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## Piercing the Corporate Veil in Montana

Jody J. Brewster

*University of Montana School of Law*

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# COMMENTS

## PIERCING THE CORPORATE VEIL IN MONTANA

Jody J. Brewster

[I]t is essential to a clear understanding of the . . . law of corporations to bear in mind distinctly that the existence of a corporation independently of its shareholders is a fiction; and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.<sup>1</sup>

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### I. INTRODUCTION

This comment presents the doctrine of piercing the corporate veil as it exists in Montana. An examination of applicable Montana cases illustrates the theories and factors relied upon by the Montana Supreme Court in deciding whether to pierce a corporate veil. Finally, the comment discusses the court's confusion of corporate veil law with agency law and the modification of the doctrine that

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1. Scott v. Prescott, 69 Mont. 540, 557, 223 P. 490, 495 (1924) (quoting 1 V. MORAWETZ, *THE LAW OF PRIVATE CORPORATIONS* § 1 (2d ed. 1886)).

has resulted from that confusion.

## II. DEFINITION OF "PIERCING THE CORPORATE VEIL"

As a general rule, the corporation is treated as a legal entity, separate and distinct from its shareholders.<sup>2</sup> The corporation alone is held accountable for its acts. The shareholders are thus able to invest money in the corporation with the assurance that their personal liability for acts of the corporation will be limited to the amount paid for their stock.<sup>3</sup> In other words, the corporate shareholder enjoys limited liability.

Under exceptional circumstances, however, the protection of limited liability may be lost because of some wrongdoing in the operation of the corporation. In such cases, the courts may exercise their equitable powers to "disregard the corporate entity" or "pierce the corporate veil."

"Piercing the corporate veil" is a term that describes a court's willingness to ignore, for purposes of a particular transaction, the fact that a corporation exists as an entity separate from those who own it.<sup>4</sup> This willingness does not depend upon a finding that the corporation was defectively formed.<sup>5</sup> Instead, it results from a policy determination to impose the legal consequences of a corporate act directly upon the shareholders of the corporation.<sup>6</sup> In the interests of justice, the court will look behind the corporate fiction, not to question the corporation's existence<sup>7</sup> nor to question its right to

2. State *ex rel.* Monarch Fire Ins. Co. v. Holmes, 113 Mont. 303, 308, 124 P.2d 994, 996 (1942); *cf.* State v. Holdren, 143 Mont. 103, 112, 387 P.2d 446, 451 (1963); Brady Irrigation Co. v. Teton County, 107 Mont. 330, 334, 85 P.2d 350, 352 (1938); Russell v. Russell, 102 Mont. 301, 308, 59 P.2d 777, 780 (1936); Barnes v. Smith, 48 Mont. 309, 316, 137 P. 541, 543 (1913).

3. MONT. CODE ANN. § 35-1-510(1) (1981) provides as follows:

(1) A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.

4. L. SODERQUIST, CORPORATIONS—A PROBLEM APPROACH 239 (1979).

5. *Id.* MONT. CODE ANN. § 35-1-204 (1981) provides that a corporation's existence begins *only* upon the issuance of the certificate of incorporation. Furthermore, the certificate is conclusive evidence that the incorporation was not done so defectively. Thus, to impose liability upon the alleged shareholders of a defectively formed corporation, a court need not pierce the corporate veil; the court need only hold that, because no certificate was ever issued, no corporation ever came into existence. The alleged shareholders would be liable under MONT. CODE ANN. § 35-1-109 (1981), which provides that "[a]ll persons who assume to act as a corporation without the authority so to do [sic] shall be . . . liable for all debts and liabilities incurred."

6. L. SODERQUIST, CORPORATIONS—A PROBLEM APPROACH 239 (1979); *see also* Hansen Sheep Co. v. Farmers' & Traders' State Bank, 53 Mont. 324, 337, 163 P. 1151, 1155 (1917).

7. Once the Secretary of State has issued the certificate of incorporation, the corpor-

exercise corporate powers,<sup>8</sup> but rather to ascertain the identity of the persons who use the name of the corporation for their own purposes.<sup>9</sup> If the court finds that the shareholders, and not the corporation, are the real parties in interest, then liability for the ostensible corporate acts will be fixed upon the shareholders.<sup>10</sup>

The doctrine of piercing the corporate veil is an equitable remedy that involves the balancing of two strong, competing policies:<sup>11</sup> the need to foster the growth of corporate business<sup>12</sup> and the need to curb the injustice that can result from improper uses of the corporate device. Since the doctrine is an equitable one, there is no general formula to fit all cases. Rather, the conditions under which a corporate entity will be disregarded vary according to the circumstances of each case.<sup>13</sup>

### III. THE PRIMA FACIE CASE

A summary of Montana case law demonstrates that two factors must be shown to exist before a corporate veil will be pierced: first, it must be shown that the corporation is the mere agent or alter ego of the shareholders; and second, it must be shown that piercing the veil is necessary to prevent fraud or to achieve equity.<sup>14</sup>

#### A. *The Corporation Is the Mere Agent or Alter Ego of the Shareholders*

The Montana court has recognized two general theories under which the corporate entity may be disregarded: the "agency" theory and the "alter ego" or "identity" theory.<sup>15</sup>

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tion is protected from all challenges to its existence except for direct attacks by the state in the form of a quo warranto proceeding to cancel or revoke the certificate. MONT. CODE ANN. § 35-1-204 (1981).

8. Dunham v. Natural Bridge Ranch Co., 115 Mont. 579, 583, 147 P.2d 902, 904 (1944).

9. Hansen Sheep Co. v. Farmers' & Traders' State Bank, 53 Mont. 324, 337, 163 P. 1151, 1155 (1917).

10. *Id.*

11. Note, *Disregard of the Corporate Entity*, 4 WM. MITCHELL L. REV. 335 (1978).

12. The corporate style of doing business was created by the legislature "to encourage trade and industry by enabling natural persons to make profitable investment by availing themselves of the skill, experience, and personal fitness of others, without incurring personal liability for the obligations incurred in the management of the business of the corporation." Barnes v. Smith, 48 Mont. 309, 316, 137 P. 541, 543 (1913).

13. See generally *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 307, 124 P.2d 994, 996 (1942).

14. *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 308, 124 P.2d 994, 996 (1942).

15. *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 307, 124 P.2d 994, 996 (1942).

## 1. Agency Theory

Under the agency theory, the court will disregard a corporation's separate identity where the corporation acted<sup>16</sup> as the mere agent of its shareholders for the particular transaction in issue.<sup>17</sup> In applying the agency theory, traditional rules of agency govern the court's analysis.<sup>18</sup> Usually, the most important element in ascertaining the existence of an agency relationship is the presence of control by the principal over the conduct and activities of the agent.<sup>19</sup> Although the Montana court has recognized the agency theory, the court has never applied the agency theory to pierce a corporate veil.

## 2. Alter Ego or Identity Theory

Under the "alter ego" or "identity" theory, the court will disregard a corporation's separate identity where the corporation is so identified with the shareholders as to make the corporation and its shareholders into one.<sup>20</sup> Neither ownership of stock nor control of management is generally sufficient by itself to justify invoking the alter ego or identity theory.<sup>21</sup> Rather, actual shareholder domination of corporate affairs must be so pervasive that the shareholders and the corporation no longer have separate identities.<sup>22</sup> In effect, the corporation is merely the name under which the shareholders

16. To invoke the agency theory, the act giving rise to the action must be the act of the agent corporation, and not the act of the shareholders. *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 308, 124 P.2d 994, 996 (1942).

17. *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 307, 124 P.2d 994, 996 (1942).

18. The agency theory of piercing the corporate veil, where the corporation acts as the agent of the shareholders, must be distinguished from the situation where corporate agents, such as directors, officers, or employees, perform acts on behalf of the corporation. In the former case the corporation is the agent; in the latter case the corporation is the principal. For a discussion of the Montana Supreme Court's confusion of the agency theory of corporate veil law with agency law, see *infra* section V of text.

19. *State v. Holdren*, 143 Mont. 103, 110-11, 387 P.2d 446, 450 (1963).

20. *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 307, 124 P.2d 994, 996 (1942).

21. *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 308-09, 124 P.2d 994, 996 (1942); *Gallatin Natural Gas Co. v. Public Service Comm'n*, 79 Mont. 269, 289, 256 P. 373, 379 (1927). *Contra Stromberg v. Seaton Ranch Co.*, 160 Mont. 293, 309, 502 P.2d 41, 49-50 (1972) (where the court held that the shareholder's ownership of 100% of the corporation's stock was sufficient to justify a finding that the corporation was the alter ego of the shareholder).

22. *Wilson v. Milner Hotels, Inc.*, 116 Mont. 424, 433, 154 P.2d 265, 269 (1944); *Commercial Credit Co. v. O'Brien*, 115 Mont. 199, 211, 146 P.2d 637, 642 (1944); *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 308, 124 P.2d 994, 996 (1942); *Gallatin Natural Gas Co. v. Public Service Comm'n*, 79 Mont. 269, 287, 256 P. 373, 378 (1927).

do business.<sup>23</sup>

Although the same principles for piercing the corporate veil apply whether the corporation has one or many shareholders, the facts necessary for the application of such principles are most frequently encountered in cases of closely-held, family corporations<sup>24</sup> and parent-subsidiary corporations.<sup>25</sup>

A summary of Montana case law identifies a number of factors upon which the court has relied in deciding whether to pierce a corporate veil. Although no single factor or set of factors is determinative, a variety of combinations of the following factors may indicate that the corporation is the alter ego of its controlling shareholder(s):

1. Shareholder owns all<sup>26</sup> or most<sup>27</sup> of the corporation's stock.<sup>28</sup>

23. *Russell v. Russell*, 102 Mont. 301, 305, 59 P.2d 777, 779 (1936); *Gallatin Natural Gas Co. v. Public Service Comm'n*, 79 Mont. 269, 282, 256 P. 373, 376 (1927); *Scott v. Prescott*, 69 Mont. 540, 561, 223 P. 490, 497; *United States Gypsum Co. v. Mackey Wall Plaster Co.*, 60 Mont. 132, 143, 199 P. 249, 251 (1921); *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 336, 163 P. 1151, 1154 (1917); *State v. Hall*, 45 Mont. 498, 518, 125 P. 639, 648 (1912); *cf. State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 308, 124 P.2d 994, 996 (1942).

24. Ownership of all or most of a corporation's stock by a family does not generally by itself afford sufficient grounds for disregarding the corporate entity. *E.g., Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980). However, the closely-held, family corporation concentrates control and knowledge in the principle shareholder(s) and thereby readily lends itself to illegitimate use.

25. Generally speaking, the corporate veil principles governing corporations owned by individuals are also applicable to corporations owned entirely by another corporation. *See State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 308, 124 P.2d 994, 996 (1942); *Gallatin Natural Gas Co. v. Public Service Comm'n*, 79 Mont. 269, 287, 256 P. 373, 378 (1927).

26. *See Stromberg v. Seaton Ranch Co.*, 160 Mont. 293, 309, 502 P.2d 44, 49-50 (1972); *Wilson v. Milner Hotels, Inc.*, 116 Mont. 424, 428, 154 P.2d 265, 267 (1944); *Commercial Credit Co. v. O'Brien*, 115 Mont. 199, 203, 146 P.2d 637, 639; *State ex rel. Foot v. Farmers' & Mechanics' State Bank of Helena*, 85 Mont. 256, 259, 278 P. 828, 829 (1929); *Barnes v. Smith*, 48 Mont. 309, 319, 137 P. 541, 544 (1913).

27. *See e.g., Russell v. Russell*, 102 Mont. 301, 305, 59 P.2d 777, 778-79 (1936); *Gallatin Natural Gas Co. v. Public Service Comm'n*, 79 Mont. 269, 280, 256 P. 373, 376; *Scott v. Prescott*, 69 Mont. 540, 551, 223 P. 490, 493 (1940). In each of these cases, the controlling shareholder owned all but a small minority of the shares—in *Russell*, the controlling shareholder owned all but ten out of 20,000 outstanding shares; in *Gallatin*, all but five out of 2500 shares; and in *Scott*, all but two out of 7200 shares. It is apparent from the facts of the cases, that the only reason that the controlling shareholder did not own 100% of the stock was the necessity of complying with the then existing statute, MONT. REV. CODES ANN. § 5933 (1921), that required every corporation to have at least three directors, each of whom was also a shareholder.

28. By implication, the Montana court appears to apply a family attribution rule in corporate veil cases. Thus, a shareholder who in fact owns less than a majority of the stock is treated as owning all of the stock held by members of his family in addition to his own stock. *See, e.g., Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *State v. Holdren*, 143 Mont. 103, 104, 387 P.2d 446, 447 (1963); *Shaffer v. Buxbaum*, 137 Mont. 397, 399, 352

2. Shareholder is a director and/or the president of the corporation.<sup>29</sup>

3. Shareholder makes all corporate decisions without consulting the other directors or officers.<sup>30</sup>

4. Shareholder, officers and/or directors fail to comply with the statutory requirements regarding operation of the corporation.<sup>31</sup>

5. Shareholder's personal funds are commingled with the corporation's funds.<sup>32</sup>

6. Shareholder's personal credit and corporation's credit are used interchangeably to obtain personal and corporate loans.<sup>33</sup>

7. Shareholder's personal business records are not kept separate from corporation's business records.<sup>34</sup>

8. Shareholder and corporation engage in same type of business.<sup>35</sup>

P.2d 83, 84 (1960); *United States Gypsum Co. v. Mackey Wall Plaster Co.*, 60 Mont. 132, 133, 199 P. 249, 250 (1921); *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 331, 163 P. 1151, 1152 (1917).

29. See *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1040 (1980); *State v. Holdren*, 143 Mont. 103, 105, 387 P.2d 446, 447 (1963); *United States Gypsum Co. v. Mackey Wall Plaster Co.*, 60 Mont. 132, 139, 199 P. 249, 251; *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 331, 163 P. 1151, 1152; *State v. Hall*, 45 Mont. 498, 502, 125 P. 639, 642 (1912). *But see Sun River Stock & Land Co. v. Montana Trust & Savings Bank*, 81 Mont. 222, 228, 262 P. 1039, 1041 (1928) (where the court declined to pierce a corporate veil despite the fact that the individual shareholders were also the officers and directors of the corporation).

30. See *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 335, 163 P. 1151, 1154 (1917).

31. Failure to issue stock: See *State ex rel. Foot v. Farmers' & Mechanics' State Bank of Helena*, 85 Mont. 256, 259, 278 P. 828, 829 (1929); failure to hold meetings of the shareholders and/or directors: see *Scott v. Prescott*, 69 Mont. 540, 552-53, 223 P. 490, 494 (1924) and *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 331, 163 P. 1151, 1153 (1917); and failure to file annual reports: see *Shaffer v. Buxbaum*, 137 Mont. 397, 399, 352 P.2d 83, 84 (1960). Sound policy considerations support piercing the corporate veil where the controlling shareholder ignores the rules of corporate behavior: where the controlling shareholder does not acknowledge the separate existence of the corporation in day-to-day operations, he should not be permitted to assert that separate existence when he is being held personally liable for ostensible acts of the corporation.

32. See *State v. Holdren*, 143 Mont. 103, 105, 387 P.2d 446, 447 (1963); *Shaffer v. Buxbaum*, 137 Mont. 397, 399, 352 P.2d 83, 84 (1960); *Wilson v. Milner Hotels, Inc.*, 116 Mont. 424, 432, 154 P.2d 265, 269 (1944); *Scott v. Prescott*, 69 Mont. 540, 553, 223 P. 490, 494 (1924); *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 333, 163 P. 1151, 1153 (1917); *State v. Hall*, 45 Mont. 498, 506, 125 P. 639, 643 (1912).

33. See *Russell v. Russell*, 102 Mont. 301, 305-06, 59 P.2d 777, 779 (1936); *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 332, 163 P. 1151, 1153 (1917).

34. See *Scott v. Prescott*, 69 Mont. 540, 553, 223 P. 490, 494 (1924).

35. See *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *Commercial Credit Co. v. O'Brien*, 115 Mont. 199, 203, 146 P.2d 637, 639 (1944); *Gallatin Natural Gas Co. v. Public Service Comm'n*, 79 Mont. 269, 276, 256 P. 373, 374 (1927). *But see Sun River Stock & Land Co. v. Montana Trust & Savings Bank*, 81 Mont. 222, 226, 262 P. 1039, 1041 (1928)

9. Shareholder and corporation have same address which is the address of shareholder's personal residence.<sup>36</sup>

10. Shareholder admits to third parties that the shareholder and the corporation are one and the same.<sup>37</sup>

11. Corporation's profits and earnings are distributed through means other than dividends.<sup>38</sup>

12. Corporation is undercapitalized.<sup>39</sup>

If a parent-subsidary relationship is involved, the following additional factors may indicate that the subsidiary corporation is the mere alter ego of its parent corporation:

13. Parent and subsidiary have same name.<sup>40</sup>

14. Parent and subsidiary have same directors and officers.<sup>41</sup>

Mechanical avoidance of the foregoing factors will not insure that the court will not pierce a corporate veil. Even the most stringent efforts to comply with the checklist will not protect a corporation where it is being used fraudulently or illegally.

### B. *Piercing the Corporate Veil Is Necessary to Prevent Fraud or to Achieve Equity*

#### 1. *Fraudulent and Illegal Uses of Corporations*

If the court finds that the corporation is a mere agent or alter ego of the dominant shareholder, the next issue is whether the shareholder has used his domination or control for fraud or some other illegal purpose.<sup>42</sup> Proving such facts places a heavy burden upon the party who advocates piercing the corporate veil. At the same time, this requirement fosters the corporate style of doing business by insuring that the corporate veil will be pierced only under extreme circumstances. For example, the Montana court has

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(where the court declined to pierce a corporate veil despite the fact that the corporation and the shareholders were engaged in the same business).

36. See *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *Shaffer v. Buxbaum*, 137 Mont. 397, 401, 352 P.2d 83, 85 (1960).

37. See *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *Gallatin Natural Gas Co. v. Public Service Comm'n*, 79 Mont. 269, 281-82, 256 P. 373, 376 (1927); *Hansen Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 333, 163 P. 1151, 1153 (1917).

38. See *Scott v. Prescott*, 69 Mont. 540, 553, 223 P. 490, 494 (1924).

39. See *Shaffer v. Buxbaum*, 137 Mont. 397, 401, 352 P.2d 83, 85 (1960) (where paid in capital was \$300, while existing debts were \$5,948.77); *Commercial Credit Co. v. O'Brien*, 115 Mont. 199, 203, 146 P.2d 637, 639 (1944) (where paid in capital was \$11,174.17 compared to the total assigned receivables of \$183,481,689.92).

40. *Wilson v. Milner Motels, Inc.*, 116 Mont. 424, 427, 154 P.2d 265, 267 (1944); *Commercial Credit Co. v. O'Brien*, 115 Mont. 199, 203, 146 P.2d 637, 639 (1944).

41. *Wilson v. Milner Hotels, Inc.*, 116 Mont. 424, 428, 154 P.2d 265, 267 (1944).

42. *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1042 (1980); *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 308, 124 P.2d 994, 996 (1942).



disregarded the corporate entity where the corporation has been used fraudulently or illegally to avoid a contractual obligation, to collect an inequitable obligation, to circumvent a regulatory statute, to evade taxes, to avoid a common law duty, and to defeat a partner's interest.

a. *Avoiding Contractual Obligations*

The corporate entity is most commonly disregarded where the corporation is being used fraudulently or in bad faith to avoid a contractual obligation. In *Wilson v. Milner Hotels, Inc.*<sup>43</sup> the court pierced a corporate veil to prevent a corporation from being used in a fraudulent scheme to deprive the plaintiffs of money owed them under a lease. After obtaining a lease for plaintiffs' motel, the defendant, a Delaware corporation, attempted to escape liability by assigning the lease to the defendant's insolvent Montana subsidiary. The court found the subsidiary to be a mere shell without substance and thus held the parent corporation liable under the lease.<sup>44</sup>

Similarly, a corporation cannot be used to defraud persons of money owed them under a promissory note. For example, in *Flemmer v. Ming*,<sup>45</sup> the plaintiffs had agreed to sell their motel on a contract for deed to the defendant, Ming. During the negotiations regarding the sale and subsequent default, each contract, promissory note, check or letter sent by Ming was in the name of one of three different corporations and signed by Ming as president. In plaintiffs' action to recover the unpaid balance of the promissory note, Ming denied personal liability. He claimed that he was merely a shareholder of the corporation that had purchased the motel. The evidence supported the trial court's finding that the corporations were in reality the "alter ego" of Ming<sup>46</sup> and were being used to defraud the plaintiffs. Thus, the court pierced the cor-

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43. 116 Mont. 424, 154 P.2d 265 (1944).

44. *Id.* at 432, 154 P.2d at 269. The court relied upon the following facts to uphold the trial court's finding that the Montana subsidiary was a mere shell without a substance: both corporations had the same officers; despite the assignment, no change took place in the management of the hotel; the subsidiary did not have a separate bank account but received a draft daily from the parent's head office; the subsidiary owned no property; and the subsidiary's annual statements were prepared at the parent's head office.

45. — Mont. —, 621 P.2d 1038 (1980).

46. *Id.* at —, 621 P.2d at 1042. The evidence showed the following: the three corporations were closely held, family corporations; the officers, shareholders and directors of each corporation were members of Ming's family; the registered office of all three corporations was Ming's personal residence; all three corporations and Ming were engaged in the same business—selling real estate; and Ming admitted at trial his unity of interest with one of the corporations.

porate veils and held Ming personally liable for the debt.<sup>47</sup> *Flemmer v. Ming* also illustrates the advantage to the plaintiff who establishes fraud in piercing the corporate veil: where there is substantial evidence of fraud, the jury may award punitive, as well as actual, damages.<sup>48</sup>

A finding that a corporation is attempting to escape a just obligation by fraudulent means is not an absolute requirement to hold the shareholder personally liable. In *Stromberg v. Seaton Ranch Co.*,<sup>49</sup> the court held that bad faith, absent a positive showing of fraud, was sufficient basis to pierce the corporate veil. The plaintiff, a broker, had interested a potential buyer in purchasing a ranch owned by Seaton Ranch Company. After telling the broker to "forget it for now," the corporation and the buyer secretly completed negotiations.<sup>50</sup> The court affirmed the trial court's decision that the broker was entitled to a commission. Furthermore, the court stated that Mrs. Seaton was the alter ego of the corporation by reason of her ownership of the entire beneficial interest in the corporation. Relying on Seaton's alter ego status and Seaton's bad faith in excluding the broker from final negotiations, the court pierced the corporate veil. Accordingly, Seaton was held personally liable for payment of the commission.<sup>51</sup>

The court also pierced the corporate veil to preclude an individual from using a corporate entity to avoid payment of a personal debt in *Hansen Sheep Co. v. Farmers' & Traders' State Bank*.<sup>52</sup> The plaintiff, an alleged corporation, had on deposit certain funds with the defendant bank. Upon the oral authorization of Hansen, the president of the corporation, the bank applied those funds to discharge a personal note in Hansen's name. When Hansen later learned that the corporation had no intention of extending him further credit, he attempted to regain the funds. As president of the corporation, Hansen brought an action against the bank. Hansen claimed that the application of corporate funds was done illegally because the bank did not have the authorization of the corporation's other director, namely, Hansen's wife. The court concluded that the authorization of Hansen's wife was unnecessary. Because Hansen owned virtually all of the corporation's stock, completely controlled the activities of the corporation, and

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47. *Id.* at —, 621 P.2d at 1043.

48. *Id.*

49. 160 Mont. 293, 502 P.2d 41 (1972).

50. *Id.* at 299, 502 P.2d at 44.

51. *Id.* at 309, 502 P.2d at 49-50.

52. 53 Mont. 324, 163 P. 1151 (1917).

used the corporation to serve his own purposes, the court pierced the corporate veil to preclude Hansen from using the corporate entity to avoid the debt.<sup>53</sup> The court concluded that Hansen's authorization to the bank to apply the deposit as he did amounted to no more than a payment of his personal obligation with monies belonging to him.<sup>54</sup> Accordingly, the court denied relief to the alleged corporation.<sup>55</sup>

#### b. *Collecting on Inequitable Obligations*

The Montana Supreme Court will also pierce the corporate veil to preclude an individual from requiring performance under an inequitable contract. In *Barnes v. Smith*,<sup>56</sup> the plaintiff was the sole owner of a corporation. The plaintiff induced two of the corporate directors to endorse as guarantors a note executed and delivered by the corporation to a bank. After the proceeds of the note had been used by the corporation, the plaintiff paid the note and then brought suit against the directors to recover on their contract of guaranty. The court held that one who owns all the stock of a corporation and uses the corporate machinery for his own purposes, even though acting in good faith, is estopped from denying its corporate capacity.<sup>57</sup> Thus, considering the manifest inequity of plaintiff's position, the court looked behind the corporate veil and held that plaintiff could not recover.<sup>58</sup>

The court also pierced a corporate veil to preclude the plaintiff from recovering under an inequitable contract in *Shaffer v. Buxbaum*,<sup>59</sup> where a family devised a unique scheme to defraud innocent parties. The plaintiff was a carpenter who worked for a corporation owned entirely by his family. Plaintiff's son, representing the corporation, grossly underbid construction contracts. When the corporation was awarded the contract, the plaintiff deposited the down payment in his personal account and then charged all building materials to the corporation. The unsuspecting defendant

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53. *Id.* at 338-39, 163 P. at 1155.

54. The holding in *Hansen* appears to be an exception to the general rule that an officer of a corporation cannot use the corporate funds to pay his personal obligations. For a similar holding see *United States Gypsum Co. v. Mackey Wall Plaster Co.*, 60 Mont. 132, 143, 199 P. 249, 251 (1921) (where the court held that the controlling shareholders "had the right to use corporate funds to pay their personal obligations, for they were the corporation").

55. *Id.*

56. 48 Mont. 309, 137 P. 541 (1913).

57. *Id.* at 319, 137 P. at 544.

58. *Id.* at 319-20, 137 P. at 544.

59. 137 Mont. 397, 352 P.2d 83 (1960).

was later forced to pay for the materials to avoid the filing of mechanics' liens against his property. The plaintiff then filed an action against both his family's insolvent corporation and the defendant to foreclose on the plaintiff's own mechanic's lien for his labor. Relying on the family's ownership of the corporation and the obvious use of the corporation to defraud the defendant, the court pierced the corporate veil.<sup>60</sup> The construction contract was held to be in fact the contract of the plaintiff and not of the sham corporation.<sup>61</sup> Thus, the plaintiff was denied recovery.

### c. *Circumventing Regulatory Statutes*

The Montana Supreme Court also refuses to distinguish between a corporation and its shareholders where the corporation is being used to avoid compliance with a statutory requirement. The court will look beyond the corporate form to require the shareholders to comply with a statute where it is in fact the shareholders and not the corporation to whom the statute applies. Thus, the court in *Gallatin Natural Gas Co. v. Public Service Commission*,<sup>62</sup> held that a parent corporation that delivered gas to Montana residents could not escape registering with the Public Service Commission merely by creating and registering a subsidiary corporation.<sup>63</sup>

In *Board of Railroad Commissioners v. Reed*,<sup>64</sup> the court was requested to pierce the veil of an association<sup>65</sup> and to hold its members subject to the regulatory power of the Board of Railroad Commissioners. The defendant claimed that he was not subject to the control of the Board because he did not transport merchandise for hire over public highways. Rather, he claimed that he was simply an employee of a "voluntary association of business members banded together to handle the shipping of goods of the members of the association only."<sup>66</sup> The court acknowledged that the evidence warranted a finding that the creation of the association was a mere

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60. *Id.* at 402, 352 P.2d at 85-86.

61. *Id.*

62. 79 Mont. 269, 256 P. 373 (1927).

63. Based on the following facts, the court concluded that the subsidiary corporation was a mere instrumentality of the parent corporation: the parent and its directors owned all of the stock of the subsidiary; the subsidiary's books were kept at the parent's head office; and the attorney and vice president of the subsidiary admitted that the parent and subsidiary were the same entity. *Id.* at 281-82, 256 P. at 376.

64. 102 Mont. 382, 58 P.2d 271 (1936).

65. Montana has extended the doctrine of "piercing the veil" beyond the corporate structure to an association where individuals were attempting to circumvent a regulatory statute by forming a sham entity.

66. *Id.* at 384, 58 P.2d at 271.

subterfuge to evade the law. The court, however, held that it could not declare the association to be a sham because the association had not been joined as a party defendant.<sup>67</sup>

Finally, in *State ex rel. Monarch Fire Insurance Co. v. Holmes*,<sup>68</sup> the Montana court indicated in dicta that it would go behind the separate corporate entity to preclude a parent whose license has been revoked from continuing to operate illegally in Montana through its licensed subsidiary. The court held, however, that for two reasons such a holding was not warranted in the present case. First, there was no showing that the parent corporation was in fact operating the subsidiary's business directly for itself. Second, since the subsidiary had been created long before the revocation of the parent's license, the court refused to hold that the subsidiary was created as a means to circumvent the revocation.<sup>69</sup>

#### d. *Evading Taxes*

The Montana Supreme Court will also not permit corporate shareholders to evade taxes through the use of a sham corporate structure. This principle is illustrated in *Commercial Credit Co. v. O'Brien*.<sup>70</sup> The plaintiff, a Montana corporation doing business in Montana, assigned all of its assets to its sole shareholder, a Delaware corporation. Plaintiff claimed that it no longer owned the assets and thus could not be taxed on them. Plaintiff further claimed that its parent corporation did not do business in Montana and thus also could not be taxed on the assets. The court stated that the evidence supported a finding that the subsidiary was merely the alter ego of the Delaware corporation.<sup>71</sup> Furthermore, the Delaware corporation had continuously used Montana state and county offices and courts in the conduct of its business. Thus, for policy as well as legal reasons, the court held that the Delaware corporation could not escape taxation on the assets in Montana.<sup>72</sup>

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67. *Id.* at 385-86, 58 P.2d at 272-73.

68. 113 Mont. 303, 309, 124 P.2d 994, 997 (1942).

69. *Id.* at 308-09, 124 P.2d at 996-97.

70. 115 Mont. 199, 146 P.2d 639 (1944).

71. *Id.* at 211, 146 P.2d at 642-43. The court relied upon the following facts in concluding that the subsidiary was the alter ego of the parent corporation: both parent and subsidiary had the same names; the parent owned all of the stock of the subsidiary; the parent controlled, dominated and directed all affairs of the subsidiary; the parent and subsidiary were engaged in the same business; despite the assignment of accounts receivable, the subsidiary continued to receive collections; when an account was fully paid, the subsidiary and not the parent delivered the note to the dealer; the subsidiary reserved title to the secured property until the note was fully paid; and the original contracts were located in Montana and not at the parent's head office.

72. *Id.* at 219, 146 P.2d at 646.

e. *Avoiding Common Law Duties*

The Montana Supreme Court also refuses to permit a corporation to be used to avoid common law duties owed to certain parties. This principle is illustrated in *Reynolds v. Burlington Northern, Inc.*<sup>73</sup> The plaintiff, an employee of Ksanka Lumber Company, was injured when a string of Burlington Northern's railroad cars struck a cable over which the plaintiff was straddled. Ksanka was a wholly-owned subsidiary of Plum Creek Lumber Company, which was in turn a wholly-owned subsidiary of the railroad. The plaintiff sued the railroad, alleging that the railroad had breached its common law duty to provide its employees with a safe place to work. The railroad denied that it owed plaintiff such a duty because plaintiff was not its employee. The court, however, refused to ignore the "real relationship" between Ksanka and the railroad. Apparently because of the railroad's ownership, the court concluded that both Ksanka and Plum Creek were the alter egos of the railroad company.<sup>74</sup> The court further noted that at the time of the injury, plaintiff was performing work more directly connected to the operations of a railroad than to the operations of a lumber company. The court held that the railroad corporation could not, by creating a wholly-owned subsidiary, "absolve itself of its responsibility to provide a safe place to work for employees who are technically employed by a subsidiary corporation, but whose employment is directly related to the operations of a railroad."<sup>75</sup>

f. *Defeating a Partner's Interest*

The Montana Supreme Court will also pierce the corporate veil to preclude an individual from using the corporate device to defeat his partner's interest in a partnership. This principle is illustrated in *Scott v. Prescott*,<sup>76</sup> where an action was brought for a partnership accounting. Scott and Prescott had been engaged in a ranching partnership before Prescott attempted to form a corporation. While Prescott was a very experienced businessman, Scott lacked financial experience and was wholly unfamiliar with the significance of a corporation. Prescott told Scott that the corporation was "just a matter of form; that it was to work no change in their partnership affairs."<sup>77</sup> Prescott handled the incorporation. He is-

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73. — Mont. —, 621 P.2d 1028 (1980).

74. *Id.* at —, 621 P.2d at 1038.

75. *Id.*

76. 69 Mont. 540, 223 P. 490 (1924).

77. *Id.* at 550, 223 P. at 493.

sued all of the stock to himself, with the exception of two shares that went to members of his family. Scott was neither a shareholder, officer, nor director. The business continued for ten years until Scott demanded, and Prescott refused, delivery of stock certificates to Scott. On the facts,<sup>78</sup> the court concluded that the corporation had never even come into existence.<sup>79</sup> Its only function was to serve as a pseudonym under which the partnership business was conducted. Accordingly, the court held Prescott liable for Scott's interest in the partnership.<sup>80</sup>

## 2. Policy Considerations

In summary, if the court finds that a corporation is merely the alter ego or agent of its shareholders and that the corporation is being used for some fraudulent or illegal purpose, the court will generally pierce the corporate veil. Even in cases where the corporation is not being used for a fraudulent or illegal purpose, the court has shown a willingness to pierce the veil if certain underlying policy considerations are present.

As a matter of policy, the court may decide to pierce a corporate veil after considering the equities involved in bearing the risk of loss. This consideration is illustrated in *State ex rel. Foot v. Farmers' & Mechanics' State Bank of Helena*,<sup>81</sup> a case involving the bankruptcy proceeding of a bank. The bank became insolvent due to embezzlement by a cashier. The cashier was also the business manager of a corporation that was owned entirely by his wife. The issue was whether the corporation could recover funds deposited in the bank. The court pierced the corporate veil and held that the cashier's wife and the corporation were one and the same.<sup>82</sup> The court disallowed the claim, stating that in light of the lack of attention given by the wife to her corporation, it appeared "more equitable that [the wife of the embezzling cashier] should suffer loss than to impose additional burdens upon the depositors and directors of the looted bank."<sup>83</sup>

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78. The court relied upon the following facts: the corporation failed to hold any shareholder meetings beyond the incorporation stage; net profits of the business were distributed more like partnership profits than dividends; the corporation did not have a separate bank account; the corporation's funds were commingled with Prescott's personal funds; the books containing the financial records of the business were headed by Prescott's name; and Prescott frequently referred to Scott as his partner.

79. *Id.* at 561, 223 P. at 497.

80. *Id.* at 562-63, 223 P. at 497-98.

81. 85 Mont. 256, 278 P. 828 (1929).

82. *Id.* at 264, 278 P. at 831.

83. *Id.*

The court may also pierce a corporate veil where it is necessary to justify a prevention of needless loss. Thus, in *Russell v. Russell*,<sup>84</sup> the court disregarded the corporate entity to credit an executrix for her payment of corporate debts with estate funds. Ordinarily, the debts of a corporation would not constitute proper claims against the estate of the decedent even where, as here, the estate consisted entirely of the stock in the corporations. The court, however, reasoned that if the executrix had treated the two corporations and the estate as separate entities, she would have been unable to pay the corporations' debts.<sup>85</sup> Failure to pay the debts would have resulted in seizure of the corporations' property, and the estate would have been entirely lost. "It would indeed be a harsh rule that would penalize the executrix for attempting to prevent such a loss."<sup>86</sup>

Other policy considerations which influence the court's decision of whether to pierce the corporate veil include a disparity in the sophistication of the parties regarding the significance of the corporate entity,<sup>87</sup> the existence of a fiduciary relationship between the corporation and the plaintiff,<sup>88</sup> and the necessity of a governmental imposition, such as taxation.<sup>89</sup>

#### IV. THE UNPIERCEABLE VEIL

*Sun River Stock & Land Co. v. Montana Trust & Savings Bank*<sup>90</sup> illustrates that it is possible to establish and operate a corporation so as to avoid having the corporate veil pierced. In *Sun River*, two partners, Burke and Power, incorporated their livestock business as Rock Creek Ranch Company. Articles of incorporation were filed, directors and officers were elected, bylaws were adopted, meetings of the shareholders and directors were held, stock was issued, a corporate bank account was opened, all title to the corporation's property was in the corporation's name, and corporate in-

84. 102 Mont. 301, 59 P.2d 777 (1936).

85. *Id.* at 309-10, 59 P.2d at 781.

86. *Id.* at 310, 59 P.2d at 781.

87. See, e.g., *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1040 (1980) (where the court was influenced by the plaintiff's testimony that the designation "Inc." after the defendant's name on the contract had held no special significance to either her or her husband). See also *Scott v. Prescott*, 69 Mont. 540, 547, 223 P. 490, 492 (1924).

88. See *Flemmer v. Ming*, — Mont. —, 621 P.2d 1038, 1043 (1980) (real estate salesman); *State v. Hall*, 45 Mont. 498, 502, 125 P. 639, 642 (1912) (attorney).

89. See, e.g., *Commercial Credit Co. v. O'Brien*, 115 Mont. 199, 215-16, 146 P.2d 637, 645 (1944) (where the court stressed the necessity of collecting taxes to enable the government to function).

90. 81 Mont. 222, 262 P. 1039 (1928).



come tax returns were filed.<sup>91</sup> Burke and Power borrowed funds for the corporation from several sources. Notes were given in the corporation's name and were personally endorsed by Burke and Power. When Burke died soon thereafter, the corporation was insolvent. Power, as president of a separate corporation that had loaned money to Rock Creek, brought action against Burke's estate for one-half of the outstanding balance on the note.<sup>92</sup> Power claimed that Rock Creek was not a bona fide corporation because of noncompliance with a statute requiring that each director also be a shareholder. Power contended that since one of the directors had not actually paid any consideration for his shares, he was not a qualified director. Thus Power claimed that Rock Creek was really a partnership and that Burke's estate was liable for one-half of the note. The court held that Power was estopped to deny the corporation's existence because he had recognized the legal entity in the past.<sup>93</sup> Furthermore, because Rock Creek "bore the similitude of a corporation in every way,"<sup>94</sup> and because there was no hint of fraud, inequity or injustice, the court concluded that there was no reason to look behind the corporate veil. Accordingly, Burke's estate was not held liable for the insolvent corporation's debts.

## V. THE CONFUSION OF CORPORATE VEIL LAW WITH AGENCY LAW

The doctrine of piercing the corporate veil and agency law are two distinct legal theories. Recall that corporate veil cases are concerned with whether the *shareholders* of a corporation should be held personally liable for acts of the corporation.<sup>95</sup> The fact that the shareholder is also an agent, such as a director or officer, of the corporation is only important as one of many different factors that may indicate that the corporation is the alter ego of the shareholders.<sup>96</sup> Agency law, on the other hand, is concerned with the relationship between the corporation and its *agents*, namely, the direc-

91. *Id.* at 226-27, 262 P. at 1041.

92. *Id.* at 231, 262 P. at 1042.

93. *Id.* at 240, 262 P. at 1046. This language in *Sun River* suggests that where the court does not find the evidence sufficient to warrant piercing the corporate veil, the court disposes of the case by holding that the party who advocates the piercing is in substance challenging the existence of the corporation. For a similar holding, see also *Dunham v. Natural Bridge Ranch Co.*, 115 Mont. 579, 585, 147 P.2d 902, 905 (1944).

94. *Id.* at 238, 262 P. at 1045.

95. See *supra* text accompanying notes 4-10; *contra* *Little v. Grizzly Mfg.*, — Mont. —, 636 P.2d 839, 842 (1981) (where the court stated in very loose and misleading language that "[i]n Montana, *officers* of a corporation have been held personally liable where it was shown that the corporation was merely an 'alter ego' for a person using a shield for purposes of fraud"). (emphasis added).

96. See *supra* note 29 and accompanying text.

tors, officers, and employees of the corporation. The fact that an agent is also a shareholder is immaterial.

The Montana Supreme Court confuses the doctrine of piercing the corporate veil with agency law principles. There are two areas where this confusion arises: the determination of a corporation's liability on contracts executed by its agent and the determination of a corporate agent's liability for his own criminal and tortious acts.

A. *The Corporation's Liability for Contracts Executed by Its Agent*

The Montana Supreme Court confuses corporate veil law with agency law when deciding whether a corporation is liable for a contract executed on behalf of the corporation by its president. In *Edwards v. Plains Light & Water Co.*<sup>97</sup> the Montana Supreme Court held that a corporation could not avoid an employment contract by claiming that the president had lacked the necessary authority to hire the plaintiff.<sup>98</sup> After superficially discussing agency law, the court disposed of the case by applying corporate veil law.<sup>99</sup> The court noted that the president owned 497 of the corporation's 500 shares of stock. Moreover, the president had complete and exclusive control over the operations of the corporation. The court stated that:

[T]he corporate entity, as distinguished from [the president] in his capacity of agent, is to be ignored, and when he executes such a contract as that under consideration here, it must be regarded as much that of the company as if it had been authorized in the most formal manner.<sup>100</sup>

Thus, the court concluded that under the circumstances, any action by the president was for all intents and purposes the action of the corporation.

The court only confused matters by attempting to apply the doctrine of piercing the corporate veil. A corporate veil is pierced to impose the legal consequences of a corporation's act directly upon the shareholders.<sup>101</sup> *Edwards* did not involve the issue of whether the shareholders were liable for acts of the corporation. Rather, the issue was whether the corporation was liable for an act

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97. 49 Mont. 535, 143 P. 962 (1914).

98. *Id.* at 545, 143 P. at 964-65.

99. *Id.* at 547-48, 143 P. at 965.

100. *Id.*

101. See *supra* text accompanying note 6.

of its agent. This issue is an agency issue, and the court should have applied only agency law. Under agency law, a corporation, as a principal, is bound by all contracts made in its behalf by an agent authorized to make such contracts.<sup>102</sup> The position of president carries with it the implied authority to perform the acts necessary to carry on the ordinary business of the corporation.<sup>103</sup> Since the ordinary business of this particular corporation required the hiring of employees, the corporation was bound by the employment contract executed by the president.

### B. *The Corporate Agent's Liability for His Criminal and Tortious Acts*

The Montana Supreme Court also confuses corporate veil law with agency law when deciding whether a corporate agent can be held personally liable for his crimes or torts committed while acting in his capacity as agent. In *State v. Hall*<sup>104</sup> and *State v. Holdren*<sup>105</sup> the court stated that it was piercing the corporate veil to preclude an individual from escaping responsibility for his criminal acts. In both cases, the court upheld the conviction of the defendant for embezzling funds while acting as the president of a collection agency.<sup>106</sup>

The principle set forth in *Hall* and *Holdren* is laudable: the corporate entity should not be the basis for avoiding criminal liability where the individual is personally responsible for the crime. But the court only confused matters by talking in terms of "piercing the corporate veil." As a general rule, an individual is always subject to liability for his own criminal conduct.<sup>107</sup> The fact that the individual is an agent of a corporation cannot be used to ab-

102. MONT. CODE ANN. § 28-10-601 (1981) provides that "[a]n agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." MONT. CODE ANN. § 28-10-603 (1981) adds that "[a]n instrument within the scope of his authority by which an agent intends to bind his principle does bind him . . . ." See generally Wyse, *A Framework of Analysis for the Law of Agency*, 40 MONT. L. REV. 47 (1979).

103. *Edwards*, 49 Mont. at 545, 143 P. at 964.

104. 45 Mont. 498, 125 P. 639 (1912).

105. 143 Mont. 103, 387 P.2d 446 (1963).

106. In both *Hall* and *Holdren* the court relied upon the following facts to pierce the veil and hold the president liable for embezzling: the president owned all of the corporation's stock, the president used corporate funds for personal expenditures, and the president had sole control over the books and the bank account.

107. MONT. CODE ANN. § 45-2-301 (1981) provides that a "person is responsible for conduct which is an element of an offense if the conduct is . . . that of the person himself . . . ."

solve the individual from liability.<sup>108</sup>

The Montana Supreme Court's confusion of agency law with corporate veil law in a torts issue is apparent from *Phillips v. The Montana Education Association*,<sup>109</sup> a case involving an action for wrongful termination of employment. The parties did not dispute the fact that Phillips had a cause of action against the corporation for alleged breach of contract.<sup>110</sup> The question was whether the agents of the corporation, namely the officers, directors and employees, could be held individually liable for the tort of maliciously induced breach of employment contract. The court balanced public policy considerations and set forth the following rules: "Where an officer or director acts against the best interests of the corporation, acts for his own pecuniary benefit, or with the interest to harm the plaintiff, he is personally liable."<sup>111</sup> The court concluded, however, that the "privilege of limited liability"<sup>112</sup> should be applicable in those situations where actions are motivated and taken in the furtherance of corporate purposes, policies and interests."<sup>113</sup> Thus, since the plaintiff failed to show that the actions taken by the individual defendants were not taken in furtherance of corporate interests, the court applied the privilege of limited liability to shield the individual defendants from personal liability.<sup>114</sup>

The court in *Phillips* reached the correct result, but its appli-

108. MONT. CODE ANN. § 45-2-312(1) (1981) provides that a "person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed to the same extent as if the conduct were performed in his own name or behalf." The annotator's note states: "The purpose of the statute is to prevent an offender from insulating himself from criminal liability by performing acts through a corporation . . ." MONT. CODE ANN. § 45-2-312 annotator's note (1981).

109. — Mont. —, 610 P.2d 154 (1980).

110. As indicated in the discussion of the *Edwards* case, see *supra* notes 97-103 and accompanying text, a corporation, as a principal, is bound by all contracts made in its behalf by an agent authorized to make such contracts. The agent, however, is not personally liable under the contract unless (1) he manifests his consent to be bound, (2) he enters into the contract without believing in good faith that he has the authority to do so, or (3) his acts are wrongful. MONT. CODE ANN. § 28-10-702 (1981). Since none of these conditions were present in *Phillips*, the court correctly held that only the corporation was liable for breach of the employment contract, and that the agents of the corporation were not liable.

111. *Phillips*, — Mont. —, 610 P.2d at 158.

112. The court's discussion of "limited liability" in the context of a corporate director is confusing. Recall that corporate *shareholders* enjoy limited liability, which is personal liability for acts of the corporation limited to the amount paid for their stock. See *supra* text accompanying note 3. Since directors, and particularly directors of the Montana Education Association, do not necessarily own stock in the corporation, it is improper to talk of limiting their liability to the amounts paid for their stock. "Absolute liability" would have been a more appropriate term.

113. *Id.* at —, 610 P.2d at 158.

114. *Id.*

cation of corporate veil law, rather than agency law, was improper and served only to confuse the court's reasoning. Just as an agent is always personally liable for the crimes he commits, he is also personally liable for the torts he commits.<sup>115</sup> The agent cannot escape liability for his torts by shielding himself behind his principal.<sup>116</sup> Thus, in *Phillips*, the officers and directors could be held individually liable for the tort of maliciously induced breach of employment contract, but only if the plaintiff could show that the defendants *maliciously* induced the corporation's refusal to perform.<sup>117</sup> The district court found that the actions taken by the defendants were not done with malice.<sup>118</sup> Thus, although the court applied the wrong legal theory, its holding that the agents were not personally liable for the tort is correct.

## VI. CONCLUSION

The corporate form of business has greatly encouraged trade and industry in Montana as well as the rest of the nation.<sup>119</sup> Limited liability of shareholders has contributed largely to that economic development. Nonetheless, the injustice that can result from improper uses of the corporate device cannot be ignored. The doctrine of "piercing the corporate veil" recognizes both the policies fostering protection of shareholders and the equities favoring those who have been harmed by improper use of the corporate device.<sup>120</sup> Realistically, it is difficult to predict with absolute certainty the likelihood for success in piercing a corporate veil. Due to the equitable nature of the doctrine, each case must be decided on the basis of its unique facts. But while the circumstances vary with the facts of each case, it is reasonably safe to predict that where a shareholder dominates a corporation so completely that he be-

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115. See generally W. SEAVEY, AGENCY § 132 (1964). MONT. CODE ANN. § 28-10-702 (1981) provides that "an agent is responsible to third persons . . . for his acts in the course of his agency . . . (3) when his acts are wrongful in their nature."

116. The existence of an agency relationship expands, rather than limits, liability in a tort situation. Through invocation of vicarious liability, the principal can also be held liable for the tort of its agent if the agent was acting within the scope of his employment when the tort was committed. MONT. CODE ANN. § 28-10-602(1) (1981) provides that "a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent . . . ."

117. The court set forth the *prima facie* case for the tort of malicious inducement of breach of contract. The plaintiff must show "(1) that a contract was entered into, (2) that its performance was refused, (3) that such refusal was induced by the unlawful and *malicious* acts of the defendant, and (4) that damages have resulted to the plaintiff." (emphasis added) *Phillips*, — Mont. at —, 610 P.2d at 157.

118. *Id.* at —, 610 P.2d at 158.

119. See generally H. BALLENTINE, CORPORATIONS § 1 (rev. ed. 1946).

120. Note, *Disregard of the Corporate Entity*, 4 WM. MITCHELL L. REV. 369 (1978).

comes the corporation itself, the Montana court will pierce the corporate veil where necessary to prevent fraud or achieve equity.

