2005

The Transformation of Modern Corporation Law: The Law of Corporate Groups

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CONNECTICUT
LAW REVIEW

VOLUME 37 SPRING 2005 NUMBER 3

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The response of the law to the challenge presented by the emergence of multinational corporations and other corporate groups as the dominant institutions in the world's economy is a major development in American and world jurisprudence. As commerce and industry have become transformed in the centuries since the beginnings of the Industrial Revolution, the corporation laws of the countries of the western world have become anachronistic. The traditional corporation law presupposing as its subject the individual corporation and looking upon it as the basic legal unit entity no longer adequately serves all the needs of modern jurisprudence.

To deal with this institutional weakness, the traditional law in a growing number of areas is being supplemented by a doctrine of enterprise law that focuses on the business enterprise as a whole, not on its fragmented components.[1] In selected areas, this newer perspective of the law better

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[1] For reviews of this development, see JOSE E. ANTUNES, LIABILITY OF CORPORATE GROUPS (1994); PHILLIP I. BLUMBERG, KURT A. STRASSER, NICHOLAS L. GEORGAKOPOULOS, & ERIC J. GOUVIN, BLUMBERG ON CORPORATE GROUPS (2d ed. 2005) [hereinafter BLUMBERG ON CORPORATE GROUPS]; PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE

serves a society in which business is overwhelmingly conducted by corporate groups. These are enterprises organized in the form of a dominant parent corporation with scores or hundreds of subservient sub-holding, subsidiary, and affiliated companies. These typically conduct a single integrated enterprise under common control and often under a common public persona. While the older entity view still adequately serves many areas, that view no longer prevails as a transcendental concept dominating all corporation law.

A full understanding of the law of corporate groups must proceed on three levels. As a matter of legal history, how did corporation law arise and to what extent does its history help to explain its evolution? As a matter of legal analysis, of what does it consist and what is its role in contemporary law? As a matter of jurisprudence, what does it represent?

The issue may be simply stated. In the modern economy, as noted, business of large or moderate size is typically conducted not by a single corporation but by a group of affiliated companies under the "control" of a parent corporation that operates, as the Supreme Court has noted, "with a unity of purpose" and a "common design."[2] When legal issues involving any of the affiliated corporations arise, courts are often called upon to determine whether to attribute the rights or impose the duties of one affiliated corporation upon another affiliate of the group in order to implement the objectives of the law in the area in dispute. Over the past century, courts and legislatures have been increasingly faced in numerous areas by this choice between focusing on the individual corporate entity or the enterprise in resolving the legal questions before them.

This choice between entity and enterprise did not face the law when corporate existence involved only the corporation on the one hand and its shareholders on the other. From its very beginning in medieval days, corporation law deemed each corporation by virtue of its creation through a royal or state charter as an independent juridical entity with its own rights and duties, separate and distinct from those of its shareholders.[3] For centu-

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LAW OF PARENT AND SUBSIDIARY CORPORATIONS (1983) (this work is the first in a seven volume treatise, the last volume of which was published in 1998); PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW (1993) [hereinafter MULTINATIONAL CHALLENGE]; KONZERNRECHT IM AUSLAND (Marcus Lutter ed., 1994); PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (1999); I GRUPPI DI SOCIETA (Paola Balzarini et al. eds., 1995).

[2] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771–72 (1984).

[3] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 467–74, 478, *reprinted in* CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA (David S. Berkowitz & Samuel E. Thorne eds., 9th ed. 1978); COLIN A. COOKE, CORPORATION TRUST AND COMPANY 7–18 (1951); 3 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 469–90 (3d ed. 1927); 2 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 103, *reprinted in* CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA (David S. Berkowitz & Samuel E. Thorne eds., 9th ed. 1978); FREDERIC W. MAITLAND, MAITLAND SELECTED ESSAYS (Hazeltine et al. eds., 1936); Cecil T. Carr, *Early Forms of Corporateness*, *in* 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 161–82 (1909); William S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 382 (1922);

ries, this separation of corporation from shareholder rested solely on this doctrine of corporate personality.

With the Industrial Revolution and the increasing need for more corporate capital to exploit the burgeoning technological developments of the time, this jurisprudential concept of the separate corporate personality was strongly reinforced by the political decision in the early nineteenth century of legislatures to provide limited liability for shareholders.[4] By then, with the growth of corporate size and the substantially increased number of shareholders, shareholders were increasingly investors, not participants in management. Major economic policy supported by powerful political pressures joined pure legal theory to insulate corporate shareholder-investors from the financial obligations of the corporation. While entity law since then has rested on the policy of limited liability as well as the jurisprudential theory of corporate personality where financial obligations are in issue, it still rests on jurisprudential theory alone for all other matters.

A half century later, the very nature of the business organization experienced a revolutionary change. Until this time, corporations had not been generally authorized to own shares of other corporations. Holding companies and subsidiaries were unknown.[5] Then in 1890, New Jersey enacted pathbreaking legislation that earned it the appellation of "New Jersey—The Traitor State."[6] Opening a new chapter in American corporate history,[7] corporations for the first time were generally authorized to acquire shares of other companies. With the door thus opened to holding companies, parent, and subsidiary corporations, the major businesses of the time, led by Standard Oil and United States Steel took advantage of the new law and reorganized as corporate groups.[8]

The new corporate permissiveness worked a profound transformation of the economic structure of the country. It led to tremendous growth in

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Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 108–09 (1888).

[4] *See* E. MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 1–9 (1954).

[5] Louis K. Liggett Co. v. Lee, 288 U.S. 517, 556 n.32 (1933) (Brandeis, J.); *see also* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, § 3.04 (discussing the evolution of the business organization in nineteenth-century America).

[6] Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385–86; Act of Apr. 17, 1888, ch. 295, § 1, 1888 N.J. Laws 445–46; Act of May 9, 1889, ch. 265, § 4, 1889 N.J. Laws 412–14; Act of Mar. 14, 1893, ch. 171, § 2, 1893 N.J. Laws 301; *see* Lincoln Steffens, *New Jersey: A Traitor State, Part II—How She Sold Out the United States*, 25 MCCLURE'S MAG. 41 (1905). *See generally* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, § 6.02; PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 3.02.1 (1987).

[7] ALFRED D. CHANDLER, STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE 30 (1962) (turning point in the evolution of American business).

[8] *See, e.g.*, Edward Q. Keasbey, New Jersey and the Great Corporations (pt. 1), Address Before the American Bar Association at Buffalo (Aug. 28, 1899), *in* 13 HARV. L. REV. 198 (1899-1900).

the size, scope, and complexity of American enterprise, to continuing mergers and acquisitions, and to a grave increase in industrial concentration. Today, corporate groups of enormous size with complex multi-tiered corporate structures dominate the national and world economy.[9]

With this dramatic change in the economic realities of business, the corporate law of older times formulated for the far simpler economy when corporate groups were unknown became largely anachronistic and dysfunctional. Thus, in response to the serious inadequacies in American corporate law, a greatly increased reliance on enterprise principles has developed. In numerous areas, American courts and legislatures have turned to concepts of enterprise and have attributed the rights or liabilities of one interrelated affiliate of a corporate group to another affiliate in resolving legal questions.

Thus, in statutory law, entity law had proven a well-nigh insuperable barrier to effective federal regulation of the railroads, the pioneer area in American government regulation of industry.[10] Prompted by this disastrous history, the Franklin Roosevelt administration in its first great wave of major reform statutes commencing in 1933 abandoned "entity" as the legal standard. In one of the outstanding developments in American jurisprudence, the draftsmen of the "New Deal" statutes and administrative regulations turned away from traditional corporate theory and adopted enterprise concepts and the functional standard of "control." In major legislation including the Emergency Transportation Act,[11] the Securities Acts of

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[9] *World Investment Report 2002*, U.N. Conference on Trade and Development, at 87, 90, U.N. Doc. UNCTAD/WIR/2002, U.N. Sales No. E.02.II.D.4 (2002), *available at* http://www.unctad.org/en/docs/wir2002_en.pdf.; U.S. Census Bureau, *Statistical Abstract of the United States: 2003*, Section 15: Business Enterprise, Table Nos. 742, 748–50 (2003), *available at* http://www.census.gov/prod/2004pubs/03statab/business.pdf.

[10] The Interstate Commerce Act, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.), as amended by The Hepburn Act, 34 Stat. 584 (1906) (superceded *sub silentio*) is one example of the failure of a federal statute to defeat the protection afforded American industry by entity law. The Hepburn Act's "Commodities Clause" made it unlawful for a railroad company to transport in interstate commerce (except for its own use) virtually any article or commodity manufactured, mined, or produced by the railroad company or under its authority, or any material in which the railroad company owned an interest. *See* United States v. Del. & Hudson Co., 213 U.S. 366, 415–18 (1909) (upholding the constitutionality of the Interstate Commerce Act as a valid congressional regulation of commerce). The ineffectiveness of the Commodities Clause, however, was quickly demonstrated by railroad companies that transported materials produced by parent and sister corporations. *See* United States v. Elgin, J. & E. Ry. Co., 298 U.S. 492, 497–98, 501 (1936) (concluding that a holding company's ownership of all stock of a railroad subsidiary did not, under the Commodities Clause, preclude the railroad company from transporting materials produced by the holding company); United States v. S. Buffalo Ry. Co., 333 U.S. 771, 772, 782–83, 785 (1948) (declining to overrule *Elgin* on similar facts); *see also* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATUTORY LAW OF GENERAL APPLICATION §19.02 (1989) (discussing statutorily-established officer and director liability under the Transportation Act of 1920).

[11] 48 Stat. 217 (1933) (codified in various sections of 49 U.S.C.).

1933 and 1934,[12] the Public Utility Holding Company Act,[13] the National Labor Relations Act,[14] and the Investment Company Act of 1940,[15] "control" became firmly established as the model for assuring expansive statutory scope in American regulatory law. Numerous subsequent federal and state statutes have similarly focused on "control," particularly in legislation and regulations regulating banking, insurance, and financial services.[16]

In these statutes (and the regulations[17] thereunder), the law turned firmly to "control" as the foundation of regulatory programs dealing with the key industries of the economy. Influenced by the success of American statutory regulation of industry based on the encompassing standard of "control," the same standard has been utilized by governments throughout the world.[18] It is a major development in the evolution of the modern administrative state.

Enterprise law rests on the realities of the complex business enterprise in which business activities are collectively conducted by interrelated and intertwined juridical entities under the "control" of a dominant parent corporation. Of all the features that characterize enterprise law and corporate groups, "control" is predominant in judge-made as well as statutory law. Thus, in numerous areas of procedure including res judicata and collateral

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[12] 48 Stat. 74 (1933) (codified at 15 U.S.C. § 77a (2000)); 48 Stat. 881 (1934) (codified at 15 U.S.C. § 78a (2000)).

[13] 49 Stat. 803 (1935) (codified at 15 U.S.C. § 79a (2000)).

[14] 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (2000)).

[15] 54 Stat. 789 (1940) (codified at 15 U.S.C. § 80a-1 (2000)).

[16] *See, e.g.*, Bank Holding Company Act of 1956, 70 Stat. 133 (codified as amended at 12 U.S.C. § 1841 (2000)); Savings & Loan Holding Company Amendments Act, 82 Stat. 5 (1968) (codified as amended at 12 U.S.C. § 1467a (2000)); Gramm-Leach-Bliley Act of 1999, 113 Stat. 1338 (codified in various sections of 12, 15, 16, & 18 U.S.C.); Nevada Gaming Control Act, NEV. REV. STAT. ANN. § 463 (Michie 2001); N.J. Alcoholic Beverage Law, N.J. STAT. ANN. § 33:1-1 (West 1994); MODEL INS. HOLDING COMPANY SYS. REGULATORY ACT § 1 (2004).

[17] Thus, although "control" is not mentioned in the National Labor Relations Act, the Labor Board developed the "integrated enterprise" standard encompassing the concept of "control" that received Supreme Court approval. 21 NLRB ANN. REP. 14 (1956); Radio & Television Broad. Technicians Local Union v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam). In its statutes amending the anti-discrimination statutes to give them extraterritorial application over American workers of American corporations and subsidiaries working abroad, the Congress subsequently adopted the "integrated enterprise" standard *in haec verba*. Older American Act Amendments of 1984, 98 Stat. 1767, 1792 (1984) (codified as amended at 29 U.S.C. § 623(h) (2000)); Civil Rights Act of 1991, 105 Stat. 1071, 1077 (amending 42 U.S.C. § 2000e-1 (2000); 42 U.S.C. § 12112 (2000)).

[18] For foreign examples of the use of "control" or its cognate, "dominant influence," as the linchpin of statutory scope, see Aktiengesetz (Stock Corporation Act), of Sept. 6, 1965 (BGBl. I § 291); Companies Act, 1989, c. 40, § 21(1) (Eng.); Council Regulation 2157/2001 on the Statute for a European Company, art. 6, 2001 O.J. (L 294) 4; Council Directive 2001/86/EC, art. 2(c), 2001 O.J. (L 294) 22; Council Directive 94/45/EC, art. 2(b), 3, 1994 O.J. (L 254) 64; Council Directive 83/349/EC, art. 1, § 1(c), 1983 O.J. (L 193) 1–2; Council Directive 83/349/EC, art. 1, § 1(c), 1983 O.J. (L 193) 1–2; Corporations Act, 2001 §§ 46(a)(i), 588V (1)(d)(ii) (Austl.); Business Corporations Act, R.S.C., ch. C-44, § 2(3) (1985) (Can.); Bankruptcy and Insolvency Act, S.C., ch. 27 (1992) (Can.); *see also* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, § 182.03.

estoppel, discovery, and cross-voting, courts have almost universally adopted enterprise law based on "control" alone.[19] Similarly, the "*excessive*" exercise of "control" depriving a subsidiary or other subservient party of any significant decisionmaking power suffices for the application of enterprise law in those jurisdictions accepting the "single-factor" form of "piercing" jurisprudence reviewed below.[20]

In most jurisdictions, however, judicial application of enterprise principles requires a showing not only of "excessive" use of "control" but also of the close economic intertwining of the activities of the related corporations. This second factor—collective conduct of an economically integrated business—is the other major element supporting reliance on enterprise law.[21]

Above and beyond "control" and economic integration, there are four additional factors of significance[22] that help support the application of enterprise principles: (a) a common public persona featuring a common trade name, logo, and marketing plan; (b) financial interdependence in which the parent or the group participate in financing of the subsidiaries, who do not raise their own capital independently; (c) administrative interdependence in which the subsidiary operates without its own legal, auditing, tax, public relations, safety, engineering, or research and development departments and relies on its parent personnel for such purposes; and (d) group identification of employees with group-wide, rather than company-by-company stock option, retirement, medical insurance, and related benefit plans, and group personnel assignments as executives move through various companies of the group during their careers.

While the literature about "piercing the veil," particularly the literature reviewing the economic dimensions of the doctrine of limited liability, tends to concentrate on the choice between traditional entity or enterprise concepts in contract and tort,[23] the fact of the matter is that much, if not

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[19] *See* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, §§ 182.03 (general), 37.01 (discovery), 39.01 (res judicata and collateral discovery), 44.01 (multiple derivative actions), 47.01 (cross voting).

[20] *See id.* § 12.02[D].

[21] For example, economic integration is the factor that along with "control" appears and reappears in judicial doctrines employing enterprise principles, along with "stream of commerce," "market exploitation," "integrated enterprise," "single business enterprise," "functional delegation," and "quasi-agency." *See id.* §§ 12.04, 16.02, 17.02, 28.04, 29.03, 29.06, 30.01.

[22] *See id.* § 182.04.

[23] *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 14.4 (3d ed. 1986); Frank H. Easterbrook & Daniel R. Fischl, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) (discussing creditors' ability to pierce the corporate veil to satisfy their claims); Paul Halpern et al., *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117 (1980) (discussing tort and bankruptcy creditors' ability to pierce the corporate veil to satisfy their claims); *cf.* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986) (analyzing limited liability as applied to corporate groups rather than to smaller controlled corporations and their individual controlling shareholders).

most, of the law of corporate groups is found in other areas.

It particularly flourishes in these areas where financial liability is not involved in the issue at hand. In these areas including procedure and *in personam* jurisdiction, entity law rests solely on the traditional jurisprudential concept of the separate juridical personality of the corporation. Here, the policy concerns underlying the doctrine of limited liability are entirely absent. No wonder that in these areas, traditional legal theory often lacks the power to withstand the pressures arising from the economic and political realities of the enterprise before the court.

Where, however, financial liability is concerned, entity law rests not only on jurisprudential conceptions of the corporate personality. It also rests on the doctrine of limited liability, an expression of legislative policy widely recognized as one of the fundamental building blocks of the modern economy. In matters where substantive liability is at stake—whether imposed by contract or tort or in statutory law—entity law is consequently more powerful and more successfully resists the application of enterprise principles.

Unlike accepted versions of the older concept of entity law, the newer enterprise doctrine is not an overriding concept applied transcendentally throughout the entire legal spectrum. When courts and legislatures apply enterprise principles, they do so only for the matter at hand. Entity law has been superseded but only for that purpose.[24] In numerous matters, entity law continues to function as what may be described as the "default" doctrine. In those other areas, whether entity or enterprise law prevails depends on which doctrine best implements the underlying objectives and policies of the law in the particular area. In the complex jurisprudence demanded by a complex society, both doctrines have roles to play.

In applying enterprise principles, the law disregards normal entity principles in order to protect third parties affected by the corporate activity or where statutes are involved in order to implement the statutory objective and prevent it from being frustrated or readily evaded.

The familiar doctrine of "piercing the corporate veil" arose to serve much the same objectives in "exceptional cases."[25] "Piercing" has served the entity system as its "safety valve" to deal with the most blatant abuses of corporate forms. However, "piercing the veil" has proven a failure. Rigid in its formulation and yielding great uncertainty in any attempt to

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[24] For an example of courts making this exception, see *Mesler v. Bragg Management Co.*, 702 P.2d 601, 607 (1985). For an example of legislatures making this exception, see *Innkeepers' Telemanagement & Equipment Group, Inc.*, 1994 U.S. Dist. LEXIS 16075, at *9 (N.D. Ill. 1994) ("integrated enterprise" standard in federal labor relations law does not apply to Illinois common-law tort law). *See generally* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, § 14.01.

[25] *E.g.*, Perpetual Real Estate Servs., Inc. v. Michaelson Props., Inc., 974 F.2d 545 (4th Cir. 1992); Baker v. Raymond Int'l, Inc., 656 F.2d 173, 179 (5th Cir. 1981), *cert. denied*, 452 U.S. 983 (1982).

predict its outcome, "piercing" has led to hundreds, if not thousands, of irreconcilable cases in each year.

Further, "piercing" jurisprudence in many jurisdictions has become self-contradictory. Traditional "piercing" jurisprudence rests on a demonstration of three fundamental elements: the subsidiary's lack of independent existence; the fraudulent, inequitable, or wrongful use of the corporate form; and a causal relationship to the plaintiff's loss. Unless each of these three elements has been shown, courts have traditionally held "piercing" unavailable.[26]

However, the traditional "three-factor" doctrine has presented so many problems that some courts such as the Court of Appeals for the Second Circuit[27] have abandoned it entirely and have adopted "single-factor piercing"[28] as governing law for "piercing" cases. Other courts have continued to apply "three-factor piercing," but no longer rely on it exclusively. In a separate line of decisions that do not cite the "three-factor piercing" decisions in the jurisdictions, these courts have rejected the need to demonstrate each of the elements of the traditional three-factor doctrine. Notwithstanding the absence of proof of one of the factors traditionally required, these courts have approved "piercing" where proof of one of the elements has been particularly striking. Thus, these courts have refused to recognize corporations that have lacked any realistic independent existence. Where a corporation has had no business objective or in other ways has been a "sham,"[29] or where the corporation's exercise of "control" has been so intrusive that the subsidiary has lacked significant decision-making power of its own, as where the parent even made day-to-day decisions, "piercing" has been approved without regard to the other elements traditionally required.[30]

Similarly, where the corporation has been formed or used to accomplish a fraudulent, inequitable, or wrongful purpose, courts have intervened to protect the victimized party or the government when a statute was being evaded, however meticulously the wrongdoer has observed the forms of

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[26] *See* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, §§ 11.01 (general), 59.02, 60.02 (torts), 68.02, 69.01 (contracts).

[27] *E.g.*, Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24 (2d Cir. 1993); William Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131 (2d Cir. 1991); *see* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, § 26.02. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Court only applies its single-factor doctrine in matters arising in federal question jurisdiction matters and is obliged to apply state law, typically three-factor piercing, in cases arising in diversity jurisdiction matters. *See id.* at 64–66.

[28] *See* BLUMBERG ON CORPORATE GROUPS, *supra* note 1, §§12.01 (general), 26.01, 26.02 (jurisdiction), 59.02, 60.01, 60.02 (torts), 68.01, 69.01.

[29] *See id.* § 12.02 [B].

[30] *See generally id.* §§ 12.02[D], 24.08 (noting the unanimity among American courts that piercing is justified "when the exercise of the parent corporation's or controlling shareholder's control goes to the extreme of making day-to-day decisions for the subsidiary").

independent existence.[31] Notwithstanding this erosion, "traditional three-factor piercing" continues to dominate American law.

The law of corporate groups is not limited to business groups consisting of parent and subsidiary corporations. Putting aside the matter of corporate forms, the factors inherent in the intertwined relationships that characterize enterprises collectively conducted by corporate affiliates are found in numerous other familiar economic relationships involving dominant and subservient interrelated parties.[32] These other relationships also are characterized by the very same factors of "control" (albeit resting on contract rather than stock), collective conduct of an economically integrated enterprise, use of a common public persona, and financial and administrative interdependence.

Of these comparable relationships, franchise systems are the leading example.[33] In the franchise area, franchisors and franchisees collectively carry on a single integrated enterprise under the control of the franchisor and under the franchisor's public persona and marketing plan.[34] A surprisingly large number of comparable other relationships exist. These include health care organizations and medical staff;[35] licensors and licensees;[36]

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[31] *See id.* § 12.03 (discussing situations in which courts have used single-factor piercing based on circumstances including fraudulent incorporation to escape a preexisting obligation and misrepresentation about the identity of the entity).

[32] *See id.* § 160.01–160.02 (introducing the idea of applying enterprise principles to economic undertakings that resemble corporate groups but are not linked by stock ownership, such as franchisors and franchisees, licensors and licensees, and health care institutions and medical staff).

[33] *See generally id.* §§ 161.01–170.04 (detailing the franchise relationship, applicable statutory regulation, jurisdictional issues, procedural problems, and liability concerns).

[34] In many respects, parent/subsidiary and franchisor/franchisee structures strongly resemble each other, and they seem functionally interchangeable and indistinguishable to their guests. In one litigation considering whether a New York court had personal jurisdiction over Holiday Inn, Inc., it emerged that the company conducted its operations in the state through six hotels operated by subsidiaries and thirty-seven hotels operated by franchisees. *See* Vaughan v. Columbia Sussex Corp., No. 91 Civ. 1629 (CSH), 1992 U.S. Dist. LEXIS 820, at *4 (S.D.N.Y. 1992). Similarly, the United Nations *World Investment Report* contains a summary on the operations of hotel chains throughout the world in the form of subsidiaries, franchises, and leases. This report shows the Hilton system operates seventeen hotels through subsidiaries and fifty through franchises or leases. *World Investment Report 2004*, U.N. Conference on Trade and Development, at 106, Box tbl. III.2.1, U.N. Doc. UNCTAD/WIR/2004, U.N. Sales No. E.04.II.D.36 (2004), *available at* http://www.unctad.org/en/docs/wir2004_en.pdf.

Similarly, Hertz has utilized both subsidiaries and franchisees in its operations. Thus, plaintiffs allegedly injured in an accident in England with a car leased from Hertz discovered that they had been dealing not with Hertz but with an English third-tier subsidiary, while in another litigation involving an accident at the Miami International Airport, the plaintiff discovered that he had been in fact dealing with a Hertz franchisee based in the Virgin Islands. *Compare* Hertz Int'l, Ltd. v. Richardson, 317 So. 2d 824, 825–26 (Fla. Dist. Ct. App. 1975), *with* Dickson v. Hertz Corp., 559 F. Supp. 1169, 1171, 1176 (D.V.I. 1983).

[35] For a discussion of health care organizations, see BLUMBERG ON CORPORATE GROUPS, *supra* note 1, §§ 171.01, 172.01–.03, .07, .10–.13, .16.

[36] For a discussion of licensors and licensees, see *id.* §§ 173.02, .04, .06, .07.

parties in integrated chains of contracts;[37] lender liability where lenders have assumed roles in operating the businesses of defaulting borrowers;[38] and parties engaged in the "stream of commerce" (including manufacturers, distributors, wholesalers, and retailers) in jurisdiction and tort law.[39] Still additional examples are found in such familiar common-law doctrines as *respondeat superior*,[40] inherent agency,[41] and successor liability.[42] Appendix A at the end of this paper illustrates their fundamental jurisprudential identity.[43]

From a jurisprudential point of view, all these developments can be seen as examples of relational law with legal rights and obligations resting on status, not on contract.[44] Years ago, Sir Henry Maine observed that the history of English law was best understood as the movement from status to contract.[45] This is no longer true. In many commercial areas, the growing acceptance of enterprise principles and the intragroup attribution of rights and liabilities from one affiliate to another demonstrate that at least insofar as commercial relationships are concerned, the law in many respects is moving from contract back to status.

Adoption of enterprise principles has served as the response of the legal system to the challenges presented by the inadequacy of traditional legal doctrines to cope with the problems presented by the complexities of the modern society. This is evident not only in corporation law but in many other areas as well. It is a profound development in world jurisprudence.

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[37] *See id.* § 173.01.

[38] For a discussion of lenders and defaulting borrowers, see *id.* §§ 174.01, .04, .07.

[39] For a discussion of stream of commerce jurisprudence, see *id.* §§ 30.09, –.10.

[40] For a discussion of *respondeat superior*, see *id.* §§ 177.01–.04.

[41] For a discussion of inherent agency, see *id.* §§ 178.04, .07.

[42] For a discussion of successor liability, see *id.* §§ 179.05–.11.

[43] *See id.* § 182.03.

[44] *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 12–24 (1921); 1 ROSCOE POUND, JURISPRUDENCE 210–21 (1959); *cf.* IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 72–108 (1980) (discussing the notion of relational contract law); MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (summarizing how different legal areas have incorporated basic norms of relational thinking); Leon Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934) (analyzing relational interests and their protection, jurisprudential operation, and value).

[45] HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 164–65 (2d ed. 1874).

APPENDIX A. RELATIONAL LAW: ATTRIBUTION OF RIGHTS AND RESPONSIBILITIES BETWEEN RELATED ECONOMIC ACTORS IN THE UNDERTAKING IN THE ABSENCE OF CONTRACT, ESTOPPEL OR PARTICIPATION

	Parent-Subsidiary	**Franchisor-Franchisee**	**Licensor-Licensee**
Common Economic Undertaking	Yes	Yes	Yes
Link	Equity	Contract	Contract
Dominant/ Subservient Parties: ("Control")	Yes	Substantial	Limited
Economic Integration	Yes	Yes	Yes
Administrative Interdependence	Substantial but Varying	Substantial but Varying	No
Financial Interdependence	Substantial but Varying	Varying	No
Employment Integration	Varying	Limited but Varying	No
Common Public Persona: Company	Varying	Yes	No
Common Public Persona: Product	Varying	Yes	Yes
Aggrieved Parties Without Effective Remedy	No	Varying	No
Aggrieved Parties Chiefly Consumers	No	Yes	No

	Integrated Chains of Contractors	Health Care Institutions & Medical Staff	Joint Ventures, Networks & Alliances
Common Economic Undertaking	Yes	Yes	Partial
Link	Contract	Contract & Site	Cross Equity or Contract
Dominant/ Subservient Parties: ("Control")	No	Limited	No
Economic Integration	Yes	Yes	Yes
Administrative Interdependence	No	N/A	No
Financial Interdependence	No	N/A	No
Employment Integration	No	Yes	No
Common Public Persona: Company	No	Varying	No
Common Public Persona: Product	No	Yes	No
Aggrieved Parties Without Effective Remedy	No	Varying	No
Aggrieved Parties Chiefly Consumers	Varying	Yes	Varying

	Inherent Agency	**Lender Liability**	**Successor Liability**	**Product Liability**	***Respondeat Superior***
Common *Economic* Undertaking	Yes	Partial	Yes (in Tandem)	Yes	Yes
Link	Equity	Debt	Contract & Product	Product	Employment
Dominant/ Subservient Parties: ("Control")	Yes	Substantial	N/A	No	Yes
Economic Integration	Yes	Limited	Yes (in Tandem)	Yes	Yes
Administrative Interdependence	Varying	No	No	No	No
Financial Interdependence	Varying	Yes	No	No	No
Employment Integration	N/A	No	Substantial	No	N/A
Common Public Persona: Company	No	No	Varying	No	No
Common Public Persona: Product	N/A	No	Yes	Yes	N/A
Aggrieved Parties Without Effective Remedy	Yes (Ineffective Remedy)	Varying	Yes (Unless Remedy)	Yes (Ineffective Remedy)	Yes (Ineffective Remedy)
Aggrieved Parties Chiefly Consumers	No	No	Varying	Yes	Yes