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The Single Business Enterprise Theory of Louisiana's First Circuit: An Erroneous Application of Traditional Veil-Piercing

I. INTRODUCTION

Millions of American entrepreneurs have formed a corporation or limited liability company ("LLC").¹ One of the most advantageous aspects of these two business forms and the most widespread reason for choosing the corporation² is the attached privilege of limited liability. The legislative grant of limited liability provides that no other person³ shall be liable for the debts of the corporation or LLC.⁴ Therefore, shareholders of a corporation are not liable for the debts of their corporation,⁵ members of a LLC are not liable for the debts of their LLC,⁶ and all other natural and juridical persons, including affiliated businesses,⁷ are not liable for the debts of a corporation or LLC.⁸ According to Professors Morris and Holmes,⁹ "the underlying

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1. Bizstats.com, available at <http://www.bizstats.com/numbersbizs.htm> (last visited Oct. 10, 2001). This is the case even though business owners have several other choices, including the proprietorship, general partnership, limited liability partnership (LLP), traditional limited partnership, limited partnership with a corporate general partner, and limited liability limited partnership. See Robert W. Hamilton, *Cases and Materials on Corporations Including Partnerships and Limited Liability Companies* 10-28 (2001).

2. Glenn G. Morris & Wendell H. Holmes, *Louisiana Civil Law Treatise: Business Organizations* § 32.01(1999) [hereinafter "Morris & Holmes"].

3. "Person" includes both natural and juridical persons. La. Civ. Code art. 24. There are two kinds of persons: natural persons and juridical persons. A natural person is a human being. A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership. The personality of a juridical person is distinct from that of its members.

La. Civ. Code art. 24 (emphasis added).

4. Morris & Holmes, *supra* note 2, § 32.02.

5. La. R.S. 12:93(B) (2003).

6. La. R.S. 12:1320 (2003).

7. "Affiliated businesses" are distinct businesses in which one natural or juridical person, or a group of natural or juridical persons, owns a controlling interest. For example, a sister company is affiliated with its sister company, and a parent company is affiliated with its subsidiary. Cf. Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. Chi. L. Rev. 589, 589 (1975) (defining "affiliated corporations").

8. See *In re New Orleans Train Car Leakage Fire Litigation*, 690 So. 2d 255, 259 (La. App. 4th Cir. 1997); *de Montfort v. Sanctuary Private Sch.*, 232 So. 2d 924, 926 (La. App. 4th Cir. 1970) ("We know of no law prohibiting the formation of several corporations by the same stockholders and officers . . ."); Brian T. Leftwich, *Piercing the Corporate Veil in Louisiana*, 22 Loy. L. Rev. 993, 994-95 (1975-76) (citations omitted) ("[A] corporation, as a juridical person, has a separate

theory for [limited liability] is that the corporation is itself considered a juridical entity, possessing its own legal personality, separate and distinct from that of its shareholders (or of any other person for that matter)."¹⁰ By granting limited liability to corporations and LLCs, the legislature encourages business development.¹¹

A jurisprudential theory created and recently expanded by Louisiana's first circuit poses four new threats to the limited liability of Louisiana business. The first circuit's single business enterprise theory provides authority for first circuit courts to disregard the separate identity of corporations and LLCs in a dangerous fashion. Under this theory, the first circuit is eroding the protection of limited liability in ways that would shock most business owners and seem unbelievable to most commercial lawyers.

These novel threats to the limited liability of Louisiana businesses should not exist because they are the result of a bad jurisprudential theory. The first circuit's single business enterprise theory is a poor theory for two main reasons. First, the theory has been developed through poor legal methodology.¹² Second, the theory promotes a bad policy.¹³

These two major problems can be resolved and the legitimate objectives of the first circuit's single business enterprise theory can be accomplished.¹⁴ The first circuit should take actions similar to the North Carolina Supreme Court.¹⁵ It should slightly alter the doctrine associated with traditional veil-piercing so that traditional veil-piercing can be applied both vertically as well as laterally.¹⁶

and distinct existence apart from its shareholders, officers, and related corporations.").

9. Glenn G. Morris, Vice Chancellor and Class of 1950 Professor of Law, Paul M. Hebert Law Center, Louisiana State University; Wendell H. Holmes, Liskow and Lewis Professor of Law, Paul M. Hebert Law Center, Louisiana State University.

10. Morris & Holmes, *supra* note 2, § 32.02, at 52. See also Riggins v. Dixie Shoring Co., Inc., 590 So. 2d 1164, 1167 (La. 1991); Johnson v. Kinchen, 160 So. 2d 296, 298 (La. App. 1st Cir. 1964); La. Civ. Code art. 24. See generally Morris & Holmes, *supra* note 2, §§ 7.04, 7.05. Because the LLC was created, among other reasons, to "offer the business planner . . . the limited liability of corporation law," it seems logical that the limited liability of a LLC, like the limited liability of a corporation, is supported by the classification of the LLC as a distinct juridical person. Morris & Holmes, *supra* note 2, § 44.01, at 482.

11. Johnson v. Kinchen, 160 So. 2d 296, 299 (La. App. 1st Cir. 1964). See *infra* Part IV.B.

12. See *infra* Part IV.A.

13. See *infra* Part IV.B.

14. See *infra* Part V.

15. See Glenn v. Wagner, 329 S.E.2d 326 (N.C. 1985); See also discussion *infra* Part IV.A.1.b.

16. See *infra* Part V.A.

Part II of this article describes the threats posed by the first circuit's single business enterprise theory. Next, the article explains the theory's development. The fourth section analyzes the legal methodology and policy associated with the first circuit's theory. Finally, Part V explains a simple resolution to the problems associated with the theory.

II. FOUR NOVEL THREATS TO LIMITED LIABILITY

The single business enterprise theory of Louisiana's first circuit discourages business development by posing four new threats to the limited liability of Louisiana businesses. These threats exist because of the manner in which the first circuit has applied the theory in the past as well as the theory's potential applications. All businesses in Louisiana should be aware of the following new threats to limited liability.

First, the first circuit's theory seemingly *requires* courts to disregard the separate identity of a corporation or LLC if it is "controlled" by another entity. Specifically, the first circuit states, "[i]f one corporation is wholly under the control of another, the fact that it is a separate entity does not relieve the latter from liability."¹⁷ Most, if not all, parent companies dominate or control their subsidiary corporations or LLCs.¹⁸ Therefore, *if taken literally*, the court's language means that parent companies would almost always be liable for the debts of their subsidiaries. Similarly, many companies dominate or control sister corporations or LLCs. Therefore, *if taken literally*, the court's language also means that dominant companies would almost always be liable for the debts of their sister corporations or LLCs. Although this language has been recited in other Louisiana circuits, the other circuits accompany this language with a consideration of whether dominance by one company has caused an inequity.¹⁹ If no inequity exists, the other Louisiana

17. *Hamilton v. AAI Ventures, L.L.C.*, 768 So. 2d 298, 302 (La. App. 1st Cir. 2000); *Grayson v. R.B. Ammon & Assocs., Inc.*, 778 So. 2d 1, 14 (La. App. 1st Cir. 2000), *writs denied*, 782 So. 2d 1026 (La. 2001), 782 So. 2d 1027 (La. 2001); *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. App. 1st Cir.), *writ denied*, 580 So. 2d 668 (1991).

18. Even Louisiana courts have historically understood that "*almost all* closely-held small business corporations are operated as the alter ego or instrumentality of their respective shareholders." *Morris & Holmes*, *supra* note 2, § 32.02, at 54. This characterization also applies to parent companies because parent companies are shareholders of their subsidiary corporations and members of their subsidiary LLCs.

19. See *Lucey Mfg. Corp. v. Oil City Iron Works*, 15 La. App. 12, 131 So. 57 (La. App. 2nd Cir. 1930).

circuits respect the separate identity of the two companies.²⁰ However, the first circuit has seemingly applied this language literally, without any consideration of whether dominance by one company has caused an inequity.²¹ These applications indicate that the first circuit seemingly *requires* courts to disregard the separate identity of a corporation or LLC if it is “controlled” by another business.²²

The second new threat to limited liability of Louisiana businesses is that the first circuit’s single business enterprise theory permits “lateral veil-piercing.”²³ Although vertical veil-piercing is supported

20. *See id.*

21. *See Hamilton*, 768 So. 2d 298; *Grayson*, 778 So. 2d 1. *See also infra* Parts III.D, IV.A.3.

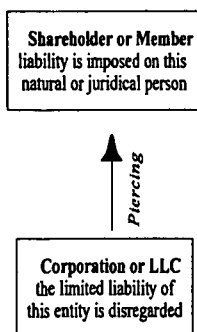
22. *See id.*

23. The term “veil-piercing” employs two metaphors. First, it imagines a “veil” surrounding the corporation or LLC, isolating it from those who might otherwise be responsible for the debts of the corporation or LLC, i.e., the shareholders, members, or affiliated businesses. This veil is “pierced” when the separate identity of the corporation or LLC is disregarded and another natural or juridical person is held liable for the debts of the corporation or LLC.

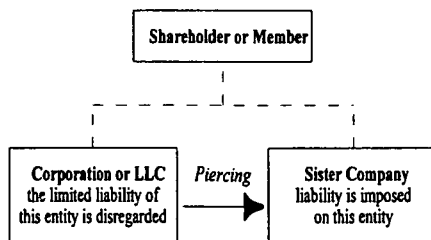
The terms “later veil-piercing” and “traditional” or “vertical veil-piercing” will be used throughout this article to distinguish between two types of veil-piercing. “Lateral veil-piercing” refers to the situation in which the separate identity of a corporation or LLC is disregarded to impose liability on a sister company. The term “lateral” is used because liability of the corporation or LLC is imposed “laterally” to its sister company.

“Vertical” or “traditional veil-piercing” refers to the situation in which the separate identity of a corporation or LLC is disregarded to impose liability on its shareholder(s) or member(s) (remember, a parent company is a shareholder of its subsidiary corporation or a member of its subsidiary LLC). The term “vertical” is used because the liability of the corporation or LLC is imposed “vertically” to the shareholder(s) or member(s). The term “traditional” is used because vertical veil-piercing has been well-accepted for decades by courts throughout the country. *Morris & Holmes*, *supra* note 2, § 32.01. *See also* Harry G. Henn & John R. Alexander, *Laws of Corporations and Other Business Enterprises* 346 (1983) [hereinafter “Henn & Alexander”]. Below are simplified diagrams to illustrate these concepts.

Vertical / Traditional Piercing



Lateral Piercing



by well-accepted doctrine, the first circuit is the only circuit in Louisiana that allows lateral piercing.²⁴ A few courts in Texas and North Carolina have invoked lateral piercing; however, unlike the first circuit, these courts require the existence of an inequity.²⁵ Lateral veil-piercing applied by the first circuit's single business enterprise theory, therefore, is a new threat to the limited liability of Louisiana businesses.

The third and most alarming way in which the first circuit's single business enterprise theory threatens limited liability is by allowing courts to disregard the separate identity of a corporation or LLC without considering whether an inequity exists. The first circuit's single business enterprise theory is almost entirely composed of an eighteen-factor test.²⁶ None of the eighteen factors considers whether an inequity exists.²⁷ In fact, most of the eighteen factors are characteristic of most closely-affiliated corporations and LLCs.²⁸ For nearly a decade, the first circuit applied its single business enterprise theory only in cases involving inequitable situations.²⁹ Recently, however, the first circuit applied its theory in cases in which there was no indication of an inequity.³⁰ This new application is novel because courts consistently consider whether inequity exists when applying traditional veil-piercing.³¹ Therefore, Louisiana's first circuit is apparently the only court in the United States that disregards the separate identity of a corporation or LLC without considering whether an inequity exists.³²

The fourth and final new threat on limited liability is that the theory effectively alters traditional veil-piercing by permitting vertical veil-piercing even if there is no inequity.³³ Nothing stated by the first circuit when applying its single business enterprise theory limits the

24. *Morris & Holmes*, *supra* note 2, § 32.15, at 99. *See also* *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. App. 1st Cir.), *writ denied*, 580 So. 2d 668 (1991).

25. *See* *Glenn v. Wagner*, 329 S.E.2d 326 (N.C. 1985); *Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534 (Tex. App.—Houston [14th Dist.] 1986), *writ ref'd n.r.e.*; *Glenn v. Wagner*, 313 S.E.2d 832 (N.C. Ct. App. 1984), *writ granted*, 329 S.E.2d 326 (N.C. 1985). *See also infra* Parts IV.A.1.b-c, IV.A.2.

26. The eighteen factors are illustrative. No one factor is dispositive, and they are to be considered in light of the totality of the circumstances. *See infra* Parts III.B., III.D.

27. *See infra* Part III.B.

28. *Morris & Holmes*, *supra* note 2, § 32.02.

29. *Id.*, § 32.15.

30. *See infra* Parts III.D., IV.A.3.

31. *See infra* Part III.A.

32. *See infra* Part III.C.

33. *See* *Hamilton v. AAI Ventures, L.L.C.*, 768 So. 2d 298, 302 (La. App. 1st Cir. 2000); *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. App. 1st Cir.), *writ denied*, 580 So. 2d 668 (1991); *infra* Part III.B.

theory's application to a lateral piercing situation. In other words, it is conceivable that a parent company could be held liable for the debts of a subsidiary corporation or LLC, a shareholder could be held liable for the debts of its corporation, and a member could be held liable for the debts of its LLC, even if there is no fraud or inequity. This is a novel threat because for decades courts have consistently required fraud or inequity to pierce the veil vertically.³⁴

III. THE FIRST CIRCUIT'S SINGLE BUSINESS ENTERPRISE THEORY IS UNIQUE

In order to understand why these four threats are novel, it is important to understand how and why the first circuit's theory is unique. An explanation of the development of the theory is now warranted.

A. *Traditional Veil-Piercing*

Veil-piercing is traditionally used to overcome limited liability through vertical piercing.³⁵ In other words, veil-piercing traditionally imposes personal liability on shareholders for the debts of their corporation or on members for the debts of their LLC. Accordingly, parent companies, as shareholders of their subsidiary corporations or members of their subsidiary LLCs, have traditionally been held liable for the debts of their subsidiary companies through traditional veil-piercing.³⁶ However, Louisiana courts, including the first circuit, apply traditional veil-piercing only after carefully considering the principle that "veil-piercing is an extraordinary remedy, to be granted only rarely."³⁷ Considering that the policy of providing limited liability to shareholders is the "most commonly-recited reason for the recognition of the separate identity of the corporation,"³⁸ it is understandable that courts are hesitant to use traditional veil-piercing to overcome limited liability.

1. *Underlying Policies*

Because it is "the strong policy of Louisiana to favor the recognition of the corporation's separate existence,"³⁹ courts use

34. See *infra* Part III.A.

35. Glenn G. Morris, *Piercing the Corporate Veil in Louisiana*, 52 La. L. Rev. 271, 271 (1991).

36. See *supra* note 23 and accompanying text.

37. Morris & Holmes, *supra* note 2, § 32.02 (citations omitted).

38. Morris & Holmes, *supra* note 2, § 32.01.

39. Morris & Holmes, *supra* note 2, § 32.02.

traditional veil-piercing to disregard the separate identity of a corporation or LLC only if its recognition would result in unjust or undesirable consequences inconsistent with the purpose of incorporation or organization.⁴⁰ According to the Louisiana Supreme Court, “[t]he policies behind recognition of a separate . . . existence must be balanced against the policies justifying piercing.”⁴¹ The major policy supporting the recognition of the separate existence of corporations and LLCs is “the promot[ion of] commerce and industrial growth by encouraging [investors] to make capital contributions to corporations [and LLCs] without subjecting all of their personal wealth to the risks of business.”⁴² Further, legislatures favor limited liability because it “encourages and promotes business, commerce, manufacturing and industry which provides employment, creates sales of goods and commodities and adds to the nation’s economic and financial growth, stability and prosperity.”⁴³ In short, the recognition of the separate identity of a corporation or LLC encourages business development.

On the other hand, disregarding the separate identity might be justified if the corporation or LLC has been used in a manner that does not promote commerce and industrial growth.⁴⁴ Therefore, veil-piercing has traditionally occurred in situations in which the corporation or LLC has been used in an illegal manner, in a manner in which the corporate form is disregarded, or if it would be clearly inequitable to recognize the separate entity.⁴⁵

2. Standard Doctrine

In an attempt to standardize the balancing of underlying policies for and against veil-piercing, the Louisiana Supreme Court in *Riggins v. Dixie Shoring Company, Inc.*⁴⁶ endorsed two tests to determine whether the separate identity of a corporation or LLC should be disregarded: the *Kingsman* test⁴⁷ and the five-factor test.⁴⁸ The *Kingsman* test contains two parts. The first part is commonly referred

40. “[W]hile most courts will insist on the recitation of doctrine, the results they reach suggest that they are sensitive to policy and function as well.” Morris & Holmes, *supra* note 2, § 32.01. See also Henn & Alexander, *supra* note 23, at 346.

41. Glazer v. Comm’n on Ethics for Pub. Employees, 431 So. 2d 752, 757-58 (La. 1983) (citations omitted).

42. *Id.* at 757.

43. Johnson v. Kinchen, 160 So. 2d 296, 299 (La. App. 1st Cir. 1964).

44. Glazer, 431 So. 2d at 757; Henn & Alexander, *supra* note 23, at 346.

45. Glazer, 431 So. 2d at 757-58 (citations omitted).

46. 590 So. 2d 1164 (La. 1991).

47. Kingsman Enter., Inc. v. Bakerfield Elec. Co., Inc., 339 So. 2d 1280 (La. App. 1st Cir. 1976).

48. Morris & Holmes, *supra* note 2, § 32.02 (citations omitted).

to as the “alter ego plus fraud” test.⁴⁹ It allows veil-piercing if “the corporation [is] the ‘alter ego’⁵⁰ of the shareholder [or member] . . . where fraud or deceit has been practiced on a third party by the shareholder [or member] acting through the corporation [or LLC].”⁵¹ The second part of the *Kingsman* test is commonly referred to as the “indistinguishability” test.⁵² The “indistinguishability” test allows veil-piercing if “the corporate entity [fails] to conduct a business on corporate footing, thereby disregarding the corporate entity to such an extent that the corporation ceases to be distinguishable from its shareholders.”⁵³ The indistinguishability test is essentially a test of estoppel—the shareholder or member should not be able to hold his activities out to the world as personal activities and then rely on limited liability to escape personal liability.⁵⁴

Although tests such as the *Kingsman* test have been used for decades, Justice Cardozo recognized the vagueness of such tests when he said, “[t]he whole problem [surrounding veil-piercing] is still enveloped in the mists of metaphor.”⁵⁵ Therefore, most post-*Riggins* decisions recite the *Kingsman* test in conjunction with the five-factor test, which was also endorsed by the Louisiana Supreme Court in *Riggins*. The five-factor test uses the following nonexclusive, unweighted factors to determine whether to recognize the separate identity of a corporation or LLC:

- (1) commingling of personal and corporate funds;
- (2) the observance of statutory formalities in the incorporation and operation of the company;
- (3) undercapitalization;
- (4) whether a separate bank account has been established for the corporation, and whether its financial records are separately maintained; and
- (5) whether regular meetings of shareholders and directors have been held.⁵⁶

49. *Id.*

50. Alter ego means “such unity of ownership and interest that the separate existence of the corporation has ceased and recognition of the separate entity might lead to an inequitable result.” Robert W. Hamilton, *The Law of Corporations in a Nutshell* 101 (1996). The common definition of alter ego is “another side of oneself; a second self.” *The American Heritage College Dictionary* 39 (3d ed. 1993).

51. *Kingsman*, 339 So. 2d at 1282 (citations omitted).

52. *Morris & Holmes*, *supra* note 2, § 32.02.

53. *Kingsman*, 339 So. 2d at 1282 (citations omitted).

54. *Cf. Landers*, *supra* note 7, at 622.

55. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58 (N.Y. 1926).

56. *Morris & Holmes*, *supra* note 2, § 32.02 (citations omitted).

Because several of these five factors can be found in “almost all closely-held small business corporations,”⁵⁷ veil-piercing is not allowed if based solely on the fact that:

- the shareholder owns a majority of the stock, most of the stock, or even all of the stock of the corporation;
- (1) the corporation was minimally capitalized; or
- (2) the corporation was incorporated by the shareholder for the very purpose of avoiding personal liability.⁵⁸

In addition to these three restrictions, the five-factor test must also be applied “in light of ‘the totality of the circumstances.’”⁵⁹

Admittedly, this combined application of the *Kingsman* and the five-factor tests does not lead to the most objective determinations.⁶⁰ Nevertheless, both tests have been endorsed by the Louisiana Supreme Court⁶¹ and are “sensitive to policy and functions.”⁶² Furthermore, these tests are similar to tests used throughout the country.⁶³ Such widespread acceptance of similar veil-piercing doctrine suggests that, as of today, this doctrine is the best way to standardize the balancing of underlying policies.⁶⁴

B. *The First Circuit’s Single Business Enterprise Theory*

The single business enterprise theory was adopted by the first circuit in *Green v. Champion Insurance Company*.⁶⁵ That case

57. *Id.*

58. *Id.* (citations omitted).

59. *Id.*

60. According to Professors Glenn G. Morris and Wendell H. Holmes: Most courts decide [veil-piercing] cases as if they were being asked to engage in some kind of metaphysical inquiry into the true nature of corporate separateness. They explain their veil-piercing decisions on the basis of rules and “factors” tending “under the totality of circumstances” to support what purports to be “primarily” a factual finding that a particular corporation really is, or is not, the type of separate business organization that is contemplated by the business corporation statute [W]hile most courts will insist on the recitation of doctrine, the results they reach suggest that they are sensitive to policy and functions as well.

Morris & Holmes, *supra* note 2, § 32.01.

61. *Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164 (La. 1991).

62. *See supra* note 40.

63. *See generally* Henn & Alexander, *supra* note 21, at 344-52.

64. Although a better doctrine may be developed in the future, a discussion on possible improvements to the current veil-piercing doctrine is beyond the scope of this article.

65. 577 So. 2d 249 (La. App. 1st Cir.), *writ denied*, 580 So. 2d 668 (1991).

involved the liquidation of assets of the insolvent Champion Insurance Company ("Champion"). The insurance liquidator had a right of full access to the records of Champion; Champion denied access. The defendants were Champion and nine affiliated corporations,⁶⁶ including sister corporations. All of the defendants were completely or nearly completely owned and managed by a total of twelve individuals, most of whom were members of the same family.⁶⁷ The assets of Champion and the affiliated corporations were repeatedly commingled.⁶⁸ The corporations had mutual officers, offices, and employees.⁶⁹ Furthermore, some corporations handled all of Champion's business within certain states.⁷⁰

The first circuit correctly realized that recognizing Champion's separate identity would have been inequitable and would have resulted in unjust or undesirable consequences inconsistent with the purpose of incorporation.⁷¹ Therefore, the policies justifying piercing clearly outweighed the policies behind recognizing a separate corporate existence.⁷² The facts in *Champion* justified an application of traditional veil-piercing.

However, for the *Champion* court to hold Champion's sister companies liable for Champion's debts, the court had to pierce Champion's veil "laterally" to the sister companies.⁷³ Because Louisiana courts had never pierced the veil laterally, the *Champion* court was correct when it stated, "[s]uch a situation has not been specifically addressed by our courts."⁷⁴ The first circuit was at a crossroads. It had to decide whether to apply traditional veil-piercing to a lateral piercing situation, develop a new theory for lateral piercing, or use some other approach.

The first circuit chose the latter. It did not apply traditional veil-piercing, nor did it develop a new theory.⁷⁵ Instead, the court used traditional veil-piercing cases to support the development of an eighteen-factor test⁷⁶ to be used for lateral piercing. The *Champion*

66. See *supra* note 7.

67. *Champion*, 577 So. 2d at 252-53.

68. *Id.* at 253.

69. *Id.*

70. *Id.* at 252.

71. See generally *Morris & Holmes*, *supra* note 2, § 32.01; *Henn* *supra* note 23, at 346.

72. See generally *Glazer*, 431 So. 2d at 757-58 (citations omitted).

73. See explanation of veil-piercing *supra* note 23.

74. *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. App. 1st Cir. 1991).

75. See *infra* Part IV.A.3.

76. According to the *Champion* court:

The following factors have been used to support an argument that a group of entities constitute a "single business enterprise":

court stated that the eighteen factors are “illustrative . . . not intended as an exhaustive list of relevant factors.”⁷⁷ Furthermore, “[n]o one factor is dispositive of the issue of “single business enterprise.”⁷⁸ Using this test, the *Champion* court determined that the affiliated corporations constituted a “single business enterprise,”⁷⁹ giving the liquidator the right to assert full access over the assets of all nine corporations as if they were the assets of *Champion*.⁸⁰

C. Traditional Veil-Piercing vs. the First Circuit’s Single Business Enterprise Theory

Traditional veil-piercing and the first circuit’s single business enterprise theory have great similarities and differences. Both are

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1. corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control;
 2. common directors or officers;
 3. unified administrative control of corporations whose business functions are similar or supplementary;
 4. directors and officers of one corporation act independently in the interest of that corporation;
 5. corporation financing another corporation;
 6. inadequate capitalization (“thin incorporation”);
 7. corporation causing the incorporation of another affiliated corporation;
 8. corporation paying the salaries and other expenses or losses of another corporation;
 9. receiving no business other than that given to it by its affiliated corporations;
 10. corporation using the property of another corporation as its own;
 11. noncompliance with corporate formalities;
 12. common employees;
 13. services rendered by the employees of one corporation on behalf of another corporation;
 14. common offices;
 15. centralized accounting;
 16. undocumented transfers of funds between corporations;
 17. unclear allocation of profits and losses between corporations; and
 18. excessive fragmentation of a single enterprise into separate corporations.

Champion, 577 So. 2d at 257-58.

77. *Id.* at 258.

78. *Id.*

79. *Champion*, 577 So. 2d at 257-58.

80. *Id.* at 254.

used to disregard the separate identity of a corporation or LLC in order to hold another natural or juridical person liable for the debts of the corporation or LLC. The underlying policies justifying both theories are the same.⁸¹

Although traditional veil-piercing and the first circuit's single business enterprise theory achieve the same result, they use different means to achieve that result. Four differences are particularly noteworthy. First, whereas Louisiana courts use traditional veil-piercing to pierce only vertically, the first circuit uses its single business enterprise theory to pierce laterally as well as vertically.

Second, whereas the first circuit's single business enterprise theory uses an eighteen-factor test developed by the first circuit, traditional veil-piercing uses a combination of tests endorsed by the Louisiana Supreme Court and other courts throughout the nation. The eighteen-factor test of the first circuit's single business enterprise theory consists of eighteen illustrative factors, many of which can be found in almost all closely-affiliated businesses.⁸² First circuit courts can apply the eighteen factor test with great flexibility because the eighteen factors are illustrative, no one factor is dispositive, and the eighteen factors are to be considered in light of the totality of the circumstances.⁸³

On the other hand, the combination of tests used in traditional veil-piercing requires courts to consider circumstances beyond those that are regularly found in most closely-affiliated corporations or LLCs. For example, according to the first part of the *Kingsman* test, courts must consider whether fraud or deceit exists. Although the five-factor test used in traditional veil-piercing does include factors that are found in "almost all closely-held small business[es],"⁸⁴ the five-factor test is not as flexible as the eighteen-factor test because it is limited with certain restrictions.⁸⁵

Third, before applying traditional veil-piercing, courts recite the following language as a reminder: "veil-piercing is an extraordinary remedy, to be granted only rarely."⁸⁶ The first circuit does not

81. See *id.* at 257 (citing *Talen's Landing, Inc. v. M/V Venture, II*, 656 F.2d 1157, 1160 (5th Cir. 1981); *Lucey Mfg. Corp. v. Oil City Iron Works*, 131 So. 57 (La. App. 2d Cir. 1930); *Brown v. Benton Creosoting Co.*, 147 So. 2d 89, 94 (La. App. 2nd Cir. 1962); *Johnson v. Kinchen*, 160 So. 2d 296, 298 (La. App. 1st Cir. 1964).

82. See *supra* note 18 and sources cited therein.

83. See *infra* Part IV.A.2.

84. See *supra* note 18 and sources cited therein.

85. See *supra* Part III.A.2.

86. *Morris & Holmes*, *supra* note 2, §32.02 (citations omitted).

regularly recite this reminder in single business enterprise cases.⁸⁷ Because it does not recite this language, the first circuit is more likely to disregard the separate identity of a corporation or LLC through its single business enterprise theory than through traditional veil-piercing.

Fourth, whereas traditional veil-piercing tests require the existence of an inequity, the first circuit's single business enterprise theory does not have a similar requirement. The existence of an inequity is important because it indicates that unjust or undesirable consequences inconsistent with the purpose of incorporation or organization would result if the separate identity of the corporation or LLC is recognized.⁸⁸ Because the *Champion* court did not explicitly require the existence of an inequity, it opened the door for future courts to disregard the separate identity of a corporation or LLC through the single business enterprise theory, even if recognition of the separate identity is consistent with the legislative purpose of incorporation or organization.

D. Recent Developments of the First Circuit's Single Business Enterprise Theory

In 2000, the first circuit in *Grayson v. R.B. Ammon and Associates, Inc.*⁸⁹ expanded its single business enterprise theory in two ways: (1) it applied the theory in a case that did not involve the liquidation of an insurance company,⁹⁰ and (2) it applied the eighteen-factor test at its mere face-value. The former expansion is significant because it shows that the first circuit applies its single business enterprise theory to any type of business, not just insurance companies that are in a position to easily defraud consumers. The latter expansion is particularly dangerous because first circuit courts now have first circuit authority to apply the single business enterprise theory without balancing "[t]he policies behind recognition of a separate corporate existence . . . against the policies justifying piercing,"⁹¹ as instructed by the Louisiana Supreme Court.

In *Grayson*, a crane operator was injured due to the negligence of a temporary worker employed by a corporation supplying temporary

87. See *supra* Part III.C.

88. See *supra* Part III.A.1.

89. 778 So. 2d 1 (La. App. 1st Cir. 2000), writ denied, 782 So. 2d 1026 (La. 2001), writ denied 782 So. 2d 1027 (La. 2001).

90. *Morris & Holmes, supra* note 2, § 32.15.

91. *Glazer v. Comm'n on Ethics for Pub. Employees*, 431 So. 2d 752, 758 (La. 1983) (citations omitted).

laborers. Approximately ten years before the events in question, one corporation supplied both clerical and labor employees. High workers' compensation rates for the labor employees increased the company's overall workers' compensation rate. Understanding that these overall rates would decrease if the clerical and labor businesses of the company were separated, the owner "encouraged his young, college-aged nephew"⁹² to form a second corporation to provide temporary labor employees.

Although the corporation supplying temporary labor employees employed the negligent temporary worker, the crane operator alleged that both corporations were liable for the negligence of the temporary worker. The nephew owned all of the stock in the new corporation. Shortly after he incorporated the new business for temporary labor employees, the nephew moved out of state; thereafter, his uncle, still the owner of the corporation providing temporary clerical employees, handled the daily operations for the corporation supplying temporary labor employees. Both corporations operated under the same trade name, shared the same office, computer system, clerical staff, personnel recruiters, and billing system. The corporation supplying temporary labor employees did not make any reimbursements to the corporation supplying temporary clerical employees for these services. Based on these facts, the first circuit affirmed the trial court's determination that the two corporations constituted a single business enterprise.⁹³

All single business enterprise cases before *Grayson* involved the Insurance Commissioner's attempted liquidation of insurance companies based on his findings of improprieties.⁹⁴ In *Champion*, the insurance company denied the court-appointed liquidator access to the company's records, and assets of *Champion* were repeatedly commingled with assets of the affiliated corporations.⁹⁵ In another single business enterprise case, *Guste v. Green*,⁹⁶ the owner misled an employee into thinking he would get a partnership interest in the company even though the company had so little cash that it had to borrow \$400,000 to pay salaries, and the owner "did whatever he thought was necessary or expedient to bring money into the company

92. *Id.*

93. *Id.*

94. *Contra Guste v. Green*, 657 So. 2d 610 (La. App. 1st Cir. 1995); *Brown v. Automotive Cas. Ins. Co.*, 644 So. 2d 723 (La. App. 1st Cir. 1994); *Green v. Champion Ins. Co.*, 577 So. 2d 249 (La. App. 1st Cir. 1991).

95. *Champion*, 577 So. 2d at 253.

96. 657 So. 2d 610 (La. App. 1st Cir. 1995).

regardless of whether it was a prudent investment.”⁹⁷ In yet another example, *Brown v. Automotive Casualty Insurance Company*,⁹⁸ the corporation used “an unusual circular transfer of funds between [the] corporations [in] a plan to misrepresent the year end capital account by \$1,000,000 for reporting purposes . . . without property security or collateralization and with no documentation whatsoever.”⁹⁹

Grayson, however, did not involve such inappropriate activities, nor did it involve facts indicating that the corporation abused its separate identity. The two businesses were separately incorporated to decrease workers’ compensation costs. There is no indication of misrepresentation, commingling of funds, or any illegitimate business activities. The court could have, and should have, easily discussed such facts if they existed. Because the court did not discuss such potentially persuasive facts, we must assume that those facts did not exist. Professors Morris and Holmes explain what types of facts might have justified piercing in *Grayson*:

The facts of *Grayson* . . . did provide some support for the veil-piercing that occurred, if one were to infer from those facts some effort by the controlling shareholder/manager to cheat tort claimants out of a reasonable level of financial responsibility for the torts committed by his laborer employees. Perhaps this shareholder had set up the second corporation as an undercapitalized, under-insured shell, to protect the assets of his first corporation not only from the higher worker compensation costs, but also from the higher tort exposure generated by the laborer employees, and had saved lots of money by cutting his insurance levels to unreasonably low levels. If that was the case, the veil-piercing that occurred in *Grayson* was justified and consistent with earlier jurisprudence.¹⁰⁰

“But,” Professors Morris and Holmes continue, “the *Grayson* court never really said that is what happened.”¹⁰¹ Nevertheless, the first circuit affirmed that trial court’s finding of a single business enterprise and the Louisiana Supreme Court denied writs of certiorari.

Grayson represents drastic developments in the first circuit’s single business enterprise theory. The liquidation of an insurance company is no longer a prerequisite to a single business enterprise

97. *Id.* at 619.

98. 644 So. 2d 723 (La. App. 1st Cir. 1994).

99. *Id.* at 729-30.

100. Morris & Holmes, *supra* note 2, § 32.15 (Supp. 2002).

101. *Id.*

determination. Additionally, and more significant, it appears courts in the first circuit are required to consider only the eighteen factors at face value. Therefore, if an undetermined number of factors in the eighteen-factor test are satisfied, two or more businesses can be deemed to constitute a single business enterprise. Remember, many of the eighteen factors can be found in almost all closely-affiliated businesses, and the factors are “illustrative and . . . not intended as an exhaustive list of relevant factors.”¹⁰² The eighteen-factor test, therefore, seems to give courts the authority to disregard the separate identity of a corporation or LLC merely because the corporation is closely related to another business.

Furthermore, first circuit courts may even be *required* to disregard the separate identity of a corporation or LLC if it is controlled by another natural or juridical person because the court in *Grayson* seems to literally interpret the following statement: “If one corporation is wholly under the control of another, the fact that it is a separate entity does not relieve the latter from liability.”¹⁰³ The casual analysis used in *Grayson* further distinguishes the first circuit’s single business enterprise theory from traditional veil-piercing.

IV. ANALYSIS OF THE FIRST CIRCUIT’S SINGLE BUSINESS ENTERPRISE THEORY

Because the developments in *Grayson* pose great danger to the preservation of limited liability in Louisiana, the first circuit’s single business enterprise theory should be scrutinized. The first circuit’s single business enterprise theory is plagued by two fundamental problems. First, the court used poor legal methodology when establishing and expanding its doctrine. Second, the theory fails to adequately consider policy concerns.

A. Poor Legal Methodology

1. The 18-Factor Test is Based on the Misapplication of Previous Jurisprudence

As previously stated, the first circuit’s single business enterprise theory consists almost entirely of the eighteen-factor test established in *Champion*. The *Champion* court supported the establishment of its

102. *Champion*, 577 So. 2d at 258; *Grayson v. R.B. Ammon & Assocs., Inc.*, 778 So. 2d 1 (La. App. 1st Cir. 2000), *writs denied*, 782 So. 2d 1026 (La. 2001), 782 So. 2d 1027 (La. 2001).

103. See cases cited *supra* note 17.

test with three separate cases:¹⁰⁴ *Baker v. Raymond International, Inc.*,¹⁰⁵ *Glenn v. Wagner*,¹⁰⁶ and *Paramount Petroleum Corp. v. Taylor Rental Center*.¹⁰⁷ The first circuit asserted that the eighteen factors “have been used to support an argument that a group of entities constitute a ‘single business enterprise.’”¹⁰⁸ Each of the eighteen factors was imported directly from one of these three cases.¹⁰⁹ However, the eighteen-factor test was founded on an erroneous interpretation and application of these cases.

a. Baker v. Raymond International, Inc.

In *Baker v. Raymond International, Inc.*,¹¹⁰ an injured maritime worker sued his employer’s parent corporation for his injuries. The parent company owned a wholly-owned subsidiary, which in turn owned fifty percent of the employer’s stock.¹¹¹

Baker was erroneously applied as authority for the eighteen-factor test because of two reasons. First, *Baker* is a traditional veil-piercing case, not a single business enterprise case. The injured employee wanted to impose liability on a parent company, not a sister company. Vertical piercing was allowed by traditional veil-piercing long before the development of the single business enterprise theory.¹¹² Because the plaintiff tried to bypass the employer’s shareholder (the wholly-owned subsidiary) and impose liability directly on the parent corporation, it might be argued that the plaintiff was not invoking traditional veil-piercing. This argument, however, is not supported by the language or reasoning of the Fifth Circuit. The court explained

104. See *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257-58 (La. App. 1st Cir. 1991), writ denied, 580 So. 2d 668 (1991).

105. 656 F.2d 173, 180 (5th Cir. 1981).

106. 313 S.E.2d 832, 839 (N.C. Ct. App. 1984), rev’d, 329 S.E.2d 326 (N.C. 1985).

107. 712 S.W.2d 534 (Tex. App. – Houston [14th Dist.] 1986), writ ref’d n.r.e.

108. *Champion*, 577 So. 2d at 257.

109. The first factor was transported from *Baker* and *Glenn*. Factors two, four, five, seven, eight, nine, and ten all came from *Baker*. Factors three, six, eleven, and eighteen were derived from *Glenn*. Factors twelve, thirteen, fourteen, fifteen, sixteen, and seventeen came from *Paramount*. Compare *Champion*, 577 So. 2d at 257 with *Baker*, 656 F.2d 173, *Glenn*, 313 S.E.2d 832 and *Paramount*, 712 S.W.2d 534.

110. 656 F.2d 173 (5th Cir. 1981).

111. The remaining fifty percent of the employer’s stock was owned by Saudi Arabian princes and corporations. *Id.* at 181.

112. “Veil-piercing is most commonly used as a justification for imposing personal liability on corporate shareholders for corporate debts . . .” Morris, *supra* note 35, at 271.

that the traditional veil-piercing doctrine could be applied to the case; furthermore, it never even used the term "single business enterprise."¹¹³ As further evidence that the Fifth Circuit was invoking traditional veil-piercing, the court remanded the case because the trial court did not adequately instruct the jury on traditional veil-piercing.¹¹⁴

The second reason the *Champion* court erroneously applied *Baker* is that the *Champion* court did not explain one important reason for which the Fifth Circuit remanded *Baker*. The *Baker* court remanded the case, in part, because the trial court should have "explained at least the rudiments of limited liability" to the jury.¹¹⁵ An explanation of limited liability would have helped the jury understand that courts disregard the separate identity of a corporation or LLC in order to correct inequities.¹¹⁶ Specifically, the Fifth Circuit in *Baker* stated that courts "exercise their equitable power" to ignore the principle of limited liability "when 'the justice of the case' requires."¹¹⁷ Even though not explaining the necessity of inequity was sufficiently grave to cause a remand in the *Baker* case, the *Champion* court did not include this requirement for its single business enterprise theory.

Although the *Champion* court used *Baker* to show factors that had "been used to support an argument that a group of entities constitute a 'single business enterprise,'"¹¹⁸ *Baker* was not even a single business enterprise case; it was a traditional veil-piercing case. Furthermore, the *Champion* court did not incorporate one of the most important reasons for which the Fifth Circuit remanded *Baker*—the trial court did not adequately consider whether an inequity exists. These two errors by the *Champion* court resulted in a severe misapplication of *Baker*. *Baker* does not support the establishment of the first circuit's single business enterprise theory.

b. *Glenn v. Wagner*

The second case on which the *Champion* court based the establishment of its eighteen-factor test, *Glenn v. Wagner*,¹¹⁹ involved a motel-apartment complex. This complex was owned by B-Bom, Inc. ("B-Bom"), but was leased and managed by B-Bom's sister

113. See *Baker*, 656 F.2d at 180.

114. *Id.* at 179-82.

115. *Id.* at 180.

116. *Id.* at 179.

117. *Id.* (citations omitted).

118. *Champion*, 577 So. 2d at 257.

119. 313 S.E.2d 832 (N.C. Ct. App. 1984), *rev'd*, 329 S.E.2d 326 (N.C. 1985).

corporation, D & S Enterprises, Inc. (“D & S”). Fifty percent of each corporation was owned by David Wagner (“David”). David’s cousin, Smilie, owned the remaining fifty percent of D & S; he also managed D & S. D & S was established to lease the complex from B-Bom, and “mainly . . . to help [Smilie] make some additional funds.”¹²⁰

Although Smilie managed the day-to-day activities and controlled the finances of D & S, David served as Smilie’s advisor and consultant.¹²¹ Further, David’s law office was the corporate offices of both B-Bom and D & S. D & S rarely, if ever, respected corporate formalities. The informal nature of D & S was apparent when David stated that he “‘thought’ that he was president and treasurer, and therefore, that Smilie ‘must be’ vice-president and secretary.”¹²² According to the court, “[t]he only formal instrument executed on behalf of D & S was the lease agreement with B-Bom. David Wagner drafted the lease and signed it both as president of B-Bom and as president of D & S on January 1,” even though D & S was not incorporated until May 8.¹²³ Two years after it was drafted, the lease between D & S and B-Bom was dissolved. In a deposition, David responded to a question concerning whether any formality was taken to dissolve the lease: “No. [D & S] simply informed B-Bom . . . but that’s like me informing me, but D & S essentially told B-Bom . . . that it’s no longer in the business of operating [the motel-apartment complex], and B-Bom said fine.”¹²⁴

Plaintiffs were tenants of the complex owned by B-Bom, but leased and managed by D & S. After one plaintiff fell behind in his rent, Smilie, as an agent of D & S, instructed his personal employee to padlock the plaintiffs’ apartments, move their personal property to a storage room, clean their apartments, and return their mail to the post office.

The jury found D & S liable for trespass, breach of quiet enjoyment, and conversion.¹²⁵ At the time of the verdict, however, D & S was insolvent.¹²⁶ Therefore, the plaintiffs alleged that the separate identity of D & S should be disregarded to impose liability on its sister corporation, B-Bom.

In *Glenn*, the court of appeals remanded the case to the trial court because of inadequate jury instructions. Specifically, the court of

120. *Id.* at 836.

121. *Id.* at 835, 837.

122. *Id.* at 837.

123. *Id.*

124. *Id.* at 838 (emphasis removed).

125. *Glenn*, 313 S.E.2d at 832.

126. *Id.* at 838.

appeals found that the trial court should not have instructed the jury on traditional veil-piercing doctrine, primarily because traditional veil-piercing can be applied only to pierce the veil vertically, not laterally.¹²⁷ Because the North Carolina court of appeals ruled that traditional veil-piercing was inapplicable, it found that the trial judge should have instructed the jury on North Carolina's "single enterprise" theory.¹²⁸

The *Champion* court, however, failed to understand the reason for which the *Glenn* court of appeals decision was overturned. The North Carolina Supreme Court reversed the court of appeals decision cited by the *Champion* court because the North Carolina court of appeals "erred in holding that the trial judge failed to properly instruct the jury with respect to piercing the corporate veil."¹²⁹ Stated another way, the North Carolina Supreme Court found that traditional veil-piercing doctrine could be applied to lateral piercing situations. The North Carolina Supreme Court explicitly stated that "piercing the corporate veil is broad enough to encompass both those situations where there is direct stock ownership of a subsidiary corporation by a parent corporation, and stock control as exercised through a mutual shareholder."¹³⁰ The North Carolina Supreme Court continued by applying traditional veil-piercing to find that "the two corporations in this case functioned as a single business enterprise."¹³¹ Although the supreme court determined that a "single business enterprise" existed, it made this determination by applying traditional veil-piercing doctrine. Furthermore, the North Carolina Supreme Court explicitly reminded its lower courts that traditional veil-piercing, which it applied to a so-called single business enterprise situation, "is an equitable doctrine,"¹³² to be applied "whenever necessary to prevent fraud or to achieve equity."¹³³

127. *Id.* at 840-44. The court of appeals found that the following language was inapplicable to traditional veil-piercing situations: "the corporate entity may be disregarded if the corporation is totally dominated by an individual shareholder, and operated as his 'alter ego,' whether the sole or dominant shareholder is an individual or another corporation." *Id.* at 840. Notice that this language is strikingly similar to the following language used by Louisiana's first circuit: "If one corporation is wholly under the control of another, the fact that it is a separate entity does not relieve the latter from liability." *Green v. Champion Ins. Co.* 577 So. 2d 249, 257 (La. App. 1st Cir. 1991) quoting *Lucey Mfg. Corp. v. Oil City Iron Works*, 131 So. 57, 61 (La. App. 2d Cir. 1930). See also *supra* note 17.

128. *Glenn*, 313 S.E.2d at 844.

129. *Glenn v. Wagner*, 329 S.E.2d 326, 328 (N.C. 1985).

130. *Id.* at 333.

131. *Id.*

132. *Id.* at 332.

133. *Id.* at 330.

The North Carolina Supreme Court case, therefore, stands for at least two propositions. First, traditional veil-piercing can be used to determine whether a “single business enterprise” exists. If it does, a court can hold a company liable for the debts of its sister corporation or LLC. The term “single business enterprise” is used as a description of the business structure. The North Carolina Supreme Court associated the term “single business enterprise” with lateral piercing situations. Second, the North Carolina Supreme Court clearly established that the separate identity of a corporation or LLC should be disregarded only if “necessary to prevent fraud or to achieve equity.”¹³⁴

The *Champion* court cited the North Carolina court of appeals decision to support the establishment of its single business enterprise theory, stating that the North Carolina Supreme Court reversed the court of appeals decision “on other grounds.”¹³⁵ Perhaps the *Champion* court determined that the *Glenn* decision was “reversed on other grounds” because the North Carolina Supreme Court did not explicitly address the “single enterprise” theory used by the North Carolina court of appeals. In reality, however, the North Carolina Supreme Court believed that a “single enterprise” theory is an unnecessary and improper extension of traditional veil-piercing. The court of appeals remanded the case for the trial court to instruct the jury on a “single enterprise” theory *because* the court of appeals determined that traditional veil-piercing doctrine is not applicable to vertical piercing situations. The supreme court, however, reversed the court of appeals decision *because* traditional veil-piercing doctrine is applicable to vertical piercing situations. The North Carolina Supreme Court clearly implied that a “single enterprise” theory is an unnecessary and improper extension of traditional veil-piercing. Clearly, the *Champion* court misinterpreted *Glenn*. *Glenn* simply does not support the establishment of the first circuit’s single business enterprise theory.¹³⁶

134. *Id.*

135. *Green v. Champion*, 577 So. 2d 249, 258 (La. App. 1st Cir. 1991).

136. However, even if the North Carolina court of appeals would have been correct in ordering the trial court to instruct the jury on a “single enterprise” theory, the *Champion* court still misapplied the “single enterprise” theory of North Carolina’s court of appeals for two main reasons. First, the *Champion* court did not incorporate a requirement of inequity, which was crucial to the North Carolina court of appeals’s decision. Second, the *Champion* court misconstrued certain factors listed in the *Glenn* court of appeals decision.

The *Glenn* court of appeals decision cited in *Champion* required the existence of an inequity in order to apply its single enterprise theory; however, the *Champion* court failed to incorporate that element into its single business enterprise

theory. The North Carolina court of appeals in *Glenn* supported its "single enterprise" theory with a North Carolina Supreme Court case, *Fountain v. West Lumber Co.*, 76 S.E. 533 (N.C. 1912). *Glenn*, 313 S.E.2d at 844 (citations omitted). *Fountain*, the first case to recognize the "single enterprise" theory in North Carolina, involved a group of businesses that used "the device of separate corporations . . . in order to evade responsibility." *Id.* (emphasis added). Additionally, the *Glenn* court of appeals allowed the imposition of liability through its "single enterprise" theory only if "it would be *unjust* to recognize, as a separate entity, one of the individual corporat[ions]." *Id.* at 845 (emphasis added). Furthermore, the court of appeals refused to apply certain language unless the control of the dominant corporation caused an inequity. Specifically, the court stated that the language applies "where the corporation to be 'disregarded' has been properly incorporated but is thereafter ignored as a separate entity by its *owners* to the *detriment of the party injured*." *Glenn*, 313 S.E.2d 841 (second emphasis added). Therefore, although the North Carolina court of appeals endorsed a "single business enterprise" theory (remember, the North Carolina Supreme Court later reversed this endorsement), its theory, unlike Louisiana's first circuit's theory, requires the existence of an inequity.

Understanding that there must be an inequity, the North Carolina court of appeals justified its implication that B-Bom and D & S constituted a single enterprise with a finding that the entity was inadequately capitalized. *Id.* at 848. Supported by North Carolina Supreme Court jurisprudence, the court of appeals considered the inadequate capitalization of an incorporated enterprise, sometimes called "thin incorporation," to be an "abuse of the privilege of . . . limited liability" because it poses a great risk of insolvency. *Id.* at 847 (citations omitted). Further, inadequate capitalization is an "attempt to do business without proper safeguards for creditors." *Id.* at 848 (emphasis omitted). A corporation can be inadequately capitalized if it "leas[es] . . . all or most of the property which it needs to operate." *Id.* at 847 (citations omitted). The North Carolina court of appeals found that D&S was inadequately capitalized because "its primary asset [was] the lease of a [motel-apartment complex] which [was] meant to *produce* income almost exclusively for the owner-corporation, [B-Bom,] and very little else." *Id.* at 848 (emphasis added). In short, the *Glenn* court of appeals applied its requirement of inequity.

In addition to not requiring inequity, the *Champion* court misconstrued factors used by the North Carolina court of appeals in *Glenn*. The court of appeals in *Glenn* based its decision on a distinction between traditional veil-piercing and a "single enterprise" theory. Specifically, the court of appeals found that traditional veil-piercing could not be applied laterally; therefore, according to the North Carolina court of appeals, the trial court should have instructed the jury on a "single enterprise" theory, not traditional veil-piercing. In a preface to its discussion concerning why traditional veil-piercing doctrine could not be applied laterally, the court of appeals in *Glenn* listed four factors used in traditional veil-piercing:

1. inadequate capitalization ("thin incorporation");
2. noncompliance with corporate formalities;
3. complete domination and control of the corporation so that it has no independent identity;
4. excessive fragmentation of a single enterprise into separate corporations.

Id. at 839 (citations omitted).

Even though the court of appeals in *Glenn* associated these factors with traditional veil-piercing, which it went to great pains to distinguish from a single

c. *Paramount Petroleum Corp. v. Taylor Rental Center*

The third case on which the first circuit based the establishment of its eighteen-factor test was *Paramount Petroleum Corporation v. Taylor Rental Center*.¹³⁷ The first circuit should not have used *Paramount* as authority for its single business enterprise theory for two reasons. First, *Paramount* was improperly decided—it should not have been a single business enterprise case. Second the *Paramount* court, like the *Champion* court, misapplied prior jurisprudence.

Paramount involved a determination of liability for a rental contract. Plaintiff, Taylor Rental Center, was in the business of renting equipment to be used on seagoing vessels. At least two requests were made to rent equipment for a vessel named the “Courtney D.” Due to certain ambiguities associated with one of these requests, the court had to determine whether one or two businesses were liable for the contract.

One request came from Captain Weld. Because Weld gave Plaintiff a business card with the name “Paramount Steamship Company, Ltd.” (“Steamship”), it was clear that Weld was acting as Steamship’s agent. Therefore, Steamship was undisputably liable for the contract.

business enterprise theory, the *Champion* court asserted that the *Glenn* court of appeals used these factors “to support an argument that a group of entities constitute a ‘single business enterprise.’” *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. App. 1st Cir. 1991). The most striking effect of this mistake by the *Champion* court is that it caused the first circuit to contradict itself. On one hand, the *Champion* court supported the establishment of its single business enterprise theory by relying on the distinction the *Glenn* court of appeals made between traditional veil-piercing and a single business enterprise theory. Without this distinction, there would be no reason to establish a separate single business enterprise theory (remember, the North Carolina Supreme Court later overruled this distinction). On the other hand, however, the *Champion* court disregarded this distinction by incorporating factors associated with traditional veil-piercing into the first circuit’s eighteen-factor test used for its single business enterprise theory. In other words, the *Champion* court simultaneously acknowledged and disregarded the reasoning in *Glenn*.

These two major errors by the *Champion* court are further proof that the first circuit’s single business enterprise theory has been problematic from its inception. The first circuit made grave mistakes in its interpretation and application of *Glenn*. For this reason, the first circuit’s single business enterprise theory was erroneously established and should not be applied in the future.

137. 712 S.W.2d 534 (Tex. App.—Houston [14th Dist.] 1986), writ ref’d n.r.e.

Another request came from Captain Jackson. Although it was clear that Jackson was renting as the agent of a business, he did not indicate the name of his business, the principal of the contract. Jackson did, however, give the rental company a phone number.

When the rental company called the phone number given by Jackson, someone answered, "Paramount," and verified that Jackson was employed by Paramount and was authorized to rent the equipment. Nevertheless, Plaintiff was instructed to send the invoices, which listed only Steamship as a debtor, to Paramount's post office box.

The identity of the principal, however, remained uncertain because both Steamship and its sister corporation, Paramount Petroleum Corporation ("Petroleum"), used Paramount as their trade name. The court also considered the following facts:

The same shareholder owned all of the stock in both companies. The two companies operated from the same Houston office. They used the same telephone number and the same post office box. Both companies paid funds to Captain Jackson for repair work on the Courtney D. The employees of both companies referred to both companies as "Paramount." Petroleum transferred funds, with no ledger entries, to a checking account over which an employee of Steamship was signatory. The president of Steamship testified that assets of Petroleum were seized when the Courtney D was seized. All accounting for the two companies was performed at the Houston office by an employee paid by Petroleum. Finally, Petroleum failed to produce, in response to discovery requests, any corporate records of either corporation . . . [T]he corporations shared the goal of restoring the Courtney D. Petroleum funded the bank account from which the restoration expenditures were paid. Petroleum's employees performed the accounting for the restoration. Steamship's employees performed the actual reconditioning work and hired subcontractors.¹³⁸

The rental company alleged that Petroleum, in addition to Steamship, was liable for the rental contract. The fourteenth district court of appeals in Texas affirmed the trial court's decision that Petroleum was liable, asserting that a single business enterprise theory could justify the trial court's judgment.¹³⁹

138. *Id.* at 536-37.

139. The court stated:

However, *Paramount* was decided improperly—it should not have been a single business enterprise case. In agency law, principals are liable for the acts of their agents.¹⁴⁰ Because it was obvious that Jackson was acting as the agent of a business, his principal would be liable. The correct issue concerned the identity of Jackson's principal: was it Steamship or Petroleum? Although this issue may have been difficult to determine, the *Paramount* court should not have avoided a difficult determination of agency law by creating a new, unfounded theory.¹⁴¹ *Paramount* should have been decided as a partial disclosure case,¹⁴² not a single business enterprise case.

The second reason for which *Paramount* is poor authority for the first circuit's single business enterprise theory is that the *Paramount* court justified the creation of its single business enterprise theory with the misapplication of two Texas cases. One of these two cases, *Allright Texas, Inc. v. Simons*,¹⁴³ uses the other case, *Murphy Brothers Chevrolet Company, Inc. v. East Oakland Auto Auction*,¹⁴⁴ as the sole justification for *Allright's* single business enterprise determination. Therefore, *Murphy* is the basis for both *Allright* and *Paramount*. *Murphy*, however, does not justify the establishment of the single business enterprise theory.

Although the *Paramount* court asserted that *Murphy* “put forward . . . the ‘single business enterprise’ theory,”¹⁴⁵ *Murphy* was not a single business enterprise case—it did not even consider whether the separate identity of a corporation or LLC should be recognized. Even

This case was tried to the court without a jury, and no findings of fact or conclusions of law were filed or requested. Thus, the trial court's judgment implies all necessary fact findings in support of the judgment. Furthermore, the trial court's judgment should be affirmed if it can be upheld on any legal theory We find the present record contains evidence sufficient to justify an *implied finding* that Petroleum and Steamship operated as a single business enterprise.

Id. at 536 (citations omitted) (emphasis added).

140. *Morris & Holmes*, *supra* note 2, § 21.04, at 539. Also, “the agent is normally liable.” *Morris & Holmes*, *supra* note 2, § 33.06, at 114.

141. This was a difficult question because Jackson did not specify for which business he was acting as an agent. Further, both Steamship and Petroleum used the same trade name. *Paramount*, 712 S.W.2d 534.

142. Partial disclosure occurs when “the agent has disclosed his agency status, and usually some information concerning the identity of his principal, but without disclosing enough information to allow the third party to identify the principal with adequate precision.” *Morris & Holmes*, *supra* note 2, § 33.06.

143. 501 S.W.2d 145, 150 (Tex. Civ. App.—Houston [1st Dist.] 1973), *writ ref'd n.r.e.*

144. 437 S.W.2d 272, 275-76 (Tex. Civ. App.—El Paso 1969), *writ ref'd n.r.e.*

145. *Paramount*, 712 S.W.2d at 536.

though the appellant in *Murphy* apparently argued that its separate identity should prevent it from being held liable, the court found the issue to be inapplicable because there was “no fact issue to substantiate the . . . issue or argument.”¹⁴⁶ Rather, the *Murphy* court held a corporation liable because it bound itself through its own actions, even though it was an agent for an affiliated corporation.¹⁴⁷ Recognizing that “when an agent makes, endorses or accepts a negotiable instrument in his own name, he is personally liable thereon,”¹⁴⁸ the *Murphy* court affirmed that the appellant was liable because it bound itself through its own activities. *Murphy*, therefore, was misconstrued by *Allright* and *Paramount*. This means that the single business enterprise theory of Texas, upon which the first circuit relies, was improperly established.

The *Paramount* case, therefore, considered the wrong issue; consequently, it established a new theory of law—Texas’s single business enterprise theory—when it should have relied on well-accepted agency law. Even if it did consider the right issue, however, the *Paramount* court, like the *Champion* court, based the establishment of its theory on the misapplication of previous cases.

2. *The First Circuit’s Single Business Enterprise Theory vs. Texas’s Single Business Enterprise Theory*

Even though Texas’s single business enterprise theory was erroneously established, it continues to be applied; therefore, it should be compared and contrasted with the first circuit’s theory. Texas and Louisiana’s first circuit apply their respective theories under significantly different circumstances. Certain language used by Texas courts forces them to be more careful before disregarding the separate identity of a corporation or LLC. Because the first circuit does not employ similar language, its theory is applied in a much more dangerous fashion than the Texas theory.¹⁴⁹

Texas courts regularly preface an application of their single business enterprise theory with a statement explaining that the theory is an equitable doctrine, analogous to partnership principles:¹⁵⁰

146. *Murphy*, 437 S.W.2d at 275.

147. Under agency law, in addition to the principal, “the agent is normally liable.” *Morris & Holmes*, *supra* note 2, § 33.06, at 114.

148. *Murphy*, 437 S.W.2d at 276.

149. See *Grayson v. R.B. Ammon & Assocs., Inc.*, 778 So. 2d 1 (La. App. 1st Cir. 2000), *writs denied*, 782 So. 2d 1026 (La. 2001), 782 So. 2d 1027 (La. 2001).

150. *Alum. Chemicals (Bol.), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 68 (Tex. App.—Texarkana 2000); *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 119 (Tex. App.—Beaumont 2001).

“When two corporations are not operated as separate entities but instead integrate their resources to achieve a common business purpose, it may be equitable, under exceptional circumstances, to hold each constituent corporation liable for the debts and liabilities incurred in the common enterprise.”¹⁵¹ Although the “exceptional circumstances” language is also commonly found in traditional veil-piercing cases in Louisiana,¹⁵² it is not regularly found in first circuit single business enterprise cases. Because most of the factors in Texas’s eight-factor test¹⁵³ and the first circuit’s eighteen-factor test are common to many closely-affiliated businesses, they are rarely indicative of a situation in which a corporation or LLC has abused its separate identity. The “exceptional circumstances” language found in the Texas theory causes Texas courts to be more cautious, thereby precluding courts from considering their eight-factor test at face value. On the other hand, because the first circuit’s theory is not accompanied with similarly restrictive language, first circuit courts do apply their eighteen-factor test at its mere face value.¹⁵⁴

Additionally, Texas courts regularly recite phrases such as “it is a doctrine founded in equity,”¹⁵⁵ or “the . . . theory relies on equity.”¹⁵⁶ The first circuit does not consider equity. In fact, the *Grayson* court disregarded the separate identity of affiliated businesses without any facts indicative of inequity.¹⁵⁷ By applying the theory only to achieve equity, Texas courts are actually more in line with the Louisiana Supreme Court than Louisiana’s first circuit. Texas courts apply their single business enterprise theory in accordance with the principle set forth by the Louisiana Supreme Court in *Glazer v. Commission on*

151. *N. Am. Van Lines*, 50 S.W.3d at 120 (citing *Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534, 536-37 (Tex. App.—Houston [14th Dist.] 1986); *Old Republics Ins. Co. v. Ex-Im Servs. Corp.*, 920 S.W.2d 393, 395-96 (Tex. App.—Houston [1st Dist.] 1996).

152. *Morris & Holmes*, *supra* note 2, § 32.02 (citations omitted).

153. Texas’s single business enterprise theory consists of eight non-exclusive factors. These include: (1) common employees; (2) common offices; (3) centralized accounting; (4) payment of wages by one corporation to another corporation’s employees; (5) common business name; (6) services rendered by the employees of one corporation on behalf of another corporation; (7) undocumented transfers of funds between corporations; and (8) unclear allocation of profits and losses between corporations. *Paramount*, 712 S.W.2d at 536 (citations omitted). See also *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 121 (Tex. App.—Beaumont 2001).

154. See *Grayson*, 778 So. 2d at 1.

155. *N. Am. Van Lines*, 50 S.W.3d at 120.

156. *Id.* at 119.

157. See discussion *supra* Part III.D.

Ethics for Public Employees:¹⁵⁸ in order to disregard the separate identity of a corporation or LLC, the policies supporting recognition must be outweighed by policies justifying piercing.¹⁵⁹

Finally, whereas the Texas theory uses eight factors, the first circuit's theory uses eighteen factors.¹⁶⁰ Although both sets of factors are illustrative and no factor is dispositive,¹⁶¹ the fact that Texas courts recite less than half of the factors recited by the first circuit indicates that the Texas theory is applied more narrowly. Furthermore, the Texas factors are subject to the guiding principles explained in the previous three paragraphs. Although the use of eight factors in Texas gives Texas courts broad parameters, the use of eighteen factors without any guiding principles or limitations by the first circuit removes virtually all limits in the test's application—a first circuit court desiring a certain outcome can justify nearly any finding through an application of the eighteen-factor test. Because the first circuit's theory is so broad, it serves as a blank check to the courts, which is unlike the theory in Texas.

3. The First Circuit's Fundamental Misunderstanding of the Relationship Between its Single Business Enterprise Theory and Traditional Veil-Piercing

The legal methodology employed by the first circuit in its single business enterprise theory manifests a fundamental misunderstanding of the relationship between its single business enterprise theory and traditional veil-piercing. The first circuit has stated that the single business enterprise theory and veil-piercing are two separate theories.¹⁶² When discussing the burden of proof to be applied to the single business enterprise theory, the first circuit ruled that “[b]ecause the separateness of the corporate entity is disregarded in *both* the ‘single business enterprise’ theory and the ‘piercing the corporate veil’ theory . . . the *two theories* should both be subjected to the same burden of proof.”¹⁶³

However, the first circuit does not always treat traditional veil-piercing and the single business enterprise theory as two distinct

158. 431 So. 2d 752 (La. 1983).

159. *Id.* at 757-58.

160. Compare *supra* note 153 with *supra* note 76.

161. *Id.*

162. Grayson v. R.B. Ammon & Assocs., Inc., 778 So. 2d 1, 17-18 (La. App. 1st Cir. 2000) (citations omitted). Texas courts have also separated the two theories: “‘Alter ego’ and ‘single business enterprise’ are not synonymous; they are separate and distinct equitable theories, although similar in purpose.” *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 119 (Tex. App.—Beaumont 2001).

163. *Grayson*, 778 So. 2d at 14 (emphasis added).

theories. In *Hamilton v. AAI Ventures, L.L.C.*,¹⁶⁴ the plaintiff sued the defendant for breach of contract. A corporation owned a majority interest in the defendant, a LLC. Although the defendant, not the parent corporation, entered into an agreement with the plaintiff, the first circuit held that the defendant and its member, the parent corporation, were solidarily liable for breach of contract.

Throughout its analysis, the first circuit casually discussed a variety of theories as if they are without distinction. First, the court stated that there are “only two exceptional circumstances,”¹⁶⁵ under which Louisiana courts pierce the corporate veil: “where the shareholders acting through the corporation commit fraud or deceit on a third party and where the shareholders have failed to conduct the business on a corporate footing, disregarding the corporate entity to such extent that they and it become indistinguishable.”¹⁶⁶ Along with this traditional veil-piercing language, the court then recited the five-factor test used in traditional veil piercing cases.¹⁶⁷ Suddenly, however, the court recited doctrine from *Champion*, the fountainhead of all single business enterprise cases, to justify its disregard of the corporation’s separate identity.¹⁶⁸ Furthermore, the court combined traditional veil-piercing’s totality of the circumstances rule with a significant portion of *Champion*’s eighteen-factor test.¹⁶⁹

By using traditional veil-piercing doctrine interchangeably with the first circuit’s single business enterprise theory, a court can apply the two theories as it sees fit, depending on the facts of the case and the desired outcome. In *Hamilton*, for example, the court used the eighteen-factor test of the single business enterprise theory to justify traditional veil-piercing.¹⁷⁰ Through this method, the court executed traditional veil-piercing without analyzing whether an inequity exists. This approach allows the court to use the blank check associated with the single business enterprise theory in traditional veil-piercing situations. If *Hamilton* is not overruled, it could disrupt decades of jurisprudence that have carefully balanced underlying policies.

The combination of doctrines in *Hamilton* was unnecessary. Perhaps the court thought it needed to justify traditional veil-

164. 768 So. 2d 298 (La. App. 1st Cir. 2000).

165. *Id.* at 302.

166. *Id.*

167. *Id.* See also *supra* Part III.A.2.

168. *Hamilton*, 768 So. 2d at 302.

169. *Id.* at 303.

170. *Id.*

piercing in *Hamilton* because the member of the LLC was a corporation and not an individual. However, it is well-accepted that traditional veil-piercing can be used to impose liability on members or shareholders, regardless of whether the member or shareholder is a natural or juridical person.¹⁷¹ Therefore, instead of mixing two separate doctrines, the court should have simply applied traditional veil-piercing. Perhaps this confusion of the first circuit would not exist had it not misapplied prior jurisprudence in *Champion*.

B. Poor Policy

In addition to being founded upon and executed with poor legal methodology, the first circuit's single business enterprise theory also promotes a poor policy for Louisiana. In order to encourage business development beneficial to the state's economy,¹⁷² the legislature grants limited liability under which no other entity, not even an affiliated business, is liable for the debts of a corporation or LLC.¹⁷³ Because the theory removes the assurance of limited liability, it contravenes the legislature's policy to encourage business development.

The Louisiana Supreme Court recognized the legislative intent of limited liability when it stated, "Because of the beneficial role of the corporate concept, the limited liability . . . should be disregarded only in *exceptional circumstances*."¹⁷⁴ Because of the guarantee of limited liability, businesses are able to form multiple corporations or LLCs to help separate functions for administrative and financial ease and economies, to reduce risk through diversification, to comply with various legal requirements, to minimize liability or to insulate certain assets from liability for other activities, or to expand internally into

171. "A parent corporation may be held liable for the debts of a subsidiary if the parent fails to observe the formalities of separate incorporation, including adequate capitalization of the subsidiary." *Baker v. Raymond Int'l., Inc.*, 656 F.2d 173, 179 (5th Cir. 1981) (citations omitted); *see also Morris & Holmes, supra* note 2, § 32.02, at 52.

172. *Johnson v. Kinchen*, 160 So. 2d 296, 299 (La. App. 1st Cir. 1964). *See also* Brian T. Leftwich, *Piercing the Corporate Veil in Louisiana*, 22 Loy. L. Rev. 993, 995 (1975-76).

173. *See supra* Part III.A.

174. *Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164, 1168 (La. 1991) (citing *Johnson v. Kinchen*, 160 So. 2d 296 (La. App. 1st Cir. 1964)) (emphasis added). Note that the case from which the supreme court derived this statement was actually a first circuit case.

an unrelated line of business.¹⁷⁵ According to Professor Landers,¹⁷⁶ this ability to form multiple businesses, each protected by limited liability, encourages business development in the following ways:

[F]irst, [it] encourage[s] an existing business to expand into a new field by limiting its risk in doing so; second, [it] permit[s] the insulation of parts of a business enterprise from the risks of other parts in circumstances where the separate parts might exist as separate businesses; and third, [it can] satisfy various legal or administrative requirements.¹⁷⁷

The existence of these options helps to stimulate the economy because businesses are protected if they take risks.

Although the legislature obviously favors the protection of limited liability, it does not intend for businesses to create enterprises in order to avoid liability by doing things such as putting “all the assets . . . in one company and all the liabilities . . . in another.”¹⁷⁸ Therefore, courts must delicately balance competing interests—they must honor the legislative intent of limited liability, while preventing abuse of the corporate entity.

The first circuit’s single business enterprise theory does not adequately balance policy concerns because it uses a poor judicial standard. Unlike the Texas theory, the first circuit’s theory does not have a preface guiding courts to apply the theory only when “it may be equitable, under exceptional circumstances.”¹⁷⁹ This statement by Texas courts reminds them to pause and consider outside influences, including legislative policy. The lack of incentive to consider legislative policy in the first circuit is exacerbated by the fact that the theory consists almost entirely of a test of eighteen illustrative, non-dispositive factors to be considered in light of the totality of the circumstances. This “test” basically gives courts the authority to disregard the separate identity of a corporation or LLC under almost any situation.¹⁸⁰

Furthermore, policy concerns are not reflected in the substance of the eighteen factors. Most of the eighteen factors can be found in most closely-affiliated corporations or LLCs.¹⁸¹ For example, the first circuit in *Grayson* alleged only legitimate business activities, yet

175. Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499 (1976); Landers, *supra* note 7, at 589.

176. Jonathon M. Landers, Professor of Law, University of Illinois.

177. Landers, *supra* note 7, at 621.

178. Landers, *supra* note 7, at 621.

179. See *supra* Part IV.A.2.

180. See *supra* Part IV.A.2.

181. See *supra* note 18.

liability was imposed because some of these legitimate activities happened to fall within some of the eighteen factors.¹⁸² Instead of disregarding limited liability “only in exceptional circumstances,”¹⁸³ the eighteen-factor test allows courts to disregard limited liability under ordinary business circumstances.

Under the first circuit’s theory, business owners have no assurance that their limited liability will be recognized. By taking away the dependability of limited liability, the first circuit inhibits the legislative goal of encouraging business development. Corporations and LLCs must conduct their business outside of Louisiana to ensure the recognition of their limited liability. Therefore, the first circuit’s single business enterprise theory discourages business development, which is a bad policy for Louisiana.

V. PROPOSED SOLUTION

As illustrated in *Champion*, some corporations abuse the privilege of limited liability. One way in which this can occur is if an enterprise tries to avoid liability by putting “all the assets . . . in one company and all the liabilities . . . in another.”¹⁸⁴ Such activities are inconsistent with the legislative intent of limited liability; therefore, they should not be tolerated. The single business enterprise theory attempts to resolve this problem, but the theory is so broad that a court can disregard the separate identity of a corporation or LLC even if that business has not abused its limited liability. Fortunately, there is a way to both prevent abuses of limited liability and continue encouraging business development. Louisiana courts should take an approach similar to North Carolina’s Supreme Court—they should slightly alter traditional veil-piercing so that it can be applied laterally as well as vertically.

A. Slight Alteration to Traditional Veil-Piercing Doctrine

Although there are two main differences between traditional veil-piercing and the single business enterprise theory, these differences actually support the application of traditional veil-piercing to single business enterprise situations. First, whereas traditional veil-piercing imposes liability vertically, the single business enterprise theory imposes liability laterally. However, nothing would prevent

182. See discussion *supra* Part III.D.

183. *Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164, 1168 (La. 1991) (citing *Johnson v. Kinchen*, 160 So. 2d 296 (La. App. 1st Cir. 1964).).

184. *Landers*, *supra* note 7, at 621.

traditional veil-piercing from being applied laterally. While traditional veil-piercing is already used to correct abuse between parent and subsidiary corporations or LLCs, a lateral application of traditional veil-piercing could be used to correct abuse by sister companies. Such an application would allow courts to impose liability on a sister company for the debts of a sister corporation or LLC, but would require courts to consider the principles associated with traditional veil-piercing. The veil would be pierced “only under exceptional circumstances”¹⁸⁵ after balancing underlying policy concerns.

The second difference between the two theories is that they apply different tests. In traditional veil-piercing cases, courts usually apply the *Kingsman* and five-factor tests together.¹⁸⁶ The *Kingsman* test has two parts: the alter ego plus fraud test and the indistinguishability test. Courts also consider a five-factor test, which is limited by three restrictions, but is considered in light of the totality of the circumstances.¹⁸⁷ The single business enterprise theory, on the other hand, consists of only an eighteen-factor test. Whereas the veil-piercing tests adequately consider underlying policy concerns, the eighteen-factor test does not.

Therefore, the *Kingsman* and five-factor tests should be slightly altered to make them applicable to lateral piercing situations.¹⁸⁸ The first part of the *Kingsman* test, the alter ego plus fraud test, should be changed to the following language: veil-piercing is allowed if the corporation or LLC is the ‘alter ego’ of the shareholder or member, *or affiliated business* where fraud or deceit has been practiced on a third party by the shareholder or member, *or by the affiliated business*, acting through the corporation or LLC. This change would retain the function of traditional veil-piercing, but would also allow the liability of one corporation or LLC to be imposed onto all types of affiliated companies if the corporation or LLC is the alter ego of the other business and fraud exists.

The second part of the *Kingsman* test, the indistinguishability test, should be changed to the following language: veil-piercing is allowed if the shareholder or member *or affiliated business* disregards the separate identity of a corporation or LLC to such an extent that the corporation *or LLC* ceases to be distinguishable from its shareholder,

185. *Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164, 1168 (La. 1991) (citing *Johnson v. Kinchen*, 160 So. 2d 296 (La. App. 1st Cir. 1964)).

186. See *supra* Part III.A.2.

187. See *supra* Part III.A.2.

188. The italicized alterations would make the traditional veil-piercing doctrine applicable to lateral piercing situations.

member, or *affiliated business*. This language would retain the function of traditional veil-piercing, but would also allow the liability of one corporation or LLC to be imposed onto all types of affiliated companies if the companies are indistinguishable.

The five-factor test of traditional veil-piercing could be easily changed to the following:

- (1) commingling of personal and business funds, *or the funds of two or more affiliated businesses*;
- (2) the observance of statutory formalities in the formation and operation of the *company(ies)*;
- (3) undercapitalization;
- (4) whether a separate bank account has been established for the corporation or LLC, and whether *each* corporation's or LLC's financial records are separately maintained;¹⁸⁹ and
- (5) whether regular meetings of shareholders and directors have been held *for each corporation*.

Also, the limitations on the five-factor test should be altered, so that veil piercing would not be allowed if based solely on the fact that:

- (1) the shareholder or member, *or affiliated business*, has a plurality, majority, or complete ownership interest in the corporation or LLC;
- (2) the corporation or LLC was minimally capitalized; or
- (3) the corporation or LLC was formed by the shareholder or member, *or affiliated business*, for the very purpose of avoiding liability.

This five-factor test should be considered "in light of the totality of the circumstances."

An application of these tests is justified because they have been tested and refined for decades. Traditional veil-piercing doctrine, in some form, is commonly accepted throughout all American jurisdictions.¹⁹⁰ Further, the Louisiana Supreme Court has endorsed traditional veil-piercing, but has not endorsed the single business enterprise theory.¹⁹¹ Most important, however, the legislature has

189. Although affiliated businesses sometimes share the same bank account, their funds should be distinguishable through accounting measures.

190. See generally Henn & Alexander, *supra* note 23.

191. See *Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164 (La. 1992); Morris & Holmes, *supra* note 2, § 32.02.

implicitly accepted veil-piercing. Although it has had plenty of opportunities, the legislature has never statutorily overruled traditional veil-piercing, even though it disregards the legislative grant of limited liability. This non-action by the legislature implies that it believes its concerns about disregarding the separate identity of a corporation or LLC are adequately considered in traditional veil-piercing cases. The same is not true for the single business enterprise theory. The single business enterprise theory is much younger than traditional veil-piercing and the dangers posed by the single business enterprise theory have manifested only within the past two years with *Hamilton* and *Grayson*. Consequently, the legislature has had less opportunity to see the effects of the theory and less opportunity to react to those effects. Finally, these alterations are supported by jurisprudence. Similar adjustments have been made in other situations in Louisiana,¹⁹² and by the Supreme Court of North Carolina.¹⁹³

B. Effect of Proposal

Although there may be some concerns about this proposal, any concerns should be largely outweighed by the benefits. This proposal would simultaneously prevent the abuse of limited liability and adequately balance underlying policy concerns. It should be a fair compromise for businesses, the state, and creditors.

One concern with lateral veil-piercing is that it might put the creditors of affiliated corporations at a greater risk than if only vertical piercing were allowed. If the veil is pierced laterally, the assets of one company might be used to pay the creditors of a sister corporation or LLC, potentially leaving the corporation or LLC paying the debt without sufficient assets to pay its own creditors. This may occur; however, the likelihood of this occurrence would be lower if traditional veil-piercing were applied laterally than if the first circuit's single business enterprise theory continues to be applied. Whereas the single business enterprise theory has been applied under an array of circumstances, traditional veil-piercing is applied only under limited circumstances.

Any concerns, however, seem to be outweighed by the proposal's benefits. This proposal would solve the major problems associated with the first circuit's single business enterprise theory. First, the proposal would alleviate policy concerns. As stated throughout this article, traditional veil-piercing balances competing policies better

192. See *Withers v. Timber Prods., Inc.*, 574 So. 2d 1291 (La. App. 3d Cir. 1991).

193. See *Glenn v. Wagner*, 329 S.E.2d 326 (N.C. 1985).

than the first circuit's single business enterprise theory. Most important, all veil-piercing, lateral and vertical, would consider whether an inequity exists. Additionally, the poor legal methodology used by the *Champion* court would be corrected. By applying traditional veil-piercing to lateral piercing situations, past jurisprudence would not be misinterpreted or misapplied. Finally, the first circuit would no longer have two theories to confuse; there would one correct theory.

Although the veil-piercing doctrine is not without problems, it does not suffer from such extensive problems as the single business enterprise theory. Veil-piercing may not be the perfect alternative, but it is certainly the better alternative. It more appropriately balances the policies involved, and it does not suffer from the same problems in legal methodology or policy as does the first circuit's single business enterprise theory. North Carolina's Supreme Court adopted this proposal in *Glenn*; Louisiana's first circuit should do the same.

VI. CONCLUSION

The *Champion* court unnecessarily established a new theory by erroneously applying past jurisprudence. The first circuit's single business enterprise theory allows courts to disregard the separate identity of a corporation or LLC without proper justification. As a result, limited liability is less dependable and, therefore, the first circuit's single business enterprise theory discourages business development in Louisiana. The first circuit should overrule *Champion* and its progeny by allowing traditional veil-piercing doctrine to be applied laterally. If the first circuit fails to do this, the legislature should statutorily ban the first circuit's single business enterprise theory.

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