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THE RECOVERY OF BANKRUPTCY ESTATE ASSETS FROM NON-DEBTOR ENTITIES

by

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Picture this: you are a creditor. Having a once productive relationship with a company that has fallen into bankruptcy, you now have the unpleasant task of recouping your losses from the bankrupt. Armed with your enforceable debt, and reinforced by a valid security interest, you participate in the bankruptcy proceedings with confidence that you will receive at least some portion of your money back.

Unfortunately for you, the debtor has other ideas. The debtor is a company held in sole ownership by its president, who is doing everything she can to siphon assets out of the reaches of creditors and into her own pockets. Complex stock transfers, mergers, and other transactions that skirt the law slowly drain the estate, and various legal bills pile up from your efforts.

After some time, you achieve a success, the court has ruled that the creditors have access to the president's assets which were deftly removed from the estate. The court has used a well-known theory for the task, termed "piercing the corporate veil." The phrase describes the act of disregarding the legal difference between a company and its controller or a parent and its subsidiary. The theory holds, in short, that if a person or entity holds such great domination over a corporate entity that it has no will of its own, the corporate separateness between the two is discarded. Naturally, after hearing of the unbridled access the court's ruling offers, your confidence is renewed that the unscrupulous president will not be able to escape the rightful obligations of her creditors.

However, the president of the debtor corporation has more tricks up her proverbial sleeve. After your attorneys comb her finances for remains of the corporate assets, you realize that most of the funds have been shuttled to friends, relatives, shell companies and various non-debtor entities. The result is a complicated web of corporate relationships, agreements, stock purchases, and strawpersons that will prove difficult and costly to untangle. What was once a simple secured debt in bankruptcy has turned into a costly exercise from which most creditors will never be able to recover.[1]

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This paper will examine some of the options available for creditors faced with such a problem. Traditional piercing the corporate veil doctrine, as embedded in state law, only goes so far. Many states authorize the disregarding of dominating corporate or individual forms, but do not authorize further efforts to reach assets belonging to the bankrupt estate. Arguments on policy grounds or to make new law in the state are possible, but represent a risky effort at best, particularly in states where corporate identity is a bedrock legal principle rarely disregarded by its judiciary. As a result, assets properly belonging within the bankruptcy estate that have undergone multiple transfers may fall beyond the reach of creditors under traditional state law.

This paper examines the issue and offers solutions for the beleaguered creditor. Part I will examine traditional piercing the corporate veil under state law, using Connecticut state law as a sample because it presents aspects of corporate veil law common to many states. This part will briefly address choice of law issues, examine Connecticut's corporate veil law, and through this jurisprudence show the uses, benefits, and limitations of traditional corporate veil doctrine.

Part II examines remedies beyond state corporate veil law. This part details the existence of federal common law regarding piercing the corporate veil. Federal common law is not only available but must be used when federal policies are thwarted by the limitations of state corporate veil law. Using such federal doctrine should be followed by creditors whenever possible because federal law tends to be less deferential of corporate forms and holds tools that could be used to reach well-dissipated assets of the estate.

Part III looks at additional tools available. Federal common law offers various methods with which to reach dissipated assets beyond state corporate veil doctrine. Two such methods will be highlighted here. First, the doctrine of substantive consolidation will be examined. Substantive consolidation joins separate but related bankrupt debtors into one unified estate. However, substantive consolidation may also be used to join *non-debtor* assets into a debtor estate. Although there is some controversy over the measure, this paper concludes that substantive consolidation of non-debtor assets is affirmed by implication by the Supreme Court, and presents a valuable tool for reaching non-debtor entities who hold dissipated corporate assets.

Part III also examines using piercing the corporate veil doctrine to reach estate assets of individual relatives and associates of the debtor's controller. Caselaw has been slowly developing that authorizes reaching such individuals who may have no direct relation to the debtor, but through the debtor's owner or controller now hold assets so that they may fall beyond the reach of the creditors. This line of cases will be examined and a conclusion reached that such cases should be supported as a useful legal tool to reach hidden assets.

PART I: THE BENEFITS AND LIMITATIONS OF PIERCING THE CORPORATE VEIL: AN EXAMINATION OF CONNECTICUT LAW AS A SAMPLE

A. Choice of Law

For a federal bankruptcy court faced with a corporate veil issue, deciding which state law to apply is not always an automatic process. Traditional doctrine dictates that a federal court sitting in diversity applies the choice of law rules of the state in which it sits to determine which state's law is appropriate.[2]

Although an important first step of analysis, choice of law does not normally raise lengthy debate. However, complexities can raise the question into a significant issue when the debtor has shifted states of incorporation. For example, Connecticut law holds that a Connecticut corporation that reincorporates in another state cannot escape liability for conduct that occurred while the corporation was previously incorporated in Connecticut.[3] As a result, a Connecticut corporation that moves to another state and incorporates there while the bankruptcy is pending (or any other suit for that matter) will still face Connecticut law as the applicable law at issue.[4] Other conflicts issues do exist, and creditors must be aware that choice of law doctrine may raise itself as a possible concern.

B. Piercing the Corporate Veil Under Connecticut Law

Like other states, Connecticut deems a corporation a discrete entity in which stockholders are not liable for its acts or obligations.[5] Corporations receive this protection so that entities working on their behalf can function without fear of personal reprisal for the actions or liabilities of the corporate entity. Indeed, Connecticut law grants significant protection to the corporate form and will only pierce that form in extraordinary situations. As Connecticut jurisprudence states, "[o]rdinarily the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice."[6]

However, a corporate veil is not an impenetrable shield. If a corporate entity is dominated by another, courts will generally disregard the corporation as a fiction and strip the protection of immunity.[7] In determining whether such a threshold of domination exists, a bright line rule does not exist, and the court makes the determination according to the particular facts of each case.[8]

Under Connecticut law, two theories exist for disregarding the corporate form: the instrumentality rule and the identity rule.[9] To satisfy the instrumentality rule, plaintiff must provide three elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.[10]

The second theory that Connecticut offers to disregard a corporate form is the identity rule. Rather than requiring control or injury, the identity rule applies "when the plaintiff shows such a unity of interest and ownership that the independence of the corporation had in effect ceased or had never begun, and that an adherence to the fiction of separate identity would serve only to defeat justice and equity[.]"[11] The identity rule is most commonly applied where two corporations are controlled by one entity because of the presence of common shareholders or owners and the lack of corporate formalities.[12] However, individual stockholders have also been found liable under identity theory.[13] Although many factors may be taken in consideration when determining whether to disregard a corporate form, the overriding consideration addresses the level of dominion exerted by the entity at issue.[14] Piercing the corporate veil doctrine in Connecticut also holds flexibility in its execution as well as its methods of determination. If a corporate veil must be penetrated, it can be pierced only partially and does not compel disregarding the entire corporate form.[15]

Since the doctrine of disregarding the corporate form is equitable in nature, it may also be disregarded on general principles of equity.[16] Where equity demands piercing the corporate form, no requirement of actual fraud need be proven.[17] Although some Connecticut decisions suggest a fraud requirement,[18] proof of actual deceit does not always need to be shown to disregard a corporate form.[19]

Connecticut offers a corporate veil law that resonates with many other states. The instrumentality rule focuses on the use of the corporation as a mere tool for the dominating entity's ends. The identity rule addresses a separate though related concept -- the existence of the individuality of the corporation compared with its stockholders. These rules provide a number of factors as guidance. Resolution of the issue is ultimately a fact sensitive matter, and ultimately rests upon equitable principles.

PART II: PIERCING THE CORPORATE VEIL UNDER FEDERAL COMMON LAW: AN OPPORTUNITY FOR EXPANDED REACH BY CREDITORS

A. Piercing the Corporate Veil Under Federal Common Law

Federal common law also articulates its own corporate veil doctrine. This doctrine parallels state law in some respects. For example, considerations such as dominance and identity are important to both doctrines. However, federal law offers some distinctive characteristics to its veil doctrine that may prove useful for the creditor. This section examines corporate veil doctrine in federal common law, focusing on the law of the Second Circuit in which the state of Connecticut sits, and reveals that federal law offers better opportunities for piercing a corporation's veil that its Connecticut counterpart.

Federal common law regarding disregarding the corporate form holds many similar requirements to its Connecticut counterpart. "Federal common law allows piercing of the corporate veil where (1) a corporation uses its alter ego to perpetrate a fraud or (2) where it so dominates and disregards its alter ego's corporate form that the alter ego was actually carrying on the controlling corporation's business instead of its own."[20]

However, unlike Connecticut law, piercing analysis must not necessarily fall neatly into the instrumentality or identity doctrine. Accordingly, federal common law offers a list of considerations for a court to apply for disregarding the corporate form. Fifteen factors have been articulated, particularly useful here since they address parent/subsidiary relations, to provide guidance on piercing corporate veil issues:

> (1) common or overlapping stock ownership between parent and subsidiary; (2) common or overlapping directors and officers; (3) use of same corporate office; (4) inadequate capitalization of subsidiary; (5) financing of subsidiary by parent; (6) parent exists solely as holding company of subsidiaries; (7) parent's use of subsidiaries property and assets as its own; (8) informal intercorporate loan transactions; (9) incorporation of subsidiary caused by parent; (10) parent and subsidiary's filing of consolidated income tax returns; (11) decision-making for subsidiary by parent and principals; (12) subsidiary's directors do not act independently in interest of subsidiary but in interest of parent; (13) contracts between parent and subsidiary that are more favorable to parent; (14) non-observance of formal legal requirements; (15) existence of fraud, wrongdoing or injustice to third parties.[21]

Like Connecticut law, the determination of whether to pierce a corporate veil is an equitable one and rests on the facts of each case.[22]

Federal law also offers relaxed requirements to which other states may not subscribe. For example, the absence of stock ownership by an entity does not necessarily preclude disregarding a corporate form to reach that entity's assets.[23] With reference to persons, individuals may be named equitable owner of a company based on their control even if they exhibit no formal criteria of ownership.[24]

Since a multitude of considerations exist for determining whether to pierce the corporate veil, more grounds are available from which to do so. Unlike Connecticut which channels such questions through two theories, federal law provides far more factors which are equal in weight. A combination of any of these may trigger the necessary domination or control required to disregard a corporate form. Accordingly, federal common law favors the creditor who would be faced with such an issue, who can bring a more diverse range of facts to show veil that piercing is necessary in their circumstance.[25]

PART III: BEYOND PIERCING THE CORPORATE VEIL: AN EXAMINATION OF THEORIES UNDER FEDERAL LAW TO REACH ASSETS DISPERSED BY THE DEBTOR'S CONTROLLER

Traditional veil piercing theory under federal law requires less indicia of control to permit disregarding of a corporate form. When a veil is pierced, the entity dominating the corporation becomes liable for the same obligations as the company. In a bankruptcy context the company at issue usually means the debtor.

However, traditional veil piercing can be an incomplete remedy. Piercing the corporate veil can only reach the dominating entity's assets. When the dominating entity has dissipated the debtor's assets through itself to other associates and shell companies, veil piercing may prove ineffective and thus the creditor's interest in receiving its full due under bankruptcy laws remain unfulfilled.

This part first shows the requirements necessary for accessing federal corporate veil piercing law. In most situations, choosing federal corporate veil theory cannot merely be a selection over state law by personal preference. Parties must fulfill specific requirements to use federal doctrine. Once these requirements are described, this part will then examine two legal theories available and recommend them as opportunities for action.

A. Articulating Necessity for Federal Law

The application of federal law for disregarding the corporate form is not an automatic one. As noted, *supra*, under most circumstances the federal court applies the law of the state in which it sits to determine whether to disregard a corporate form.[26] For example, Connecticut law would apply to a federal court sitting in Connecticut. However, federal common law can be applied in addition to or overriding of state law where a court finds that it must protect a substantial federal interest or policy.[27] In other words, if the application of state corporate veil law doctrine alone does not sufficiently fulfill federal policies or interests, a federal court may apply whatever federal jurisprudential tools are available to achieve those ends.[28] Such policies are prevalent in bankruptcy, and may be thwarted when a dominating entity shuttles assets away from the debtor and to allied associates or firms.

For example, bankruptcy law establishes as a fundamental tenet the breadth of the available "property of the estate." The term encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case."[29] The phrase is interpreted in a very broad fashion, encompassing any property of the debtor no matter where it may be located.[30] The broad interpretation of the phrase, as interpreted by *United States v. Whiting Pools, Inc.*,[31] furthers the goals of Congress: "[b]oth the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate."[32]

The Congressional and Judicial policy of broadly determining 'property of the estate' will be partially thwarted if disregarding a firm's corporate form is the only action taken. If a debtor, through its owner, has transferred assets away from the estate into various allied entities, traditional corporate veil law will not reach such organizations and thus not fulfill the Congressional mandate for a broad reading of the property of the estate. Accordingly, the thwarting of such an interest can represent a useful articulated policy for a creditor with which to contend that the court should take the reins of the more invasive federal common law and leave state corporate veil law behind.

A second policy existing for an estate in bankruptcy is the protection of tort creditors. The distinction between tort and contract creditors is a significant one, which arises out of the nature of the relationship between the creditor with the debtor. Contract creditors enter into agreements voluntarily for an exchange of goods and services and presumably self-beneficial gain. Tort creditors are involuntary creditors, and do not choose a relationship with the debtor. The creditor relationship is forced upon them just as suddenly as the injury inflicted.[33] Tort creditors often do not enter the creditor/debtor relationship on equal footing, and may suffer from unequal bargaining power compared to their contract creditor brethren. Appropriately, where tort creditors are concerned, less reluctance exists to disregard corporate forms than when faced with their contract counterparts.[34] The federal policy of protecting these creditors, particularly vulnerable because of their lack of sophistication and involuntary participation in the suit, would be thwarted if measures are not taken to ensure compensation for their injuries.

Accordingly, to the extent that state law (here Connecticut law) does not permit disregarding the corporate form beyond the original dominator into associate entities, a creditor may contend that state law thwarts important federal policies favoring a broad view of the bankruptcy estate and the protection of involuntary tort creditors. When these goals are thwarted, federal common law may be used to further these goals.

B. Substantive Consolidation Examined

Substantive consolidation, in short, is a process whereby the assets and liabilities of different entities are merged together and treated as though they are one unit.[35] It results not only in the pooling of assets of the related entities, but satisfies liabilities from the common fund that results.[36] The common fund eliminates inter-entity claims; and combines the creditors of the multiple entities for purposes of voting on reorganization plans.[37] Substantive consolidation permits what may not be possible when a debtor's assets have been widely dispersed -- a comprehensive inventory of the assets available to creditors prior to submission of a bankruptcy plan.[38]

Substantive consolidation is not merely an alternative phrase for piercing the corporate veil.[39] Rather, substantive consolidation achieves a different result and effectuates a different goal. Piercing the corporate veil sheds the limited liability afforded to a corporation, which rests on the determination that some domination by the corporation's owner has harmed third parties.[40] Substantive consolidation, on the other hand, merges the two entities into one and sees as its goal the equitable treatment of all creditors.[41] The primary focus of substantive consolidation is not deception or domination, but rather whether the affairs of various entities have become so entangled (i.e. financially, in business practice) that consolidation of these entities would benefit all creditors involved.[42]

The power of substantive consolidation does not find its explicit origins in the Bankruptcy Code. Rather, substantive consolidation primarily traces its origins to the development of common law. The only statutory-based allusion to the concept rests in section 1015 of the Federal Bankruptcy Rules.[43] Section 1015 provides for joint administration of the estates of two debtors.[44] Joint administration differs from substantive consolidation because it does not join multiple entities. Rather, it combines two cases by using a single docket to hear claims involving common issues.[45]

Although 1015 authorizes a distinct mechanism from substantive consolidation, the concept is explicitly addressed in the Advisory Committee Note ("Committee Note") for section 1015. The Committee Note states that "[c]onsolidation of the estates of separate debtors may sometimes be appropriate, as when affairs of an individual and a corporation owned or controlled by that individual are so intermingled that the court cannot separate their assets and liabilities."[46] However, the Committee took a neutral stance towards the doctrine, noting that substantive consolidation is "neither authorized nor prohibited" by section 1015.[47] In short, as some courts have aptly noted, substantive consolidation is mainly the "product of judicial gloss," and does not derive explicit authority from the Bankruptcy Code.[48]

Merely because substantive consolidation does not stem from statutory command does not necessarily mean that the doctrine stands on uncertain legal ground. Far from it -- courts have consistently found the authority for substantive consolidation in the bankruptcy code's general equitable powers pursuant to 11 U.S.C. § 105.[49] Section 105 states, in pertinent part, that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[50] These powers, although quite broad, must be exercised within the confines of the Bankruptcy Code and cannot be used in a manner inconsistent with the Code's mandates.[51]

Although no single indicia exists to determine whether substantive consolidation is appropriate, several factors have been raised by various courts to determine its appropriateness.[52] One such test rests on a showing of need or the avoidance of harm and that the benefit of consolidation will outweigh its harm to any objecting creditors.[53] Others focus the harm/benefit analysis to creditors and look to the past behavior of the debtors towards the creditors and the debtors' present financial status. Specifically, this test considers whether the debtor entities share a substantial identity or have financial affairs that are so entangled that consolidation will benefit all creditors.[54] Another addresses similar considerations but adds specific consideration of creditors who relied on the separate credit of one of the entities and will be prejudiced by the consolidation.[55] The fourth and final set of considerations articulated focus on the unity between the two entities, factors similar to veil piercing doctrine.[56]

Although specifics differ, the decision of whether to substantively consolidate entities rests on two key considerations: the effect on creditors and the status of the entities to be consolidated. And between the two, the paramount consideration is likely the benefit or harm to creditors when substantive consolidation occurs. It is questionable whether a court faced with harming creditors if two entities merged would enact substantive consolidation of similar entities. Substantive consolidation of two debtors ultimately rests on the benefit or harm to the creditors, and has been widely used and accepted for the task.

C. Substantive Consolidation of Non-Debtors

Substantive consolidation has been widely applied for the merging of separate debtors. It has certainly been useful for merging debtors that have acted as one unit, or have their finances so entangled that the creditors would benefit from the combination. Such doctrine, though useful for multiple debtors, leaves creditors stranded who witness the property of the bankruptcy estate siphoned away to non-debtor entities. Consolidation of the debtor with non-debtor entities would allow creditors to reach these debtor havens and bring lost assets back into the estate. However, the measure is a controversial and unsettled one, leaving the bankruptcy bench and commentators alike disagreeing as to whether substantive consolidation can be used in such a manner at all.

Primary authority for the proposition that substantive consolidation may be ordered with non-debtor as well as debtor entities stems from the Supreme Court itself. In *Sampsell v. Imperial Paper Corp.*,[57] the Supreme Court affirmed a consolidation of a non-debtor corporation into the estate of a debtor.[58] The Supreme Court reached this conclusion where the affairs of the non-debtor corporation were so closely associated with the debtor dominant shareholder that the non-debtor corporation was little more than a corporate pocket to place assets beyond the reach of creditors.[59] In upholding consolidation, the Court stated, in passing, that the "power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete."[60]

Some bankruptcy courts have followed *Sampsell* and approved substantive consolidation involving non-creditors.[61] However, the application of substantive consolidation to non-debtor entities remains a controversial one. In many circuits no cases explicitly affirm such a proposition, and caselaw exists rejecting the concept.[62] Thus, although it is not entirely settled that merging with a non-debtor estate is an accepted practice, substantive consolidation presents a useful vehicle with which to retrieve assets which have been diverted away from the estate.

D. Reaching Non-debtor Associates and Relatives

In certain situations, equity and justice may permit piercing the corporate form beyond the sham organizations to recover funds from non-owner entities who may have helped perpetrate corporate frauds. When various relatives or close friends operate in conjunction to shuttle funds out of reach of bankruptcy creditors, equity demands reaching beyond the corporate form and attributing property held by various family members to the estate.[63]

For example, in *In re Daily,*[64] the court addressed the issue of whether three entities owned by the debtor's relatives could be attributed to the debtor. In spite of the fact that the debtor did not have ownership or officer status within the corporations,[65] the court concluded that the debtor controlled three corporate entities which were legally owned by the debtor's wife, son, and daughter.[66]

The court reasoned that the debtor's behavior towards the firms, in spite of his lack of formal relationship, proved telling. The debtor organized them as a means of carrying on his business and was the "moving and controlling force behind all of their actions."[67] The court found that state corporation law as well as federal bankruptcy court cases supported the decision to attribute property to nonowners in order to prevent injustice.[68]

This method of reaching non-debtor assets presents an alternative method to substantive consolidation theory. Cases like *In re Daily* apply federal and state common law to apply a kind of equitable ownership to the non-debtor entities. The reasoning is based on equitable corporate veil principles, with the goal to do justice on behalf of the creditors.

Reaching non-debtors in this way has a clear advantage – it applies traditional piercing the corporate veil doctrine and does not require applying the more controversial issue of substantively consolidating non-creditors. However, such doctrine promoting an equitable ownership to another may not be developed under many state's common law. Where it is developed, action may only be based in equity, a doctrine that can prove unhelpful since it rests so much on the facts of an individual case. Reaching non-debtors through piercing the corporate veil is an effective method of reaching dispersed assets, but may not be available in all cases.

CONCLUSIONS

Retrieving funds from a bankrupt estate represents a most uncertain task for a creditor to perform. Competing creditors seek recovery from similar assets and the debtor often does not have the money available to repay everyone. The problem is made even more difficult when the debtor looks to place funds outside the reach of creditors. Piercing the corporate veil may help when debtors disperse the funds to themselves from the estate. However, when debtors take the additional step of passing assets to relatives and allied entities, the task of recovery becomes more difficult.

The concepts offered here provide additional opportunities for beleaguered creditors. By seeking to apply federal common law to pierce the corporate veil, creditors may tap into a more flexible doctrine that is generally less respectful of corporate forms than its state law counterpart. Further, the doctrine of substantive consolidation provides a more drastic remedy than piercing the corporate veil. Substantive consolidation, in merging the assets of the debtor and non-debtor party, treat the two entities as one unit. However, applying substantive consolidation against a non-debtor remains a controversial and unsettled issue of law which has been rejected in some districts. Finally, the creditor may apply an equitable ownership doctrine and contend that the debtor's dominant control over an entity should constitute ownership for purposes of the bankruptcy.

No one theory may prove dispositive all of the time, for these remedies merely present various alternatives for the creditor. However, reaching beyond traditional state corporate veil alter ego theory into the doctrines discussed here will likely increase the likelihood of creditors retrieving assets dispersed from the debtor estate.

ENDNOTES

[1]This scenario is loosely based on the facts stated in In re MacDonald, 114 B.R. 326 (D. Mass. 1990) and In re Daily, 107 B.R. 996 (Bankr. D. Haw. 1989), *rev'd*, 940 F.2d 1306 (9th Cir. 1991).

[2]*E.g.,* Klaxon Co. v. Stentor Electric Mfg., 313 U.S. 487, 496 (1941); Valley Juice Ltd. v. Evian Waters of France, Inc., 87 F.3d 604, 607 (2d Cir. 1996); In re Carterhouse, Inc., 94 B.R. 271, 276 (Bankr. D. Conn. 1988). Connecticut has traditionally applied the doctrine of lex loci delicti -- the place where the injury occurred determines which state's law applies. Pollack v. Bridgestone/Firestone, Inc., 939 F. Supp. 151, 152 (D. Conn. 1996). However, Connecticut abandons the lex loci delicti doctrine when "strict application of the lex loci delicti rule frustrates the legitimate expectations of the parties and undermines an important policy of the state." O'Connor v. O'Connor, 201 Conn. 632, 637, 519 A.2d 13, 15 (1986). In these cases, Connecticut follows the 'most significant relationship' test articulated in section 145 of the Restatement (Second) Conflict of Laws. Pollack, 939 F. Supp. at 152. Under this test, the law of the state applies which has the most significant relationship to the occurrence and the parties. *Id.*

[3] Mackay v. New York, N.H. & H.R. Co., 82 Conn. 73, 85 (1909) ("That . . . a merger was effected between . . . a purely Connecticut corporation, and [a Massachusetts

corporation] certainly cannot detract from the power of the courts of this state to regulate the conduct of the corporation now bearing the latter name by compelling it to fulfill its obligations, here assumed, to do acts here to be performed. To a suit against it as a Connecticut corporation it must respond as a Connecticut corporation."). *See also* CONN. GEN. STAT. § 33-820 (1997) ("A proceeding pending against any corporation party to the merger may be continued as if the merger did not occur[.]").

[4] *Id.*

[5] Kmart Corp. v. First Hartford Realty Corp., 810 F. Supp. 1316, 1327 (D. Conn. 1993) ("[A] corporation is a distinct legal entity and the stockholders or other related corporations are not personally liable for the acts or obligations of the corporation.").

[6] Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc., 187 Conn. 544, 557, 447 A.2d 406, 412 (1982). See also Carterhouse, 94 B.R. at 276; Hoffman Wall Paper Co. v. Hartford, 114 Conn. 531, 535, 159 A. 346, 348 (1932).

[7] Kmart Corp., 810 F. Supp. at 1327 ("Courts will disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor.").

[8] Angelo Tomasso, 187 Conn. at 554-55, 447 A.2d at 411 ("No hard and fast rule, however, as to the conditions under which an entity may be disregarded can be stated as they vary according to the circumstances of each case.").

[9] Connecticut courts also frequently use the phrase "alter ego" as a means of describing when a corporate veil should be pierced. The term does not arise as a term of art meaning a separate theory from instrumentality or identity doctrine. Rather, it commonly appears as a method to describe the overall goal of veil piercing theory: to determine whether another individual or entity lies behind a corporation such that the corporate veil should be ignored. *E.g.*, De Leonardis v. Subway Sandwich Shops, Inc., 35 Conn. App. 353, 358, 646 A.2d 230, 233 (1994) ("When the corporation is the mere alter ego, or business conduit of a person, it may be disregarded."). The phrase is also used as a synonym for the identity doctrine used in Connecticut, Klopp v. Thermal-Sash, 13 Conn. App. 87, 89 n.3, 534 A.2d 907, 908 (1987), or a phrase that could encompass both identity and instrumentality doctrine. Saphir v. Neustadt, 177 Conn. 191, 209-10, 413 A.2d 843, 853-54 (1979).

[10] Angelo Tomasso, 187 Conn. at 553, 447 A.2d at 410 (emphasis omitted); Zaist v. Olson, 154 Conn. 563, 575, 227 A.2d 552, 558 (1967). *See also* Campisano v. Nardi, 212 Conn. 282, 291-94, 562 A.2d 1, 5-7 (1989).

[11] United Electrical Contractors, Inc. v. Progress Builders, Inc., 26 Conn. App. 749, 755, 603 A.2d 1190, 1194 (1992).

[12] *Id.*

[13] Saphir v. Neustadt, 177 Conn. 191, 211, 413 A.2d 843, 854 (1979).

[14] In re Carterhouse, Inc., 94 B.R. 271, 276 (Bankr. D. Conn. 1988) ("[T]he key factor in any decision to disregard the separate corporate entity is the element of control or influence exercised by the entity sought to be held liable over corporate affairs.").

[15]Angelo Tomasso, 187 Conn. at 559, 447 A.2d at 413 ("The fact that the corporate veil could be disregarded for some purposes does not mean that it must be disregarded for all purposes.")

[16]Connecticut Co. v. New York, N.H. & H.R.R., 94 Conn. 13, 27, 107 A. 646, 651 (1919) (A corporate entity "will be disregarded where, as here, the interests of the justice and righteous dealing so demand.").

[17]International Union v. Bristol Brass Co., 1988 WL 235669 at *3 (D. Conn. 1988) (construing Connecticut law). *See also* Bergesen d.y. A/S v. Lindholm, 760 F. Supp. 976, 988 (D. Conn. 1991) (agreeing with this conclusion) (citing Brunswick Corp. v. Waxman, 599 F.2d 34, 36 (2d Cir. 1979) (equity considerations paramount)).

[18] *E.g.,* Tishman Equip. Leasing, Inc. v. Levin, 152 Conn. 23, 28, 202 A.2d 504, 507 (1964); Humphrey v. Argraves, 145 Conn. 350, 354, 143 A.2d 432, 433-34 (1958).

[19] DeMartino v. Monroe Little League, Inc., 192 Conn. 271, 275, 471 A.2d 638, 641 (1984) ("Fraud need not be shown in order to disregard the corporate entity where one corporation is used as an adjunct to another corporation.").

[20] Status International S.A. v. M & D Maritime Ltd., 1998 WL 54263 (S.D.N.Y. Feb. 4, 1998). *See also* Dow Chemical Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329, 342 (2d Cir. 1986); Kirno Hill Corp. v. Holt, 618 F.2d 982, 984-85 (2d Cir. 1980).

[21] Bergesen d.y. A/S v. Lindholm, 760 F. Supp. 976, 987 (D. Conn. 1991).

[22] Kregos v. Latest Line, Inc. 929 F. Supp. 600, 602 (D. Conn. 1996).

[23] Shades Ridge Holding Co., Inc., v. United States, 888 F.2d 725, 729 (11th Cir. 1989); Baker v. Raymond International, Inc., 656 F.2d 173, 181 (5th Cir. 1981), *cert. denied,* 456 U.S. 983 (1982); Krivo Industrial Supply Co. v. National Distillers & Chemical Corp., 483 F.2d 1098, 1104 (5th Cir. 1973), *modified per curiam on other grounds,* 490 F.2d 916 (5th Cir. 1974).

[24] Freeman v. Complex Computing Company, Inc., 119 F.3d 1044, 1057 (2d Cir. 1997) (applying New York law, finding individual equitable owner of company who was neither a shareholder, officer, director, or employee).

[25] Indeed, this has been noted in practice. *See* Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1[st] Cir. 1981) ("In applying [the pierce the corporate veil rule] federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine.") (citations omitted).

[26] *E.g.,* Klaxon Co. v. Stentor Electric Mfg., 313 U.S. 487, 496 (1941); Valley Juice Ltd. v. Evian Waters of France, Inc., 87 F.3d 604, 607 (2d Cir. 1996). However, certain areas of the law apply only federal common law when deciding whether to pierce a corporation's veil and do not consider state doctrine. *E.g.,* Chan v. Society Expedition, Inc., 123 F.3d 1287, 1294 (9[th] Cir. 1997) (case in admiralty). These applications of veil piercing law fall outside of bankruptcy and are outside the scope of this paper.

[27] *E.g.,* In re Carterhouse, Inc., 94 B.R. 271, 276 (Bankr. D. Conn. 1988).

[28] United Paperworkers Int'l Union v. Penntech Papers, Inc., 439 F. Supp. 610, 620 (D. Me. 1977) ("[A] federal court may pierce the corporate veil for any reason acceptable under the common law of the state in question or if disregarding the corporate entities is the only way to protect a substantial federal policy or interest."), *aff'd sub nom*, United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978).

[29] Official Committee of Unsecured Creditors v. PSS Steamship Co. (In re Prudential Lines Inc.), 928 F.2d 565, 569 (2d Cir. 1991) (quoting 11 U.S.C. § 541(a)(1)).

[30] *See e.g.,* Straton v. New, 283 U.S. 318, 320-21 (1931) (purpose of bankruptcy law is "to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors.").

[31] 462 U.S. 198 (1983).

[32] *Id.* at 203.

[33] *See* United States v. Jon-T Chemicals, 768 F.2d 686, 693 (5th Cir. 1985) (highlighting this distinction on related grounds).

[34] In re Matter of Clark Pipe & Supply, 870 F.2d 1022, 1029 (5th Cir. 1989) ("Courts are more likely to find that one corporation has used another as an instrumentality in aid of a tort creditor who unwillingly and without choice became a creditor of that corporation."), *withdrawn and superseded on other grounds*, 893 F.2d 693 (5th Cir. 1990); In re Chateaugay Corp., 139 B.R. 598, 604 (Bankr. S.D.N.Y. 1992) (courts more reluctant to pierce veil for contract creditor than for tort creditor).

[35] Federal Deposit Insurance Corp. v. Colonial Realty Co., 966 F.2d 57, 58 (2d Cir. 1992) ("The substantive consolidation of estates in bankruptcy effects the combination of the assets and liabilities of distinct, bankrupt entities and their treatment as if they belonged

to a single entity.") (citing 5 COLLIER ON BANKRUPTCY § 1100.06 (Lawrence P. King ed., 15th ed. 1991)).

[36] In re Augie/Restivo Baking Co., Ltd., 860 F.2d 515, 518 (2d Cir. 1988).

[37] *Id.*

[38] Chemical Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966).

[39] However, early courts did just that -- confusing substantive consolidation and corporate veil doctrine as interchangeable theories. *See e.g.,* In re Tito Castro Construction, Inc., 14 B.R. 569, 571 (Bankr. D.P.R. 1981); In re 1438 Meridian Place, N.W., Inc., 15 B.R. 89, 89 (Bankr. D.C. 1981).

[40] Wm. Passalacqua Builders v. Resnick Developers South, Inc., 933 F.2d 131, 136 (2d Cir. 1991).

[41] In re Augie/Restivo Baking, 860 F.2d at 518.

[42] *Id.*

[43] FED. R. BANKR. P. 1015.

[44] *Id.*

[45] FED R. BANKR. P. 1015(b) ("[If] a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, [the court may order joint administrations of estates].").

[46] FED R. BANKR. P. 1015 advisory committee's note.

[47] *Id.* ("Consolidation, as distinguished from joint administration, is neither authorized nor prohibited by this rule since the propriety of consolidation depends on substantive considerations and affects the substantive rights of the creditors of the different estates.") (citing Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941) and Chemical Bank N.Y. Trust Co., v. Kheel, 369 F.2d 845 (2d Cir. 1966)).

[48] In re Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988).

[49] Federal Deposit Insurance Corp. v. Colonial Realty Co., 966 F.2d 57, 59 (2d Cir. 1992).

[50] 11 U.S.C. § 105(a) (1998).

[51] Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988); In re Plaza de Diego

Shopping Ctr., Inc., 911 F.2d 820, 830-31 (1st Cir. 1990).

[52] Underlying these considerations is the everpresent concern that substantive consolidation is no mere procedural mechanism, but rather affects substantive rights of the parties. In re Food Fair, Inc., 10 B.R. 123, 124 (Bankr. S.D.N.Y. 1981). Accordingly, consolidation is used "sparingly." Chemical Bank N.Y. Trust Co., v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966); In re Lewellyn, 26 B.R. 246, 251 (S.D. Iowa 1982).

[53] In re F.A. Potts & Co., 23 B.R. 569, 571 (Bankr. E.D. Pa. 1992); In re Snider Bros., Inc., 18 B.R. 230, 138 (Bankr. D. Mass. 1982).

[54] Federal Deposit Insurance Corp., v. Colonial Realty Co., 966 F.2d 57, 61 (2d Cir. 1992); In re Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988).

[55] In re Auto-Train Corp., 810 F.2d 270, 276 (D.C. Cir. 1987).

[56] The seven factors articulated are:

> (1) The presence or absence of consolidated financial statements; (2) The unity of interests and ownership between various corporate entities; (3) The existence of parent and intercorporate guarantees on loans; (4) The degree of difficulty in segregating and ascertaining individual assets and liabilities; (5) The existence of transfers of assets without formal observance of corporate formalities; (6) The commingling of assets and business functions; (7) The profitability of consolidation at a single physical location.

Holywell Corp. v. Bank of New York, 59 B.R. 340, 347 (S.D. Fla. 1986) (citing In re Donut Queen, 41 B.R. 706, 709 (Bankr. E.D.N.Y. 1984)).

[57] 313 U.S. 215 (1941).

[58] *Id.* at 216.

[59] *Id.*

[60] *Id.* at 219.

[61] *E.g.*, In re Trueaud, 45 B.R. 658, 662 (Bankr. N.D. Okla. 1985) ("Under its general equitable powers, 11 U.S.C. § 105(a), a bankruptcy court may substantively consolidate affiliate corporations within a pending case when the assets and liabilities of different entities are dealt with as if the assets were held by, and the liabilities were incurred by a single entity."), *aff'd*, 59 B.R. 973 (N.D. Okla. 1986).

[62] *E.g.*, In re Circle Land & Cattle Corp., 213 B.R. 870, 876-77 (Bankr. M.D. Fla. 1997) (rejecting substantive consolidation involving non-debtor party); *In re Alpha & Omega*

Realty, 36 B.R. 416, 417 (Bankr. D. Idaho 1984) (similar). *See also* Christopher J. Predko, Note, *Substantive Consolidation Involving Non-Debtors: Conceptual and Jurisdictional Difficulties in Bankruptcy,* 41 WAYNE L. REV. 741 (1995) (rejecting substantive consolidation of non-debtor estates).

[63] In re Gary G. MacDonald, 114 B.R. 326, 330 (Bankr. D. Mass. 1990) (court found debtor had beneficial interest in stock ostensibly owned by debtor's father); In re Landbank Equity Corp., 83 B.R. 362, 373 (E.D. Va. 1987) (bankruptcy court could reach behind corporate veil and recover from relatives related to the debtor various funds where corporations were owned and operated by members of one family and used to remove funds from the corporation to various family members); In re Tureaud, 45 B.R. at 662-663 (existence of non-debtor corporation entities disregarded and subsumed in the debtor's estate).

[64] 107 B.R. 996 (D. Haw. 1989), *rev'd*, 940 F.2d 1306 (9th Cir. 1991). Although the opinion was ultimately overturned, its factual underpinnings are still instructive.

[65] *Id.* at 1008.

[66] *Id.* at 999.

[67] *Id.* at 1008.

[68] *Id.* at 1007.