

1999

Preface: Symposium on Corporate Groups

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Recommended Citation

Blumberg, Phillip, "Preface: Symposium on Corporate Groups" (1999). *Faculty Articles and Papers*. 385.
https://opencommons.uconn.edu/law_papers/385

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Citation:

Phillip I. Blumberg, Preface, 13 Conn. J. Int'l L. 397
(1999)

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Thu Jun 21 14:38:41 2018

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PREFACE

*Phillip I. Blumberg**

Anglo-American corporation law has traditionally been bottomed upon the concept that each corporation, like each human being, is a separate juridical person with its own legal rights and duties; this is entity law. This doctrine arose centuries ago and was well suited to deal with the needs of a simpler economic society. It was a time when corporations generally could not own other corporations, and corporate groups with holding companies or parent corporations were unknown. At that time, each corporation was a separate economic enterprise as well as a separate legal entity. This is no longer the case.

Over the centuries, the economy has dramatically changed. In the modern world, giant multinational enterprises with multi-tiered corporate structures dominate the economy and conduct worldwide businesses through numerous subsidiaries. Investors look upon each multinational as a separate corporate enterprise. However, the traditional corporate law sees only the scores or hundreds of separate corporations in the group, each with its own rights and duties. The traditional law, thus, ignores the economic reality that the subsidiaries are not acting as separate, independent businesses. Instead, they are collectively conducting a common business under the control of their parent corporation.

In this manner, the traditional corporation law constitutes a substantial barrier to the imposition of liability upon the parent corporation and the group by reason of the activities of a subsidiary. Although it is a barrier, the subsidiary's activities arise in the conduct of the common enterprise for the benefit of the enterprise and typically under the common public persona of the enterprise. In this manner, the assets of the enterprise are

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not available for the payment of all the liabilities of the enterprise. The companies in each layer of the multi-tiered group are insulated from the liabilities of each other and from the liabilities of all companies in lower tiers in the complex corporate structure. The traditional law results in successive limitations of liability.

It should be evident that insofar as corporate groups are concerned, the expansive limited liability provided under these circumstances goes far beyond the insulation of liability of the public shareholders of the parent corporation. The traditional corporation law, thus, represents a dramatically excessive response to the limited liability problem.

Reflecting these factors, the American law has in many areas found automatic application of the traditional doctrine unacceptable. In order to be able to implement better the underlying objectives and policies of the area of law in issue, courts and legislatures have turned to other approaches permitting the adoption of enterprise principles and the imposition of liability for subsidiary action upon the parent and the group.

Of these, the doctrine of "piercing the corporate veil" is the most prominent of the routes available for courts to escape the severe restrictions of entity law and impose liability upon the enterprise. However, "piercing" is a creature of equity jurisprudence with rigorous requirements and many difficulties in its application. It was designed for the resolution of private controversies at a time when each corporation was in most cases still a separate enterprise as well as a separate entity. The issue was whether the investor-shareholder as well as the corporation was to be liable for the tort or contract of the corporation. It is ill-suited for dealing with the problems presented by large corporate groups. In these cases, the issue is the liability of the parent corporation for the obligations of its subsidiaries; imposition of liabilities on the public shareholders of the parent corporation, who are the investors in today's large enterprises, does not arise at all.

Statutory law, not judge-made enterprise law, represents the greatest triumph of enterprise principles in American law. Until 1933, American statutory regulatory law proceeded exclusively in reliance on traditional corporation law that looks upon each corporation as a separate legal entity. By 1933, it had become evident that "piercing" was a highly ineffective judicial response when the government sought to prevent widespread evasion of statutory objectives by sophisticated manipulation of the corporate structure. Entity law proved too high a barrier to effective social and economic regulation.

In the New Deal reform legislation, the Congress, accordingly, no longer drafted major regulatory statutes in the traditional entity law terms that had proved so ineffective. Turning to enterprise principles and the

concept of “control”, the Congress expressly expanded the scope of the most important statutory programs of the period to include not only the regulated company but its “controlling” corporations and often corporations under its “common control”, “affiliates”, and other “insiders”. Through this highly effective technique, regulatory programs for the first time included all companies in the corporate group and, thereby, reached the entire economic enterprise.

This wave of New Deal legislation and subsequent statutory law accomplished a veritable revolution in American law. It included the great statutes regulating such key industries as the railroads, securities, banking, savings and loan, investment, and utility industries, as well as important areas in foreign trade and investment. In labor relations, the most pressing social issue of the time, “control” served as the basic factor in the “integrated enterprise” doctrine adopted by administrative gloss to provide much of the basic framework for the regulatory program. This American model of statutory enterprise law has spread throughout the developed world. Thus, in its key regulatory areas, the European Union has widely utilized the concept of “control.” Reliance on the doctrine is also evident to a much lesser extent in the statutory law of numerous European national governments as well.

In those statutory areas where the Congress had utilized the concept of “control”, resort to “piercing the veil” to reach affiliated companies of the group was no longer necessary. However, in other areas of statutory law, the fundamental jurisprudential problem remained.

Faced with unrealistic consequences arising from application of the conventional “piercing doctrine”, federal courts became less ready to apply the traditional form of “piercing” that had evolved in the adjudication of controversies between private parties in the statutory areas where public considerations were paramount. Many courts broadened their approach. They became readier to apply enterprise principles and disregard traditional entity concepts when required in order to implement the underlying statutory objectives and policies and to prevent evasion and frustration of regulatory programs.

This development has taken a number of forms. Many courts turned from traditional corporation law and the literal reading of statutes. They reached enterprise results through “broad” or “liberal” construction to remedial legislation. Even when courts turned to “piercing”, they ignored its limitations by evoking a much looser version of the doctrine observing that public interests, rather than private controversies, were concerned. This is a spotty and uneven development, but it is indicative of the extent of judicial frustration with entity law and “piercing the veil” when vital public interests are at stake.

In common-law areas involving private controversies, traditional corporation law and "piercing the veil jurisprudence" has retained much greater vitality. Even here, however, in tort cases particularly, courts in an impressive number of cases have imposed liability on parent corporations while employing the conventional "piercing" doctrine. Although this is not the usual result, it happens often enough to make "piercing" an issue in most tort litigation.

In an interesting variety of areas, courts have also turned to other approaches in order to reach an enterprise result where enterprise principles rather than entity principles better implemented the underlying objectives of the law in the area. These alternative approaches have taken a number of forms of varying significance that have been applied in numerous areas.

Perhaps, the most used route to enterprise liability in common law matters has been the broadening or liberalization of conventional concepts. This has occurred in the field of jurisdiction reinforced by the "stream of commerce" doctrine. It has also occurred in other areas in procedure including claim and issue preclusion and discovery through the concept of "control"; in agency law giving rise to a body of law that may well be described as quasi-agency law; in apparent agency in particular in such areas as franchising and integrated health care enterprises; and in tort law with such familiar developments as product liability and non-delegable duty.

Product liability is a doctrine with a much broader objective than dealing solely with the issues arising with respect to parent and subsidiary corporations. In its comprehensive sweep applying the philosophy of enterprise liability, it renders superfluous the need to rely on "piercing the veil" for imposition of liability in product liability matters when parent and subsidiaries are involved.

Other doctrines of varying importance in different areas include the liberalization or expansion of conventional concepts. This is occurring in jurisdictions reinforced by the "stream of commerce" doctrine; in certain areas in procedure including claim and issue preclusion and discovery; in agency law giving rise to a body of law that may well be described as quasi-agency law; in apparent agency especially in such areas as franchising and integrated health care enterprises; and in tort law with such concepts as product liability and non-delegable duty.

In sum, the doctrine of the separate corporate entity in many areas in statutory law, in important areas of procedure, and in some areas of common law has yielded to the increasing acceptance of enterprise principles. This comprises the American law of corporate groups, a substantial body of jurisprudence that represents the struggle of American

jurisprudence to adapt doctrinal concepts formulated centuries ago in a very different society to the contemporary world of multinational corporate groups of enormous size and incredible complexity.

