Introduction to the 2025-2026 Edition

It has now been 35 years since the original publication of this treatise, and there have been just shy of that many annual revisions. It is now possible to make generalizations about the problem treated here with more confidence than it was three and one-half decades ago. Despite the continuing belief of some scholars that the piercing question leads to unpredictable results, there does appear to be an increasing consensus that there is a strong presumption in favor of limited owner liability, and that consequently, it should be difficult to pierce the corporate or the LLC veil. The summary statement made in the "Introduction" to the last revisions still remains valid: It should now be evident to practitioners, judges, and scholars that the shield of owner limited liability should prevail if owners act in good faith and seek to put the entities they form into business with the resources believed necessary to meet the obligations to creditors they reasonably expect to assume. If, however, the owners or other persons in control *act in bad faith either by deliberately setting up an entity without intending that it will meet the obligations to its creditors, or if they abuse the form of the entities they control by draining off funds to their benefit while knowing creditors will be unpaid*, they can expect the veil of separateness of their entities to be pierced, and to have liability for entity debts imposed on themselves.

Putting this into a bit more detailed language, more consistent with that found in the cases treated here, it does appear to be becoming clearer that owners of corporations and LLCs should not be exposed to personal liability *unless there has been an abusive manipulation by those owners with the intention of harming creditors and, indeed, that the manipulation does so harm them*. In other words, it has become clear in most states, and it seems to be becoming clearer in others, that the veil of limited liability should not be removed unless there has been (1) complete *domination* by the shareholder, owner, or other controller to the extent that the dominated entity has no separate mind, will, or existence of its own, (2) an intentional and unjust *abuse* of that control designed to favor the controller and injure creditors, and (3) an actual injury to creditors *caused* by that abusive manipulation. Or, to vary the language slightly, as some courts have, there is a three-part test, each part of which must be satisfied to pierce the veil. There must be (1) a "unity of interest" between the party to be charged and the controlled entity, (2) some

injustice or unfairness present, and (3) a showing that the unjust or unfair behavior was the "proximate cause" of the injury to the plaintiff. This three-part test is generally applied whether the process is called "piercing the veil," or finding one entity or person to be the "alter ego" of another, although in some jurisdictions "alter ego" is shorthand for the first of the tests limned here, often referred to as the "domination" or "control" test. As the reader of this update will discover, some jurisdictions still appear occasionally to regard "alter ego" as a separate and complete ground for corporate disregard, but the better view, as suggested, is to regard "alter ego" as just another way of describing the first of the three required tests for veil piercing.

More cases seem to be arising concerning "piercing" or "alter ego" for jurisdictional purposes, and some jurisdictions have rendered some decisions suggesting it should be easier to pierce the veil for jurisdictional than for liability purposes. Other jurisdictions have either not addressed the issue of easier standards, or have simply, without discussion, applied the same standards. The wiser view, it would seem, is this latter one (applying the same standards), because imposing jurisdiction is itself a form of liability, given the expense of responding to and defending a lawsuit. If we are serious about maintaining limited liability, we should be concerned about any lowering of standards for veil piercing.

It is also becoming clearer that the three-part inquiry (alter ego, injustice, proximate case) should be conducted whether the attempt to pierce the veil involves corporations, LLCs, or other limited liability vehicles, and that essentially the same rules should be applied whether the owners or controllers in question are individuals or other business entities. As indicated in the text, one scholar has recently powerfully argued that it is a "myth" that it is easier to pierce the corporate veil in the parent/subsidiary context than it is in the individual shareholder/corporation or LLC situation. The need for this treatise endures because it does remain true that there is still some uncertainty involved in veil-piercing cases (even though that uncertainty appears to be diminishing), because piercing the corporate or LLC veil remains an essentially *equitable* concept, thus requiring discretion on the part of the court required to do equity.

While, as indicated, there is now increasing understanding among judges that limited liability ought to be the strong presumption, and piercing the "rare exception," because of the *economic* benefits to society of lowering the costs of business investment through limited liability, it remains true that the second major theme of this treatise – that such limited liability

also has *democratic* benefits – has yet to be fully appreciated. Indeed, there are still some jurisdictions that have not grasped that whatever doctrine is employed to withdraw the benefits of limited liability – "agency," "alter ego," "identity," "instrumentality," "single business enterprise," or "piercing the veil" – the issues and concerns are essentially similar, and that *it is inappropriate to deny limited liability unless that legislatively assured privilege has been abused in a manner unjustly to cause harm to a complaining plaintiff*. While this revision includes a few decisions that have erred in this regard, the trend remains in a direction favorable to the friends of limited liability, and developments restricting vicarious or indirect liability to intentional abuses of the corporate and LLC form now do predominate. Nevertheless, as many cases considered in this revision demonstrate, there is a continuing awareness that controlling individuals and entities who *directly participate* in causing harm ought consequently to have liability imposed on them. To further complicate terminology, one federal court in one jurisdiction, Tennessee, for example, has sought to alleviate some misconceptions by seeking to limit "veil piercing" to instances of *vicarious* liability, and to use "alter ego" simply as a term to describe *direct participant* liability. For the time being this is exceptional, because, as already indicated, many jurisdictions use "alter ego" and "veil piercing" interchangeably.

As in the previous few years, this revision includes alterations in most of the sections of Chapter 2 (that dealing with state law regarding piercing the veil; in this revision there are new cases for all of the 50 states) and in several of the sections of Chapter 3 that treat the law, particularly the federal common law, in each of the federal circuits. Of particular significance is one fine United States Supreme Court case, dealing with the Lanham Act, that reaffirms the integrity of the corporate form. Once again, approximately 200 new state and federal cases have been added (with, as usual, a plethora of opinions from the most active jurisdictions such as New York (more than 40 new cases), Texas (25 new cases), California (with one case suggesting that bad faith is not required to find alter ego), Illinois (many cases, including several notable choice of law decisions), Pennsylvania (several decisions upholding the Pennsylvania strong presumption against piercing and several recognizing the continuing validity of the "single business enterprise" theory), and Ohio (eight new court of appeals cases). There is one new Tennessee Supreme Court case that considerably clarifies the piercing jurisprudence of that state and cites this treatise 15 times. One more notable new development in federal piercing law is the application, in an FTC Act context, of the so-called "common enterprise" doctrine. Finally, there are new cases that consider the piercing law of

Bermuda, Canada, Japan, and Taiwan.

As before, as well as reviews of new cases, this revision considers relevant legislation or regulations, scholarship, and consideration of doctrinal changes in the law regarding shareholder or owner liability for the debts of both corporations and LLCs. In particular, this revision reports on new arguments for the requirement of adequate capital in order to avoid owner liability to those damaged by tortious conduct.

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