bldg. Prod., 931 F.2d 327, 330* (5th Cir.), cert. denied, *502 U.S. 1004 (1991); United States v. Kayser-Roth Corp., 910 F.2d 24, 25-26 (1st Cir. 1990),* cert. denied, *498 U.S. 1084 (1991); United States v. TIC Inv. Corp., 866 F. Supp. 1173, 1178-79 (N.D. Iowa 1994),* aff'd in part, rev'd in part, *68 F.3d 1082 (8th Cir. 1995),* cert. denied, *117 S. Ct. 50 (1996); United States v. Nicolet, 712 F. Supp. 1193, 1203-05 (E.D. Pa. 1989); Colorado v. Idarado Mining Co., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578 (D. Colo. 1987),* rev'd on other grounds, *916 F.2d 1486 (10th Cir. 1990),* cert. denied, *499 U.S. 960 (1991); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671-72 (D. Idaho 1986),* aff'd in part, rev'd in part, *810 F.2d 726 (8th Cir. 1986),* cert. denied, *484 U.S. 848 (1987).*

n220. Oswald & Schipani, supra note 188, at 301-15; see also *Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990),* cert. denied, *498 U.S. 1108 (1991); United States v. Jon-T Chem., Inc., 768 F.2d 686, 691 (5th Cir. 1985),* cert. denied, *475 U.S. 1014 (1986); CPC Int'l v. Aeroget-Gen. Corp., 777 F. Supp. 549, 572 (W.D. Mich. 1991),* aff'd in part, rev'd in part sub nom *United States v. Cordova Chem. Co., 59 F.3d 584* (6th Cir.), vacated, *67 F.3d 586 (6th Cir. 1995); Nicolet, 712 F. Supp. at 1193; In re Acushnet River & New Bedford Harbor, 675 F. Supp. 22, 30-31 (D. Mass. 1987);* cf. Rospatch Jessco Corp. v. Chrysler Corp., No. 4:93-*CV-47, 1995 U.S. Dist. LEXIS 12692,* at *15 (W.D. Mich. Aug. 8, 1995) (addressing liability of federal government for cleanup costs at site owned by defense contractor).

n221. See, e.g., *New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985); Kayser-Roth, 724 F. Supp. at 20-23; Nicolet, 712 F. Supp. at 1203; United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848 (W.D. Mo. 1984),* aff'd in part, rev'd in part, *810 F.2d 726 (8th Cir. 1986),* cert. denied, *484 U.S. 848 (1987).*

n222. See, e.g., *Kayser-Roth, 910 F.2d at 27-28; Nicolet, 712 F. Supp. at 1203-04; Idarado Mining Co., 18 Envtl. L. Rep. at 20,578; Bunker Hill, 635 F. Supp. at 672.*

n223. See, e.g., *Joslyn, 893 F.2d at 83; Nicolet, 712 F. Supp. at 1202; In re Acushnet River, 675 F. Supp. at 22.*

n224. *893 F.2d 80 (5th Cir. 1990),* cert. denied, *498 U.S. 1108 (1991).*

n225. *Josyln, 893 F.2d at 83* (citing *United States v. Jon-T Chem., Inc., 768 F.2d 686, 691-92 (5th Cir. 1995)).*

n226. See *United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988);* Kathryn R. Heidt, Liability of Shareholders Under the Comprehensive Response Compensation and Liability Act (CERCLA), *52 Ohio ST. L.J. 133, 139-40 (1991);* Oswald & Schipani, supra note 188, at 302.

n227. Securities Act of 1933, *15 U.S.C. 77a* (1994).

n228. Securities Exchange Act of 1934, *15 U.S.C. 77b,* 77j, 77k, 77m, 77o, 77s, 78q (1994).

n229. See, e.g., *Metge v. Baehler, 762 F.2d 621, 630-31 (8th Cir. 1985)* (setting forth the tests for determining primary and secondary liability), cert. denied, *474 U.S. 1057 (1986);* Blumberg, supra note 148, at 538-39. See generally William H. Kuehnle, Secondary Liability Under the Federal Securities Laws - Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme, *14 J. Corp. L. 313 (1988)* (examining the common-law principles of secondary liability in relations to the securities laws).

n230. *Orloff v. Allman, 819 F.2d 904, 908 (9th Cir. 1987),* overruled in part by *Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1576 (9th Cir. 1990),* cert. denied, *499 U.S. 976 (1991).*

n231. See *Eichenholtz v. Brennan, 52 F.3d 478, 486 & n.14 (3d Cir. 1995)* (stating that in a case involving the federal securities laws a nationwide federal rule is advisable); *Orloff, 819 F.2d at 908-09* (assuming for the sake of argument that an alter ego cause of action could coexist with a claim brought simultaneously under the securities laws, but finding that the grounds were insufficient to pierce the veil). But see *Hollinger, 914 F.2d at 1576* (overruling Orloff to extent Orloff held that Section 20(a), *15 U.S.C. 78t,* did not apply to actions under the securities laws); *SEC v. Elmas Trading Corp., 620 F. Supp. 231, 233-34 (D. Nev. 1985)* (discussing veil piercing in the context of federal securities law), aff'd, *805 F.2d 1039 (9th Cir. 1986); Kersh v. General Council of the Assemblies of God, 535 F. Supp. 494, 496-97 (N.D. Cal. 1982)* (stating the alter ego doctrine could be applied in a federal securities law case).

n232. *620 F. Supp. 231 (D. Nev. 1985).*

n233. *Id. at 234.*

n234. Id.

n235. *114 S. Ct. 1439 (1994).*

n236. *Id. at 1455.*

n237. *Id. at 1448.*

n238. Decisions subsequent to Central Bank have produced mixed results. See *Nordstrom, Inc. v. Chubb & Son, Inc., 54 F.3d 1424, 1433-34 (9th Cir. 1995)* (discussing vicarious corporate liability under the doctrine of respondeat superior without discussion of Central Bank, stating that "although respondeat superior liability is independent of section 20(a) liability [citing *Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1578 (9th Cir.*

1990), cert. denied, *499 U.S. 976 (1991)],* in the present case any corporate respondeat superior liability would be concurrent with directors' and officers' section 20(a) liability"); *Pollack v. Laidlaw Holdings, Inc., 1995 WL 261518,* at *17 (S.D.N.Y. May 3, 1995) (discussing the Central Bank case and quoting the Central Bank dissent stating "this decision has called into question all common law claims that are adjunct to a direct securities claim," indicating that decisions based on respondeat superior are unlikely to survive the majority's ruling; also noting the dearth of comment upon the area of vicarious liability after Central Bank); *Denton v. Merrill Lynch, 887 F. Supp. 176, 179-80 (N.D. Ill. 1995)* (failing to discuss Central Bank and allowing the claims based on the common law of respondeat superior to survive the motion to dismiss); *In re Medeva, No. CV93-4376, 1994 WL 447141,* at *3 (C.D. Cal. June 3, 1994) (dismissing aiding and abetting charge but allowing charge under control person liability to proceed); *In re Proxima Corp., No. 93-1139, 1994 WL 374306,* at *8 (S.D. Cal. May 3, 1994) (dismissing, with prejudice, the aiding and abetting claims in response to the Central Bank decision; also dismissing plaintiff's claim under common-law agency theory and conspiracy).

In addition, the decision in Central Bank has been criticized by commentators. See James P. Berklas, Jr., Implied Liability Under 10(b) of the Securities Act of 1934: *Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994), 18 Harv. J. L. & Pub. Pol'y 603, 604 (1995)* (stating that the Court's clear deference to the statutory language to interpret liability under 10(b) puts at least two forms of secondary liability at risk and "may portend the eventual elimination of all private civil liability" under that section); Richard A. Booth, Vicarious Liability and Securities Fraud, 22 Sec. Reg. L.J. 347, 347-48 (1994-95) (arguing that the Court has shown a trend of looking exclusively to the statutes when interpreting the Acts, stating that the controlling person provisions of federal securities law, rather than state common-law principles, should control in securities cases); Thomas O. Gorman, Who's Afraid of 10b-5? The Scope of a Section 10(b) Cause of Action After Central Bank of Denver, 22 Sec. Reg. L.J. 247, 250 (1994) (noting that Central Bank rejected the holdings of 11 circuit courts that had previously allowed aiding and abetting liability); S. Scott Luton, The Ebb and Flow of Section 10(b) Jurisprudence: An Analysis of Central Bank, *17 U. Ark. Little Rock L.J. 45, 46-47 (1994)* (claiming that although theories of secondary liability are at risk after Central Bank, lower federal courts have traditionally tempered these results by establishing alternative theories of recovery); Joel Seligman, The Implications of Central Bank, *49 Bus. Law. 1429, 1430 (1994)* (claiming that the lasting effect of Central Bank may be to reduce investor confidence, expressing concern about the immediate impact of the decision on secondary claims, including respondeat superior and conspiracy, and concluding that Congress should address this issue directly and take steps to reverse Central Bank); Mark I. Steinberg, The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation, *70 Notre Dame L. Rev. 489, 502 (1995)* (claiming that Central Bank "disallows private actions based on aiding and abetting under section 10(b)" and "the Court's language and tenor signify that other common-law theories of liability, unless provided for by statute, will likewise be rejected").

n239. *Central Bank, 114 S. Ct. at 1452;* see Berklas, supra note 235, at 603 (arguing that the absence of express statutory language undermines the majority's principle and jeopardizes secondary claims); Booth, supra note 238, at 376 (arguing that the controlling person provision of federal securities law, rather than state common-law principles, should control in securities cases; and that although it may not do any harm to apply common law "in tandem" with statutory law, it is also arguable that such an approach unnecessarily complicates and confuses securities litigation); Seligman, supra, note 238, at 1445 (expressing concern about effects on secondary claims, including respondeat superior and conspiracy); *Steinberg, supra* note 238, at 499 ("The Supreme Court reaffirmed its restrictive approach in its 1994 decision in Central Bank.").

n240. *Peacock v. Thomas, 116 S. Ct. 862, 866 (1996).*

n241. See id.

n242. *Central Bank of Denver v. First Interstate Bank of Denver, 114 S. Ct. 1439, 1448 (1994).*

n243. See United Elect., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1091 (1st Cir. 1992) (explaining that under Massachusetts common law, piercing the veil is rarely permissible); *Poyner v. Lear Siegler, Inc., 542 F.2d 955, 957 (6th Cir. 1976)* (explaining that Kentucky courts are averse to piercing the veil and will do so only in the case of fraudulent reorganization), cert. denied, *430 U.S. 969 (1977); Zubik v. Zubik & Sons, 384 F.2d 267, 273 (3d Cir. 1967)* (explaining that "veil piercing" is an exception recognized only in unusual circumstances), cert. denied, *390 U.S. 988 (1968); Killian v. McCulloch, 850 F. Supp. 1239, 1250 (E.D. Pa. 1994)* (explaining that veil piercing is an "extreme" remedy); *Carpenters' Dist. Council v. W.O. Kessel Co., 487 F. Supp. 54, 57 (W.D. Pa. 1980)* (explaining that Pennsylvania courts will pierce the corporate veil only in the most unusual circumstances); In re Kreisler Group, Inc., No. 79 B 1704, slip op. at 2 (Bankr. S.D.N.Y. Aug. 6, 1980) (claiming that courts are reluctant to pierce the veil); Phillip I. Blumberg & Kart A. Stressor, The Law of Corporate Groups, Statutory Law-Specific 26 (1992) (arguing that piercing the veil should only occur in "exceptional" cases); Hansmann & Kraakman, supra note 148, at 1931 (claiming that the class of cases where courts pierce the veil is "quite narrow"); Thompson, supra note 168, at 1070 (concluding that limited liability is the "usual" rule); Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, *95 Harv. L. Rev. 853, 853 (1982)* (arguing that a corporation is normally distinct from shareholders and should be ignored only if abused).

n244. *Anderson v. Abbott, 321 U.S. 349, 361-62 (1944)* (explaining that limited liability is the general rule, not the exception); *NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1051 (10th Cir. 1993)* (explaining that veil should be pierced "only reluctantly and cautiously"); *In re Silicone Gel Breast Implants, 887 F. Supp. 1447, 1452 (N.D. Ala. 1995)* ("Limited liability is the rule, not the exception."); *Castleberry v. Branscum, 721 S.W.2d 270, 271 (Tex. 1986)* (holding that corporate form protects shareholders unless they "abuse the corporate privilege"); James A. King, Kayser-Roth, Joslyn, and the Problem of Parent Corporation Liability Under CERCLA, *25 Akron L. Rev. 123, 123 (1991)* (claiming states have generally been reluctant to pierce corporate veil).

n245. See supra notes 179-209 and accompanying text.

n246. Thompson, supra note 168, at 1070 ("Piercing of the corporate veil is limited to close corporations and corporate groups."); see also 1 F. Hodge O'Neal & Robert B. Thompson, O'Neal's Close Corporations 1.10, at 44 (3d ed. 1994) ("Results of an empirical study ... showed that the courts never pierced the veil to shareholders of a publicly held corporation.") (footnote omitted); Barber, supra note 166, at 372 ("A review of the decisional law ... shows no case in which the shareholders of a corporation whose stock was publicly traded or widely held were found personally liable for the obligations of the corporation.") (footnote omitted); Easterbrook & Fischel, supra note 1, at 109 & n.37 (discussing generally the role of limited liability); Oswald & Schipani, supra note 188, at 298 ("Courts apparently have never pierced the veil of a publicly traded corporation to reach the individual shareholders.") (footnote omitted).

n247. Thompson, supra note 168, at 1039, 1070.

n248. Oswald & Schipani, supra note 188, at 298 n.217.

n249. See, e.g., *New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985)* (regarding a CERCLA violation); *Riverside Maritime Enter., Inc. v. Ishmael, 1991 WL 68214,* at *3 (E.D. La. Apr. 22, 1991) (explaining that the corporation was set up to avoid payment of charter and fuel expenses and to protect assets from seizure); *United States v. Kayser-Roth, 724 F. Supp. 15, 24 (D.R.I. 1989)* (piercing corporate veil to reach controlling parent corporation for CERCLA violation), aff'd, *910 F.2d 24 (1st Cir. 1990),* cert. denied, *498 U.S. 1084 (1991); United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988)* (regarding a CERCLA violation); *Castleberry v. Branscum, 721 S.W.2d 270, 275 (Tex. 1986)* (stating that president admitted corporation was formed in response to lawsuit). See generally Clark, supra note 148, at 74-77; Hansmann & Kraakman, supra note 148, at 1881 (describing corporations setting up separate entities to bear costs of environmental liabilities).

n250. *Gilbralter Savings v. LDBrinkman Corp., 860 F.2d 1275, 1277 (5th Cir. 1988)* (finding that plaintiff failed to plead potentially meritorious "sham to perpetrate fraud" claim against president), cert. denied, *490 U.S. 1091 (1989); Solomon v. Klein, 770 F.2d 352, 352-53 (3d Cir. 1988)* (implying that court would probably have pierced the veil, if that had been pleaded); *Castleberry, 721 S.W.2d at 275* (finding that former president and vice president formed new corporation to avoid paying partner in buyout agreement); *Cheatle v. Rudd's Swimming Pool Supply, 300 S.E.2d 828 (Va. 1987);* Thompson, supra note 148, at 10 ("In close corporations in which the same individuals are shareholders as well as officers and directors, the result produced by direct liability for tort, crime, or regulatory actions is the same as piercing the veil to reach shareholders.").

n251. Thompson, supra note 168, at 1056.

n252. See, e.g., *United States v. Jon-T Chems., Inc., 768 F.2d 686 (5th Cir. 1985),* cert. denied, *475 U.S. 1011; Milgo Elec. Corp. v. United Business Comm., Inc., 623 F.2d 645* (10th Cir.), cert. denied, *449 U.S. 1066 (1980); Sabine Towing & Transp. Co. v. Merit Ventures, Inc., 575 F. Supp. 1442 (E.D. Tex. 1983); Anderson v. Kennebec River Pulp & Paper Co., 433 A.2d 752 (Me. 1981); Herman v. Mobile Homes Corp., 26 N.W.2d 757 (Mich. 1947).* But see Presser, supra note 1, at 164 (arguing that if goal of limited liability is to encourage investment, the courts should refrain from easily piercing the corporate veil in either the parent-subsidiary or the individual shareholder context).

n253. Easterbrook & Fischel, supra note 1, at 111.

n254. Thompson, supra note 168, at 1038, 1056. But see Presser, supra note 1, at 164 (arguing that if goal of limited liability is to encourage investment, the courts should refrain from easily piercing the corporate veil in either the parent-subsidiary or the individual shareholder context).

n255. *McKibben v. Mohawk Oil Co., 667 P.2d 1223, 1230 (Alaska 1983)* (quoting *Jackson v. General Elec. Co., 514 P.2d 1170, 1173 (Alaska 1973),* and adopting the above factors from Frederick Powell, Parent and Subsidiary Corporations 6, at 9 (1931)).

n256. *McKibben, 667 P.2d at 1230* (quoting *Jackson, 514 P.2d at 1173).*

n257. See generally 1 Fletcher, supra note 1, 43.

n258. *Amfac Foods., Inc. v. International Sys. & Controls Corp., 630 P.2d 868, 874 (Or. Ct. App. 1981)* rev'd, *654 P.2d 1092 (1982)* (citations omitted).

n259. *Phoenix Canada Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1084-85 (D. Del. 1987),* aff'd in part, rev'd in part, *842 F.2d 1466* (3d Cir.), cert. denied, *468 U.S. 908 (1988).* But see *Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990)* ("Veil piercing should be limited to situations in which the corporate entity is used as a sham to perpetrate a fraud or avoid personal liability."), cert. denied, *498 U.S. 1108 (1991).* Even so, the Joslyn court outlined 12 factors to consider in evaluating the control of the parent over the subsidiary, similar to those factors delineated by the state courts. *Id. at 83* (citing *United States v. Jon-T Chems., Inc., 768 F.2d 686, 691-92 (5th Cir. 1985),* cert. denied, *475 U.S. 1011 (1986),* discussed supra at notes 223-24 and accompanying text).

n260. For example, in *United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989),* the court created the following federal rule for veil piercing in a CERCLA case:

Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.

Id. at 1202. Similarly, the court in *In re Acushnet River & New Bedford Harbor, 675 F. Supp. 22 (D. Mass. 1987),* examined whether the parent corporation exercised pervasive control over the hazardous waste disposal practices of its subsidiary, or whether the parent treated its subsidiary as a mere instrumentality, in deciding whether to pierce the corporate veil and hold the parent liable for the CERCLA violations of the subsidiary. It was not enough that the parent corporation had formed the subsidiary to purchase the assets of another company to avoid CERCLA liability for previous violations. *Id. at 34.* The factors relevant to the analysis of the Acushnet court included:

in approximate descending order of importance, (1) inadequate capitalization in light of the purposes for which the corporation was organized, (2) extensive or pervasive control by the shareholder or shareholders, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers and directors.

Id.

n261. See supra note 148.

n262. See Hansmann & Kraakman, supra note 148, at 1907-09 (arguing that there seems to be no justification for limited liability in the case of corporate torts); *Sommer, supra* note 1, at 270 (arguing that limited liability should "almost always be breached for torts" in the parent-subsidiary context); Note, Investor Liability: Financial Innovations in the Regulatory State and the Coming Revolution in Corporate Law, *107 Harv. L. Rev. 1941, 1953-54 (1994)* (arguing that limited liability provides incentives to ignore interests of noncorporate parties and "engage in morally hazardous conduct" in relation to those parties).

n263. Hansmann & Kraakman, supra note 148, at 1884-85; Leebron, supra note 148, at 1604; Rosemary R. Schnall, Extending Protection to Foreseeable Future Claimants Through Delaware's Innovative Corporate Dissolution Scheme - In re Rego Co., *19 Del. J. Corp. L. 141, 146 (1994).*

n264. Hansmann & Kraakman, supra note 148, at 1880.

n265. Id. at 1920; see also *Sommer, supra* note 1, at 236 (describing tort compensation as "ex post facto negotiation with the victim").

n266. Hansmann & Kraakman, supra note 148, at 1892. But see Leebron, supra note 148, at 1577, 1614.

n267. Hansmann & Kraakman, supra note 148, at 1919; *Sommer, supra* note 1, at 236-37.

n268. Hansmann & Kraakman, supra note 148, at 1919. When discussing limited liability for subsidiaries, it has been argued that contract creditors of the subsidiary are able to protect themselves. Experienced creditors are aware of the risks of lending to a subsidiary and presumably have factored these costs into any credit which they extend. See *Sommer, supra* note 1, at 232. Therefore, although limited liability may increase the cost of credit to subsidiaries, the parties involved at least have had the opportunity to negotiate beforehand. Id. at 236.

n269. Hansmann & Kraakman, supra note 148, at 1919; see also *In re Silicone Gel Breast Implants, 887 F. Supp. 1447, 1453 (N.D. Ala. 1995)* (many jurisdictions require different standards of proof for contract and tort).

n270. Hansmann & Kraakman, supra note 148, at 1920; see also Thompson, supra note 168, at 1036, 1058 (finding in empirical study that "courts pierce more often in the contract context than in the tort context"). But see Presser, supra note 1 (refuting the conclusion that courts pierce more often in contract cases).

n271. See supra text accompanying notes 33-52.

n272. See infra text accompanying notes 275-314.

n273. See infra text accompanying notes 315-58.

n274. See infra text accompanying notes 359-92.

n275. See supra text accompanying notes 66-68.

n276. See *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust For S. Cal., 508 U.S. 602, 605-07 (1993).* On the other hand, ERISA permits multiemployer plans to require longer vesting periods than single-employer plans. Compare ERISA 203(a)(2)(A)&(B), *29 U.S.C. 1053*(a)(2)(A)&(B) (1994) (requiring single-employer plans to provide for five-year cliff vesting or three- through seven-year incremental vesting) with ERISA 203(a)(2)(C), *29 U.S.C. 1053*(a)(2)(C) (permitting multiemployer plans to use a 10-year vesting schedule). Perhaps as a result of these differences, multiemployer defined benefit plans report that only half of their participants are vested as opposed to two-thirds of the participants in comparable single-employer plans. However, vesting in defined contribution plans is roughly equivalent between multiemployer and single-employer plans. Ninety percent of participants in multiemployer plans are vested compared with 85% of participants in single-employer plans. Labor Department Cites Growth of Defined Contribution Plans, Pensions & Benefits Daily (BNA), Apr. 24, 1995.

n277. Criticisms abound of the lack of portability in the private pension system. For recent discussions of this issue, see Karen Ferguson & Kate Blackwell, Pensions in Crisis 37-46 (1995). See also Roberta Romano, Public Pension Fund Activism in Corporate Governance Reconsidered, *93 Colum. L. Rev. 795, 849 (1993)* (noting that portability is a greater problem in defined benefit than in defined contribution plans); Keir N. Dougall, Note, Augmenting ERISA with Market Discipline: Transforming Pension Plan Interests into Securities, *24 U. Mich. J.L. Ref. 709, 757 (1991)* (arguing that making plan benefits more easily transferrable would solve some of the problems associated with privately sponsored benefit programs).

n278. See 1990 Construction Pension Plans in Good Condition, AGC, CLRC Find, Pensions & Benefits Daily (BNA), Oct. 13, 1993 (noting that more than half of the multiemployer plans service the construction industry).

n279. See Fischel & Langbein, supra note 123, at 1113.

n280. See Susan C. Glen, Comment, Central States v. Personnel, Inc.: When Real Estate Investments Create Personal Liability Under the Multiemployer Pension Plan Amendments Act of 1980, *78 Minn. L. Rev. 501, 505 (1993);* see also 126 Cong. Rec. 23,003, 23,043 (1980) (statement of Rep. Erlinborn) (arguing for certain amendments to avert "the very chaos and scramble to the exit for PBGC handouts that [MPPAA] purports to avoid.").

n281. See ERISA 4201, *29 U.S.C. 1381.*

n282. See ERISA 4206-4214, *29 U.S.C. 1386*-1394.

n283. The Supreme Court alone has decided six cases involving MPPAA. See *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 115 S. Ct. 981 (1995); Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993); Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993); Connolly v. Pension Benefits Guar. Corp., 475 U.S. 211 (1986); Pension Benefits Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984); Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982).*

n284. See, e.g., *Concrete Pipe & Prod., 508 U.S. at 605.*

n285. ERISA 4001(b)(1), *29 U.S.C. 1301*(b)(1) (1994).

n286. S. Rep. No. 383, 93d Cong., 2d Sess. 43 (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4928.

n287. 29 C.F.R. 2612.3(a)(1) (1993). ERISA states that "regulations prescribed by the corporation" will explicate the statutory common control provision. ERISA 4001(b)(1), *29 U.S.C. 1301*(b)(1).

n288. The applicable Internal Revenue Code provisions are found at 414. *I.R.C. 414* (1988).

n289. *Treas. Reg. 1.414(c)-1* to -5 (1988).

n290. See *Chicago Truck Drivers, Helpers & Warehouse Union Pension Fund v. Steinberg, 32 F.3d 269, 270 n.2 (7th Cir. 1994); Board of Trustees of Trucking Employees of N.J. Welfare Fund, Inc. v. Centra, 983 F.2d 495, 502 (3d Cir. 1992).*

n291. ERISA 4001(b)(1), *29 U.S.C. 1301*(b)(1); *Connors v. Incoal, Inc., 995 F.2d 245, 249 (D.C. Cir. 1993).*

n292. See, e.g., *Incoal, Inc., 995 F.2d at 247; Central States S.E. & S.W. Areas Pension Funds v. Skyland Leasing, 691 F. Supp. 6, 8 (W.D. Mich. 1987),* aff'd without opinion, *892 F.2d 1043 (6th Cir. 1990).*

n293. See *Board of Trustees of W. Conf. of Teamsters Pension Trust Fund v. H.F. Johnson, Inc., 830 F.2d 1009, 1012 (9th Cir. 1987).*

n294. See, e.g., *Central States S.E. & S.W. Areas Pension Funds v. Personnel, Inc., 974 F.2d 789, 791 (7th Cir. 1992)* (leasing real estate); *Board of Trustees of the W. Conf. of Teamsters Pension Trust Fund v. Lafrenz, 837 F.2d 892, 893 (9th Cir. 1988)* (leasing two dump trucks); *ILGWU Nat'l Retirement Fund v. Minotola Indus., No. 88-9131, 1991 U.S. Dist. LEXIS 6147,* at *1 (S.D.N.Y. May 3, 1991) (operating a farm).

n295. See, e.g., *Incoal, Inc., 995 F.2d at 254; Personnel, Inc., 974 F.2d at 793; Lafrenz, 837 F.2d at 895; H.F. Johnson, Inc., 830 F.2d at 1014; ILGWU Nat'l Retirement Fund, No. 88-9131, 1991 U.S. Dist. LEXIS 6147,* at *20-21; *Skyland Leasing, 691 F. Supp. at 12-13.*

n296. Technically, Title IV, which provides for withdrawal liability, does not contain a definition of the term "employer" and does not refer to the definition in Title I. As a result, some courts question whether the

Title I definition is applicable to withdrawal liability cases. *Seaway Port Auth. v. Duluth-Superior Ila Marine Assoc. Restated Pension Plan, 920 F.2d 503, 506-07 (8th Cir. 1990)* (declining to use the definition of employer in Title I for Title IV cases because Title I expressly limits its definitions by stating "for purposes of this Title"), cert. denied, *501 U.S. 1218 (1991); Connors v. P & M Coal Co., 801 F.2d 1373, 1376-78 (D.C. Cir. 1986)* (refusing to use Title I definition of employer in Title IV case because no clear congressional intent that the expansive definition of employer should apply and the more expansive definition runs counter to assumptions about corporate forms protecting individuals); *Connors v. B.M.C. Coal Co., 634 F. Supp. 74, 76-77 (D.D.C. 1986)* (refusing to use the more expansive definition of employer from Title I because a corporate officer should only be held liable if acting as alter ego or justification exists to pierce the corporate veil). But see *Central Pa. Teamster's Pension Fund v. Service Group, Inc., 645 F. Supp. 996, 997 (E.D. Pa. 1985)* (holding that Title I definition of employer applies to MPPAA); *In re Uiterwyk Corp., 63 B.R. 264, 266 (M.D. Fla. 1986)* (same).

n297. See ERISA 3(5), *29 U.S.C. 1002*(5) (1994) ("any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan" is an employer); see also *Nationwide Mut. Ins. Co. v. Darden, 112 S. Ct. 1344, 1348 (1992)* (calling the ERISA definition "completely circular and explaining nothing").

n298. ERISA 201-216, *29 U.S.C. 201*-216.

n299. See infra text accompanying notes 379-81.

n300. See *Plumbers' Pension Fund v. Niedrich, 891 F.2d 1297, 1301 (7th Cir. 1989),* cert. denied, *495 U.S. 930 (1990); Scarbrough v. Perez, 870 F.2d 1079, 1082-85 (6th Cir. 1989); International Bhd. of Painters v. George C. Kracher, Inc., 856 F.2d 1546, 1548-50 (D.C. Cir. 1988); Solomon v. Klein, 770 F.2d 352, 353-55 (3d Cir. 1985);* see also *Rockney v. Blohorn, 877 F.2d 637, 641-43 (8th Cir. 1989)* (applying definition in the context of a top hat plan).

n301. See *Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp., 845 F.2d 23, 25 (1st Cir. 1988);* see also *Sasso v. Cervoni, 985 F.2d 49, 50 (2d Cir. 1993)* (casting the question as one of obligation rather than as requiring interpretation of the term "employer"), cert. denied sub nom. *Bourgal v. Cervoni, 508 U.S. 973 (1993).*

n302. ERISA 515, *29 U.S.C. 1145.*

n303. ERISA 515, *29 U.S.C. 1145.*

n304. See *Cement & Concrete Workers Dist. Council v. Lollo, 35 F.3d 29, 36-37 (2d Cir. 1994); Starrett Paving Corp., 845 F.2d at 25-27;* see also *Sasso, 985 F.2d at 50* (agreeing with the logic of Starrett Paving Corp.).

n305. See, e.g., *Sasso, 985 F.2d at 50-51; Vaughn v. Sexton, 975 F.2d 498, 504 (8th Cir. 1992); Plumbers' Pension Fund v. Niedrich, 891 F.2d 1297, 1299-1301 (7th Cir. 1989),* cert. denied, *495 U.S. 930 (1990); Scarbrough v. Perez, 870 F.2d 1079, 1083-84 (6th Cir. 1989); International Bhd. of Painters v. George C. Kracher, Inc., 856 F.2d 1546, 1550 n.28 (D.C. Cir. 1988); Starrett Paving Corp., 845 F.2d at 24, 26-27; Solomon v. Klein, 770 F.2d 352, 354 (3d Cir. 1985).*

n306. See supra text accompanying notes 179-95.

n307. *801 F.2d 1, 4 (1st Cir. 1986).*

n308. *Starrett Paving Corp., 845 F.2d at 27.*

n309. See Central States S.E. & S.W. Areas Pension Fund v. Goldstein, No. 94 C 7176, *1995 U.S. Dist. LEXIS 4755,* at *5 n.1 (N.D. Ill. Apr. 10, 1995); see also Hanley v. Giordano's Restaurant, Inc., No. 94 Civ. 4696(RPP), *1995 U.S. Dist. LEXIS 10429,* at *8-9 (S.D.N.Y. July 24, 1995) (adopting, without explanation, a New York state standard of veil piercing); *Connors v. Marontha Coal Co., 670 F. Supp. 45, 48 n.5 (D.D.C. 1987)* (declining to determine whether state or federal law governed a veil piercing claim). Resolution of the question of whether state or federal law should apply is beyond the scope of this article.

n310. PBGC Ltr. Rul. 82-83 (Dec. 14, 1982).

n311. See *Schaffer v. Charles Benjamin, Inc., Nos. CIV.A.90-6225, 91-6954, 1992 WL 59152,* at *6-7 (E.D. Pa. Mar. 18, 1992), aff'd without opinion, *980 F.2d 724 (3d Cir. 1992).*

n312. See supra text accompanying notes 282-87.

n313. See *Schaffer, 1992 WL 59152,* at *1, *11.

n314. See *Goldberg v. Colonial Metal Spinning & Stamping Co., No. 92-3721, 1993 WL 361672,* at *4, *7 (S.D.N.Y. Sept. 14, 1993), later opinion, *No. 91-3721, 1994 WL 510037* (S.D.N.Y. Sept. 16, 1994) (granting summary judgment on joint and several liability of related companies, damages, and attorneys' fees); see also *Schaffer, 1992 WL 59152,* at *7 (finding corporation liable as an alter ego of the signatory to the CBA).

n315. ERISA 409, *29 U.S.C. 1109*(a) (1994).

n316. ERISA 409, *29 U.S.C. 1109*(a).

n317. ERISA 409, *29 U.S.C. 1109*(a).

n318. ERISA 409, *29 U.S.C. 1109*(a).

n319. *Dardaganis v. Grace Capital, Inc., 889 F.2d 1237, 1242-43 (2d Cir. 1989).*

n320. *Kay v. Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co., 780 F. Supp. 1447, 1460-65 (E.D. Pa. 1991).*

n321. *Barker v. American Mobil Power Corp., 64 F.3d 1397, 1403-04 (9th Cir. 1995);* see also *Katsaros v. Cody, 744 F.2d 270, 279* (2d Cir.) (finding fiduciaries liable for making a loan to an unstable bank), cert. denied, *469 U.S. 1072 (1984); Professional Helicopter Pilots Assoc. v. Denison, 804 F. Supp. 1447, 1455 (S.D. Ala. 1992)* (holding fiduciaries personally liable when deductions were made from employee checks but were not contributed to plan); *Connors v. Paybra Mining Co., 807 F. Supp. 1242, 1246 (S.D. W.Va. 1992)* (finding individual fiduciaries personally liable when funds were not deposited in plan), appeal dismissed, *21 F.3d 421 (4th Cir. 1993).*

n322. See ERISA 409(a), *29 U.S.C. 1109*(a).

n323. *473 U.S. 134, 144 (1985).*

n324. See, e.g., *Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993).*

n325. See, e.g., *Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 992-93 (7th Cir. 1993)* (holding that an individual plan participant may sue for a fiduciary violation where he failed to receive important plan information).

n326. See, e.g., *Sokol v. Bernstein, 803 F.2d 532, 535 (9th Cir. 1986)* ("The Russell Court used language implying that all of the statute's provisions relating to fiduciary duties run only to plans, and not to ... individuals ....").

n327. *116 S. Ct. 1065, 1068 (1996).*

n328. See ERISA 502(a)(3), *29 U.S.C. 1132*(a)(3).

n329. *57 F.3d 270, 276-78 (3d Cir. 1995).*

n330. *Id. at 272.*

n331. Id.

n332. *Id. at 278.*

n333. Firm Was Partnership's Alter Ego PBGC Claims in Action Against Armco, *21 Pens. & Benefits Rep. (BNA) No. 15, at 758* (Apr. 11, 1994).

n334. Id.

n335. *Minnesota Power v. Armco, 937 F.2d 1363, 1368 (8th Cir. 1991).*

n336. Firm Was Partnership's Alter Ego PBGC Claims in Action Against Armco, supra note 333, at 758.

n337. Id.

n338. PBGC, Armco Agree to Settle Pension Suit for $ 27.5 Million, 21 Pens. & Benefits Rep. (BNA) No. 27, at 1336 (July 4, 1994); see also *Adamson v. Armco, Inc., 44 F.3d 650, 652* (8th Cir.) (affirming dismissal of suit brought by Reserve Mining retirees who were seeking welfare benefits from Armco), cert. denied, *116 S. Ct. 85 (1995).*

n339. This is true because the statutory section at issue applies to all of Title IV of ERISA. See ERISA 4001(b)(1), *29 U.S.C. 1301*(b)(1) (1994).

n340. See supra text accompanying notes 284-95.

n341. See *Pension Benefit Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1092-93* (1st Cir.), cert. denied, *464 U.S. 961 (1983).* But see *Pension Benefit Guar. Corp. v. Anthony Co., 575 F. Supp. 953, 956-58 (N.D. Ill. 1983)* (criticizing the Ouimet reasoning).

n342. See *Gates v. Victor Fine Foods, 54 F.3d 1457* (9th Cir.) (applying Foreign Sovereign Immunity Act to foreign parent of a subsidiary that terminated its welfare benefit plan), cert. denied, *116 S. Ct. 187 (1995); Simcox v. McDermott Int'l, Inc., 152 F.R.D. 689 (S.D. Tex. 1994)* (dismissing, on basis of forum non conveniens, a suit for benefits).

n343. United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1083 (1st Cir. 1992), vacated on other grounds, *987 F.2d 39 (1st Cir. 1993)* (granting jurisdiction on traditional minimum contacts analysis).

n344. *960 F.2d at 1085.*

n345. *Id. at 1091.*

n346. *Id. at 1096.*

n347. 163 Pleasant St. Corp., 987 F.2d at 48.

n348. At the time of the sale, Navistar was still known as *International Harvester. Lumpkin v. Envirodyne Indus., 933 F.2d 449, 451* (7th Cir.), cert. denied, *502 U.S. 939 (1991).*

n349. Id.

n350. *Id. at 451-52.*

n351. *Id. at 451.*

n352. The PBGC sued Navistar in order to recover the amount of the PBGC guarantees. Approximately four and one-half years after a federal district court in Illinois refused to dismiss all of the PBGC's claims, Navistar and the PBGC announced a $ 65 million settlement. Navistar Agrees to Pay PBGC $ 65 Million Pension Settlement, 19 Pens. Rep. (BNA) 1514, 1514 (Aug. 24, 1992). ERISA now contains a provision that prohibits transactions undertaken for the purpose of evading or avoiding liability for the termination of pension plans. See ERISA 4069(a), *29 U.S.C. 1369*(a) (1994).

n353. *Lumpkin, 933 F.2d at 452.*

n354. Id.

n355. Id.

n356. *Id. at 453.*

n357. *Id. at 459.*

n358. *Id. at 460.* On remand, the district court denied plaintiff's motion for summary judgment. *Lumpkin v. Envirodyne Indus., 159 B.R. 814 (N.D. Ill. 1993).* Finally on December 8, 1995, the suit settled. After 16 years of litigation, Envirodyne agreed to a settlement of 900,000 shares of common stock worth approximately three million dollars. Enforcement: Former Employees of Wisconsin Steel Settle Pension Dispute with Envirodyne, *22 Pens. & Benefits Rep. (BNA) 2787* (Dec. 18, 1995).

n359. See supra notes 196-242 and accompanying text.

n360. See, e.g., *McLeod, supra* note 197, at 139-83.

n361. *42 U.S.C. 2000e-1* to -17 (1994).

n362. Id. 2000e-2(a)(1).

n363. *29 U.S.C. 621*-634 (1994).

n364. Id. 623.

n365. *42 U.S.C. 12,101-213.*

n366. Id. 12,112.

n367. See *Humphreys v. Medical Towers, Ltd., 893 F. Supp. 672, 689 (S.D. Tex. 1995)* (denying summary judgment on a claim under Title VII, which alleged personal liability based upon the alter ego doctrine), aff'd, (5th Cir. 1996); *Martin v. Nannie & the Newborns, Inc., Civ-91-544-T, 1994 U.S. Dist. LEXIS 20550,* at *3-4 (W.D. Okla. June 24, 1994) (granting summary judgment on personal liability claim under Title VII where no evidence supported piercing the corporate veil); Dellert v. Total Vision, Inc., 94 C 456, *1994 U.S. Dist. LEXIS 7816,* at *2 (N.D. Ill. June 13, 1994) (stating piercing could lead to shareholder liability under Title VII but no grounds had been alleged in the case); see also *Schallehn v. Central Trust & Sav. Bank, 877 F. Supp. 1315, 1337 n.20 (N.D. Iowa 1995)* (finding shareholders personally liable under ADEA "would raise complex equitable and legal issues concerning piercing of the corporate veil").

n368. *42 U.S.C. 2000e-7.*

n369. See, e.g., *California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987)* ("Congress has explicitly disclaimed any intent categorically to pre-empt state law or to "occupy the field' of employment discrimination law."). But see, e.g., *O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. Dist. Ct. App. 1991)* (voiding state statute that eroded protection to pregnant women).

n370. This is not to say that state, rather than federal, law would serve as the appropriate standard in a piercing claim brought in conjunction with a Title VII claim. Of the Title VII cases that even reference piercing the corporate veil, only the Humphreys court actually applied a piercing standard, and it utilized a state standard. *893 F. Supp. at 689.*

n371. See *Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1008 n.2 (N.D. Ill. 1994).*

n372. See *Schallehn v. Central Trust & Sav. Bank, 877 F. Supp. 1315, 1329 (N.D. Iowa 1995)* (outlining the split in the circuits); *Jendusa, 868 F. Supp. at 1008-10* (same). For thorough discussions of these issues, see Janice R. Franke, Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?, *12 Hofstra Lab. L.J. 39 (1994);* Cristopher Greer, Note, Who, Me?: A Supervisor's Individual Liability for Discrimination in the Workplace, *62 Fordham L. Rev. 1835, 1836 (1994);* Phillip L. Lamberson, Note, Personal Liability for Violations of Title VII: Thirty Years of Indecision, *46 Baylor L. Rev. 419, 421-25 (1994).*

n373. *29 U.S.C. 201*-219 (1994).

n374. Id. 206.

n375. Id. 207.

n376. Id. 212.

n377. See, e.g., id. 213 (granting certain exemptions from coverage).

n378. See id. 218(a).

n379. See, e.g., *Secretary of Labor v. DeSisto, 929 F.2d 789, 792, 797 (1st Cir. 1991).*

n380. *29 U.S.C. 203*(d) (defining an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee").

n381. See, e.g., *Fegley v. Higgins, 19 F.3d 1126, 1131* (6th Cir.), cert. denied, *115 S. Ct. 203 (1994); Donovan v. Agnew, 712 F.2d 1509, 1510-14 (1st Cir. 1983).*

n382. See *Donovan, 712 F.2d at 1512-13; Shultz v. Chalk-Fitzgerald Constr. Co., 309 F. Supp. 1255, 1257 (D. Mass. 1970).*

n383. Pub. L. No. 198, *49 Stat. 449 (1935)* (codified as amended at *29 U.S.C. 151*-169 (1994)). For purposes of this article, references to the National Labor Relations Act (NLRA) will include that body of amendments made under the Wagner Act. See Labor Management Relations Act, Pub. L. No. 100, *61 Stat. 136 (1947)* (codified as amended at *29 U.S.C. 141*-187 (1994)).

n384. See supra text accompanying note 27.

n385. However, the NLRA does contain a few specific provisions regarding preemption. See, e.g., *29 U.S.C. 164*(b) (exempting state right-to-work statutes from preemption).

n386. See, e.g., Henry H. Drummonds, The Sister Sovereign States: Pre-emption and the Second Twentieth Century Revolution in the Law of the American Workplace, *62 Fordham L. Rev. 469, 529 (1993).*

n387. See *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).*

n388. *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 146 (1976)* (quoting *Teamsters Union v. Morton, 377 U.S. 252, 258 (1964)).* For one of the more recent and detailed discussions of preemption of collective bargaining statutes, see Drummonds, supra note 386, at 560-95.

n389. See, e.g., *Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1110-11 (9th Cir. 1979)* and cases cited therein.

n390. See Stephen F. Befort, Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation, *1987 Wis. L. Rev. 67, 75-89; McLeod, supra* note 197, at 142-47.

n391. See Befort, supra note 390, at 89-100; *McLeod, supra* note 197, at 147-50.

n392. See Befort, supra note 390, at 75-76, 93-94; see also *McLeod, supra* note 197, at 151 (distinguishing the "specialized" single employer and alter ego doctrines from "more traditional veil piercing theories").

n393. *116 S. Ct. 862 (1996).*

n394. Id.

n395. See supra text accompanying notes 272-358.

n396. See infra text accompanying notes 398-479.

n397. See infra text accompanying notes 480-92.

n398. See supra text accompanying notes 49-53.

n399. Articles addressing ERISA preemption include: Conison, supra note 50; Gregory, supra note 54; James E. Holloway, ERISA, Pre-emption and Comprehensive Federal Health Care: A Call for "Cooperative Federalism" to Preserve the States' Role in Formulating Health Care Policy, *16 Campbell L. Rev. 405 (1994);* Irish & Cohen, supra note 106; Larry J. Pittman, ERISA's Pre-emption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority, *46 Fla. L. Rev. 355 (1994).*

n400. See supra text accompanying notes 42-48.

n401. *473 U.S. 134, 146-47 (1985).*

n402. See *id. at 146* ("The six carefully integrated civil enforcement provisions found in 502(a) of the statute ... provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.").

n403. *508 U.S. 248 (1993).*

n404. See, e.g., *Pacificare v. Martin, 34 F.3d 834, 836 (9th Cir. 1994)* (ERISA does not permit an insurer to sue a participant for unjust enrichment); *Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 58-60* (4th Cir.) (allowing estoppel claims may burden plans with significant unanticipated expenses), amended, slip op. (4th Cir. July 17, 1992), cert. denied, *506 U.S. 1081 (1993);* see also *Coonce v. Aetna Life Ins. Co., 777 F. Supp. 759, 770 (W.D. Mo. 1991)* (claim for estoppel or misrepresentation may affect actuarial integrity of plans).

n405. *District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 135 n.3 (1992)* (Stevens, J., dissenting).

n406. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins., 115 S. Ct. 1671, 1683 (1995)* (ERISA does not preempt a state law which instituted surcharges on medical costs for participants in ERISA health care plans); *Greater Wash. Bd. of Trade, 506 U.S. at 130-31* (ERISA preempts District of Columbia workers' compensation provision affecting health insurance coverage); *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 140 (1990)* (ERISA preempts Texas common-law claims for unlawful discharge); *FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990)* (ERISA does not preempt Pennsylvania subrogation statute for plans that are not self-insured); *Massachusetts v. Morash, 490 U.S. 107, 116 (1989)* (ERISA does not preempt Massachusetts statute requiring payment of discharged employee's due vacation benefits); *Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 830, 831-32 (1988)* (ERISA preempts Georgia garnishment statute that specifically refers to ERISA benefit plan but not a garnishment statute of general application); *Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19 (1987)* (ERISA does not preempt Maine statute requiring lump-sum severance payment); *Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 57 (1987)* (ERISA preempts Mississippi tort and contract common-law causes of action for improper processing of insurance claims); *Metropolitan Life Ins. v. Taylor, 481 U.S. 58, 62 (1987)* (ERISA preempts Michigan common-law causes of action asserting improper processing of a benefit claim); *Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 744 (1985)* (ERISA does not preempt Massachusetts statute setting minimum standards for health care benefits); *Shaw v. Delta Air Lines, 463 U.S. 85, 108 (1983)* (ERISA preempts New York employment discrimination statute to the extent the statute was inconsistent with ERISA requirements); *Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524-25 (1981)* (ERISA preempts New Jersey statutory provision that affects the way an ERISA plan may calculate pension benefits).

n407. *Alessi, 451 U.S. at 504.*

n408. *Id. at 522.*

n409. Id.; see also *Ingersoll-Rand, 498 U.S. at 137-38* ("The purpose of Congress is the ultimate touchstone.") (citations omitted).

n410. *Fort Halifax, 482 U.S. at 9;* Drummonds, supra note 386, at 523.

n411. *Shaw v. Delta Airlines, 463 U.S. 85, 96-97 (1983)* (emphasis added).

n412. The classic example of such a footnote is footnote number four in *United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).* See Gerald Gunther, Constitutional Law 467 n.1 (1985); Paul W. Kahn, Community in Contemporary Constitutional Theory, *99 Yale L.J. 1, 19 n.81 (1989)* ("famous footnote four of Carolene Products"); Kenneth Lasson, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, *103 Harv. L. Rev. 926, 939 (1990)* ("On occasion, notes become more important than text. Witness the famous footnote four in United States v. Carolene Products Co.") (footnote omitted); Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, *108 Harv. L. Rev. 593, 598 n.7 (1995)* ("famous "footnote four"').

n413. During the first six months of 1995, 12 opinions by seven U.S. Courts of Appeal used this phrase. *Farr v. U.S. West, Inc., 58 F.3d 1361, 1365 (9th Cir. 1995); Dillingham Constr. N.A., Inc. v. County of Sonoma, 57 F.3d 712, 719 (9th Cir. 1995); Harris v. American Airlines, 55 F.3d 1472, 1474 (9th Cir. 1995); O'Shea v. First Manhattan Co. Thrift Plan & Trust, 55 F.3d 109, 113 (2d Cir. 1995); Zuniga v. Blue Cross & Blue Shield of Mich., 52 F.3d 1395, 1402 (6th Cir. 1995); The Meadows v. Employers Health Ins., 47 F.3d 1006, 1009 (9th Cir. 1995); Wagman v. Federal Express Corp., No. 94-1422, 1995 U.S. App. LEXIS 3111,* at *5 (4th Cir. Feb. 17, 1995); *Minnesota Chapter of Assoc. Builders & Contractors v. Minnesota Dep't of Labor & Indus., 47 F.3d 975, 979 (8th Cir. 1995); Rosario-Cordero v. Crowley Towing & Transp. Co., 46 F.3d 120, 123 (1st Cir. 1995);*

Williams v. Ashland Eng'g Co., 45 F.3d 588, 591 (1st Cir.), cert. denied, *116 S. Ct. 51 (1995); Smith v. America W. Airlines, 44 F.3d 344, 347 (5th Cir. 1995); Hodges v. Delta Airlines, 44 F.3d 334, 336 (5th Cir. 1995).*

n414. *Shaw, 463 U.S. at 100 n.21.*

n415. *District of Columbia v. Greater Wash. Bd. of Trade, 113 S. Ct. 580, 582 (1992).*

n416. *Id. at 583.*

n417. See *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990).*

n418. *Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 739 (1985).*

n419. The circuits have developed a variety of tests to fill the gap. *Hospice of Metro Denver, Inc. v. Group Health Ins. of Okla., 944 F.2d 752, 754-56 (10th Cir. 1991)* (three-factor test); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 245 (5th Cir. 1990)* (two-prong test); *Rebaldo v. Cuomo, 749 F.2d 133, 139 (2d Cir. 1984),* cert. denied, *472 U.S. 1008 (1985)* (same test as the 10th Circuit); *Barnes Hosp. v. Sanus Passport/Preferred Serv., Inc., 809 F. Supp. 725, 727 (E.D. Mo. 1992)* (seven-factor test).

n420. *115 S. Ct. 1671, 1674 (1995).*

n421. *Id. at 1679.*

n422. *Id. at 1679-80.*

n423. Id.

n424. *Id. at 1680* (citations omitted).

n425. *486 U.S. 825, 827-28 (1988).*

n426. *Id. at 827-30.*

n427. *Id. at 830.*

n428. See supra text accompanying notes 411-12.

n429. *Mackey, 486 U.S. at 831.*

n430. *Id. at 832-34.*

n431. *Id. at 834.*

n432. ERISA 206(d)(1), *29 U.S.C. 1056*(d)(1) (1994).

n433. *Mackey, 486 U.S. at 836-37.*

n434. *Id. at 842.*

n435. *Id. at 842-43.* The majority had dismissed the statutory amendments establishing the exceptions at issue as acts of a subsequent Congress with little bearing on the intent of the body that enacted the original version of ERISA. *Id. at 840.*

n436. See *id. at 844.*

n437. See id.

n438. See infra notes 439-41.

n439. See, e.g., *Pane v. RCA Corp., 868 F.2d 631, 635 (3d Cir. 1989).*

n440. *Swinney v. General Motors Corp., 46 F.3d 512, 520-21 (6th Cir. 1995).*

n441. See, e.g., *Parker v. BankAmerica Corp., 50 F.3d 757, 765-68 (9th Cir. 1995); Rowe v. Allied Chem. Hourly Employees' Pension Plan, 915 F.2d 266, 269 (6th Cir. 1990).*

n442. *482 U.S. 1, 23 (1987).*

n443. *Id. at 4-6.*

n444. ERISA 514(a), *29 U.S.C. 1144*(a) (1994). ERISA separately defines the phrase "employee benefit plan." ERISA 3(3), *29 U.S.C. 1002*(3).

n445. *482 U.S. at 12.*

n446. *Id. at 14.*

n447. *Id. at 8* (quoting *Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 747 (1985)* (quoting *Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)));* see also supra text accompanying note 392.

n448. *482 U.S. at 9-12.*

n449. *Id. at 12-15.*

n450. *Mass. Ann. Laws ch. 149, 183* (Law. Co-op. Supp. 1996) (invalidated by *Simas v. Quaker Fabric Corp., 6 F.3d 849, 856 (1st Cir. 1993)).*

n451. Id. 183(b) (invalidated by *Simas v. Quaker Fabric Corp., 6 F.3d 849, 856 (1st Cir. 1993)).*

n452. Id. 183(a), (d)(2) (invalidated by *Simas v. Quaker Fabric Corp., 6 F.3d 849, 856 (1st Cir. 1993)).*

n453. Id. 183(b) (invalidated by *Simas v. Quaker Fabric Corp., 6 F.3d 849, 856 (1st Cir. 1993)).*

n454. *Simas v. Quaker Fabric Corp., 6 F.3d 849, 856 (1st Cir. 1993).*

n455. See id. (calling the result an "odd irony").

n456. *CTS Corp. v. Dynamics Corp., 481 U.S. 69, 87-94 (1987).*

n457. *Simas, 6 F.3d at 852-54.* The defendants also argued that, even if the statute required the establishment of a plan, the plan could not be an employee plan because the payment would be made by the acquiring firm, not by the former employer. *Id. at 852.* The court rejected this argument because ERISA's definition of the term "employer" is broad enough to include the acquiror. *Id. at 854-56.*

n458. *Id. at 853.*

n459. Id.

n460. Id.

n461. *Id. at 854.*

n462. *Id. at 856.*

n463. Of course, this question is very different from the questions of the ideal extent of ERISA's preemption clause or whether the jurisprudence could have developed in a different manner. These latter two questions are beyond the scope of this article.

n464. *Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829-30 (1988).*

n465. See, e.g., *Frary v. Shorr Paper Prods., 494 F. Supp. 565, 569 (N.D. Ill. 1980);* see also *Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1417 (2d Cir. 1985)* (stating that employer did not act as a fiduciary when amending plan), cert. dismissed, *474 U.S. 1113 (1986).*

n466. ERISA 404(a)(1)(A)(i), *29 U.S.C. 1104*(a)(1)(A)(i). For a brief explanation of ERISA's fiduciary standards, see Muir, supra note 127, at 4-19.

n467. *Akers v. Palmer, 71 F.3d 226, 230 (6th Cir. 1995)* (holding that a company is not subject to fiduciary duties when deciding what the terms of a plan are to be), cert. denied, *116 S. Ct. 2523 (1996); Belade v. ITT Corp., 909 F.2d 736, 738 (2d Cir. 1990)* (holding that design of a program is "purely a corporate management decision").

n468. See *Musto v. American Gen. Corp., 861 F.2d 897, 910-12 (6th Cir. 1988)* ("When an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards."), cert. denied, *490 U.S. 1020 (1989); Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276, 279 (3d Cir. 1984)* (recognizing that ERISA does not require an employer to maintain medical coverage); *Sutton v.*

Weirton Steel Div. of Nat'l Corp., 724 F.2d 406, 410 (4th Cir. 1983) (holding that employer did not breach its fiduciary duty by amending its plan and limiting its own liability), cert. denied, *467 U.S. 1205 (1984).*

n469. *793 F.2d 1456 (5th Cir. 1986);* see also *Richmond v. American Sys. Corp., 792 F. Supp. 449, 460 (E.D. Va. 1992)* (upholding state laws governing the fiduciary duties owed to minority shareholders).

n470. *Sommers Drug Stores, 793 F.2d at 1458.*

n471. *Id. at 1465.*

n472. Id.

n473. Id.

n474. *Id. at 1468.*

n475. See, e.g., *id. at 1467.*

n476. *Id. at 1468.*

n477. See id.

n478. See id.

n479. Id.

n480. *Peacock v. Thomas, 116 S. Ct. 862, 866 (1996).*

n481. Id.

n482. *Thomas v. Peacock, 39 F.3d 493, 503 (4th Cir. 1993).*

n483. In fact, this is basically the situation that led to the Peacock litigation. See supra text accompanying note 127.

n484. *115 S. Ct. 1671 (1995).* See also supra text accompanying notes 420-24 for a discussion of this decision.

n485. *Travelers Insurance, 115 S. Ct. at 1680.*

n486. *486 U.S. 825 (1988).*

n487. See supra text accompanying notes 429-33.

n488. For a discussion of the alter ego and instrumentality theories, see supra notes 187-95 and accompanying text.

n489. See, e.g., *Ryan v. Brophy, 755 F. Supp. 595, 597 (S.D.N.Y. 1991)* (holding partners jointly and severally liable for tort claims against the partnership and jointly liable for contract claims against the partnership); *Seymour v. Hull & Moreland Eng'g, 418 F. Supp. 190, 197 (C.D. Cal. 1976)* (holding general partners jointly and severally liable for amounts owed by partnership in action brought by trustees of union health and welfare fund), aff'd in part and rev'd in part, *605 F.2d 1105, 1115 (9th Cir. 1979)* (remanding for amendment to hours worked by contractor); see also *Grass v. Homann, 130 Ill. App. 3d 874, 881 (1984)* (holding that partner may be jointly or severally liable for a contract claim against the partnership).

n490. See supra text accompanying notes 196-270. Although the choice between state and federal law may be important in this context, a discussion of that choice is beyond the scope of this article.

n491. See supra text accompanying notes 179-209 for a discussion of the factors considered in a veil piercing claim.

n492. See supra text accompanying note 410.

n493. *116 S. Ct. 862 (1996).*