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THE CASE FOR OUTSIDE REVERSE VEIL PIERCING IN NEW MEXICO

Laura Spitz*

INTRODUCTION

A corporation is a distinct legal person.¹ This is a foundational tenet of the modern American legal system. As such, except in extraordinary circumstances, a corporation's shareholders will not be held liable for corporate actions or debts absent some commitment to guarantee them. Instead, a shareholder's liability is limited to her financial contribution to the corporation. In other words, if a corporation is unsuccessful, a shareholder may lose her investment—the price she paid for her shares or the amount she lent to the corporation—but no more. This is true in reverse as well; a corporation is not ordinarily responsible for the actions and debts of its shareholders. This makes sense as shareholders and corporations are separate legal persons, and persons are not ordinarily liable for one another's debts. In the vocabulary of corporate law, shareholders have limited liability.²

At the same time, courts—including New Mexico courts³—have made clear they will not permit shareholders to use the corporate form for an improper purpose and cause harm to others. This is one of the limits of limited liability. As a matter of both public policy and equity, courts will disregard a limited liability entity to “pierce the corporate veil” and hold a shareholder personally liable for a corporation's actions or debts where, for example, “the corporation was set up for fraudulent

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1. *See, e.g.*, *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819); *Citizens United v. FEC*, 558 U.S. 310 (2010). New Mexico recognized the corporate form even before the adoption of its constitution. *Shillinglaw v. Owen Shillinglaw Fuel Co.*, 1962-NMSC-047, ¶ 16, 70 N.M. 65, 69, 370 P.2d 502, 505. More recently, *see Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶ 6, 107 N.M. 118, 753 P.2d 897 (“[A] corporation will ordinarily be treated as a legal entity separate from its shareholders.”).

2. New Mexico's steadfast protection of the corporate form provides the foundation for the state's public policy in favor of limited liability. Through separate legal personhood, limited liability ensures that investors will not incur personal liability for the debts of the corporation. Without the fear of personal liability, the state hopes to incentivize investors to invest large sums of capital into corporations in New Mexico. *Scott*, 1988-NMSC-028, ¶ 6, 753 P.2d at 900.

3. Corporate limited liability “is the rule and not the exception.” *Wirth v. Sun Healthcare Grp., Inc.*, 2017-NMCA-007, ¶ 35, 389 P.3d 295, 304; *Cruttenden v. Mantura*, 1982-NMSC-021, ¶ 8, 97 N.M. 432, 640 P.2d 932; *Harlow v. Fibron Corp.*, 1983-NMCA-117, ¶ 15, 100 N.M. 379, 671 P.2d 40; *Scott*, 1988-NMSC-028 ¶ 7, 753 P.2d at 900; *Garcia v. Coffman*, 1997-NMCA-092, ¶ 7, 124 N.M. 12, 946 P.2d 216; *Morrissey v. Krystopowicz*, 2016-NMCA-011, ¶ 13, 365 P.3d 20, 23.

purposes, or where to recognize the corporation [as a separate entity⁴] would result in inequity.”⁵

In a classic veil piercing case, the court pierces a corporation’s veil to reach the assets of its shareholders to satisfy an obligation of the corporation. This is known as “vertical” piercing because the plaintiff and the court are literally looking up a corporation’s organizational chart to its shareholders for a corporate debt. However, as corporate organization and corporate law have grown in complexity, American courts have had to adapt the veil piercing doctrine. Businesses increasingly use more complex corporate structures and therefore create new challenges for claimants seeking to pierce the corporate veil. For example, in addition to the more traditional “vertical” piercing, courts have been asked to consider “horizontal”⁶ and “triangular”⁷ veil piercing, as well as a distinct but related remedy, “enterprise liability.”⁸ In practice, horizontal, triangular, and enterprise liability claims are less

4. In some ways, this is a remarkable remedy precisely because the court is saying two legal persons will be considered one for the purpose of providing a remedy to a plaintiff. In such circumstances, the formal legal personhood of the corporation is disregarded. Put another way, it is a legal subject in name only, stripped of certain rights ordinarily associated with personhood. For examples where human persons have been stripped of many of the rights associated with legal personhood and treated like property, see Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 18 (2011); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (Farrar, Straus and Giroux 2017).

5. *Scott Graphics, Inc. v. Mahaney*, 1976-NMCA-038, ¶¶ 17, 18, 89 N.M. 208, 549 P.2d 623 (Courts may look behind the corporate form “where the corporation was set up for fraudulent purposes, or where to recognize the corporation would result in inequity.”); see also *Harlow*, 1983-NMCA-117, ¶ 19, 671 P.2d at 44 (holding that it is improper to pierce the corporate veil unless directors, officers, and shareholders used or contributed to corporate funds for the purpose of perpetuating fraud or “promoting their personal affairs”).

6. Classic veil piercing is applied vertically: courts are looking to a corporation’s shareholders to satisfy the debts of the corporation. Horizontal piercing refers to piercing the corporate veil between affiliated entities controlled by the same, or substantially the same, owners. *Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶¶ 23, 40, 474 P.3d 176, 183, 186 (Colo. App. 2020), cert. denied, No. 20SC460, 2020 WL 6325871 (Colo. Oct. 26, 2020) (“Colorado corporate law permits horizontal veil piercing, under the traditional veil piercing test, between entities that share common ownership through another entity, but only if the veil of each corporate entity is also pierced. . . . [H]orizontal veil piercing may occur between entities that do not share direct common owners, but that indirectly share common owners through another entity in an ownership chain.”). See also *Walkovszky v. Carlton*, 223 N.E.2d 6, 7 (N.Y. 1966), appeal after remand, 287 N.Y.S.2d 546 (N.Y. App. Div. 1968), aff’d, 244 N.E.2d 55 (N.Y. 1968); *Lea v. Kentwood & E. Ry. Co.*, 60 So. 370, 373 (La. 1912). Note that a crucial distinction between horizontal piercing and horizontal consolidation is the former requires a finding that the non-defendant or non-debtor entities are alter egos of the defendant/debtor, while the latter does not. See DAVID A. WARFIELD, ABIGAIL B. WILLIE, KAY STANDRIDGE KRESS & G. BLAINE SCHWABE, III, BUSINESS TRACK: IT WASN’T ME!: DEALING WITH SUCCESSOR LIABILITY, ALTER EGO, VEIL PIERCING AND SUBSTANTIVE CONSOLIDATION ISSUES WITH RESPECT TO INSOLVENT COMPANIES, 102617 ABI-CLE 67 (2017).

7. Triangular piercing occurs when “a controlled corporation is held liable for the debts of an affiliated corporation, through an intermediary controlling shareholder. The liability flows in a triangle, first from the controlled corporation to the controlling shareholder, then from the controlling shareholder to the affiliated corporation.” Matthew D. Caudill, *Piercing the Corporate Veil of a New York Not-For-Profit Corporation*, 8 FORDHAM J. CORP. & FIN. L. 449, 469 (2003).

8. Enterprise liability treats a group of related entities as a single entity for some or all purposes. “The result is to construct a new aggregate of assets and liabilities. . . . The decisions disregard the paper corporate personalities and base the results on the assets of the enterprise.” Adolph Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 348 (1947) (cited in John H. Matheson, *The Limits of Business Limited Liability: Entity Veil Piercing and Successor Liability Doctrines*, 31 WM. MITCHELL L.

common than traditional veil piercing claims. A more widespread development, however, is “reverse” veil piercing. In a reverse piercing case, the court pierces a corporation’s veil from the “other direction” to reach the assets of a corporation and treats those assets as belonging to a shareholder of the corporation. There are two distinct types of reverse veil piercing: “inside” and “outside.” Courts engage in inside reverse piercing for the benefit of a so-called insider, usually a shareholder, seeking to claim the corporation’s assets as its own, often at the request of the shareholder and with the support of the corporation.⁹ In contrast, courts apply outside reverse piercing for the benefit of an outsider, typically a creditor seeking to satisfy the debt of a shareholder, at the request of the creditor and over the objections of the corporation.¹⁰

Although both inside and outside reverse veil piercing are reverse piercing in a directional sense, they are sufficiently distinct to raise different questions of corporate law and public policy.¹¹ The distinctions between inside and outside reverse veil piercing are sometimes overlooked by advocates and courts, and the failure to be specific has led to some confusion in the jurisprudence.¹² To understand the distinctions, one must understand how each doctrine functions. An inside reverse piercing claim is typically brought by the party or parties using and benefiting from the limited liability entity itself. In a common example, a shareholder attempts to have the corporate entity disregarded to avail itself of certain corporate assets, such as accounts receivable or claims against third parties. In other words, the insider seeks to claim the assets of the corporation as its own.¹³ In another example, a shareholder might want to bring corporate assets under the shelter of some legal protection from third-party claims, where the shelter is available only for assets owned by the shareholder and not for assets owned by the corporation.

REV. 411, 422 (2004)). In practice, enterprise liability often requires triangular—and therefore vertical and horizontal—veil piercing. “The alter ego doctrine [described *infra*, Part I.A.] may be used to hold shareholders liable for the debts of their corporation (traditional veil piercing), to hold a corporation liable for the debts of a sole shareholder (reverse veil piercing), or to hold parent, subsidiary or affiliate corporations liable for the debts of another corporation.” *Dry Handy Invs., Ltd. v. Corvina Shipping Co.*, S.A., 988 F. Supp. 2d 579, 682 (E.D. Va. 2013) (quoting *Medici888, Inc. v. Rileys Ltd.*, No. 2:12cv317, 2013 WL 5533235, at *4, 2013 U.S. Dist. LEXIS 144231, at *9 (E.D. Va. Oct. 3, 2013)) (emphasis added).

9. *In re Petters Co., Inc.*, 561 B.R. 738, 750 (Bankr. D. Minn. 2016); *Spradlin v. Beads & Steeds Inns, LLC (In re Howland)*, 516 B.R. 163, 166 (Bankr. E.D. Ky. 2014); see also Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 37 (1991). For an argument that inside reverse veil piercing may, in certain circumstances, advance “significant public policies,” see Stephen Bainbridge, *A Critique of the Corporate Law Professors’ Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE 1, 12 (2014) (citing Stephen Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235, 246–48 (2013)) (arguing that reverse veil piercing provides the analytical framework to disregard the corporate entity to allow shareholders to exercise religion through a corporate entity).

10. Crespi, *supra* note 9, at 37.

11. With respect to inside veil piercing, for example, the Fourth Circuit Court of Appeals observed that “many courts strongly oppose allowing a company’s veil to be pierced for the benefit of the individuals who themselves have created the company.” *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 385 (4th Cir. 2018).

12. For example, some courts have purported to reject “reverse piercing,” but a close reading of the cases reveals they mean to reject “inside reverse piercing.”

13. *Connolly v. Englewood Post No. 322 VFW of the United States, Inc. (In re Phillips)*, 139 P.3d 639, 644–45 (Colo. 2006) (en banc) (citing Crespi, *supra* note 9, at 37).

Inside reverse piercing claims often arise in the context of corporate bankruptcy.¹⁴ Under the U.S. Bankruptcy Code,¹⁵ shareholder claims enjoy low priority against the bankruptcy estate, and inside reverse piercing offers the potential for shareholder access to corporate assets that would otherwise be used to satisfy the debts of senior creditors. Inside reverse veil piercing has also been used to allow parent and subsidiary entities to be viewed as a singular employer for purposes of receiving the benefit of workers' compensation immunity.¹⁶

Outside reverse piercing, on the other hand, more clearly maps onto traditional veil piercing analyses. A shareholder's creditor—or in the vocabulary of the doctrine, a corporate outsider—will seek to pierce the corporate veil to reach the assets of the shareholder's corporation to satisfy a debt of the shareholder¹⁷ on an alter ego or instrumentality theory.¹⁸ The creditor might be a “voluntary” creditor, such as a bank, or an “involuntary” creditor, such as a tort victim. Typically, the third party seeks to pierce the veil only after it has brought a successful claim against the corporate shareholder.¹⁹ In such cases, the successful claimant would ordinarily use standard judgment collection procedures to attach the judgment to the debtor's *shares* in the corporation. In an outside reverse pierce case, the successful claimant would seek instead to attach the corporation's *assets* directly.²⁰

The New Mexico Supreme Court has not explicitly considered reverse veil piercing,²¹ although it has applied the doctrine without naming it.²² Nevertheless, the number of states to consider and adopt the doctrine in either or both forms has grown rapidly in recent decades. It is likely only a matter of time before New Mexico courts

14. *Gugino v. Clark's Crystal Springs Ranch, LLC (In re Clark)*, 525 B.R. 107 (Bankr. D. Idaho 2014); *Butler v. Candlewood Rd. Partners, LLC (In re Raymond)*, 529 B.R. 455 (Bankr. D. Mass. 2015); *Dzikowski v. Friedlander (In re Friedlander Cap. Mgmt. Corp.)*, 411 B.R. 434 (Bankr. S.D. Fla. 2009); *In re Howland*, 516 B.R. 163 (Bankr. E.D. Ky. 2014); *In re Petters Co.*, 561 B.R. 738 (Bankr. D. Minn. 2016).

15. 11 U.S.C.A. § 507 (West).

16. *Cabrera v. JBS USA, LLC*, 568 S.W.3d 865, 873 (Ky. Ct. App. 2019).

17. *Liberty Synergistics, Inc. v. Microflo Ltd.*, 50 F. Supp. 3d 267, 297 (E.D.N.Y. 2014) (“Although uncommon, New York law recognizes ‘reverse veil-piercing,’ where, as here, a party seeks to hold a subsidiary liable for the actions of its parent or shareholders.”).

18. *In re Howland*, 516 B.R. at 166; *In re Knight*, 574 B.R. 800, 814 (Bankr. N.D. Ga. 2017). *See also In re Phillips*, 139 P.3d at 645 (“Outside reverse piercing claims occur when a corporate outsider ‘pressing an action against a corporate insider seeks to disregard the corporate entity [and] to subject corporate assets to the claim’ or when an outsider ‘with a claim against a corporate insider seeks to assert that claim against the corporation in an action between the claimant and the corporation.’” (quoting *Crespi*, *supra* note 9, at 55)).

19. Kathryn Hespe, *Preserving Entity Shielding: How Corporations Should Respond to Reverse Piercing of the Corporate Veil*, 14 J. BUS. & SEC. L. 69, 76 (2013).

20. *Wick v. Ach*, 2019-Ohio-2405, 139 N.E.3d 480, 483, at ¶ 5.

21. *In re Hess*, 618 B.R. 13, 21 (Bankr. D.N.M. 2020) (noting that New Mexico appellate courts have not addressed insider or outsider reverse piercing).

22. *See Addison v. Tessier*, 1959-NMSC-010, ¶¶ 14–15, 65 N.M. 222, 335 P.2d 554. In that case, defendant shareholder had transferred assets to a corporation in which he had a 98% interest for the purpose of avoiding having to pay creditors. The New Mexico Supreme Court held that “the legal entity of the corporation must be disregarded for purposes of satisfying appellant's judgment [against the shareholder].” Without using the vocabulary of outside reverse veil piercing, the court permitted the creditor to disregard the corporation entity—pierce the corporate veil—to reach the assets of the corporation to satisfy the debts of its controlling shareholder.

will be asked to explicitly consider its applicability in the state. In anticipation of such development, this article surveys New Mexico veil piercing jurisprudence and other states' reverse piercing jurisprudence and concludes that outside reverse veil piercing is consistent with New Mexico law and public policy. As with traditional veil piercing, outside reverse piercing is driven by a concern that the corporate form has been misused by one or more shareholders, causing some injustice or inequity. Outside reverse piercing should therefore be adopted in the state.²³ I leave the question of whether New Mexico courts should adopt inside reverse veil piercing for another day.²⁴

This article proceeds as follows. Part I sets out the current law on veil piercing in New Mexico. Jurisdictions that adopt outside reverse piercing often apply much the same test for both traditional and outside reverse veil piercing cases;²⁵ accordingly, the best predictor of how New Mexico courts will approach outside reverse piercing is how they have approached traditional veil piercing. Part II summarizes the positions of other jurisdictions to have considered outside reverse veil piercing, as well as themes, concerns, and key debates in outside reverse piercing cases. This jurisprudence points in the direction of adopting the doctrine in New Mexico and demonstrates its consistency with New Mexico law and public policy. Finally, Part III suggests a possible—and arguably likely—test to apply in outside reverse piercing cases in New Mexico.

I. CLASSIC VEIL PIERCING IN NEW MEXICO

The common law doctrine of veil piercing in New Mexico is well established, and there are several New Mexico Supreme Court and Court of Appeals decisions in agreement about the required elements.²⁶ In New Mexico, a plaintiff must show that: (A) the corporate form is a mere instrument or alter ego of another person;²⁷ (B) the corporate form has been used for an improper purpose;²⁸ and (C)

23. To the extent that New Mexico corporate law is not so different from other states, much of the analysis in this Article should be generally applicable in those states as well.

24. To the extent that outside reverse veil piercing implicates vertical, horizontal, triangular, or enterprise liability issues, I would endorse the approach of the Colorado Court of Appeals in *Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶¶ 22–23, 474 P.3d 176, 182–83 (Colo. App. 2020), *cert. denied*, No. 20SC460, 2020 WL 6325871 (Colo. Oct. 26, 2020).

25. Texas, Colorado, New York, and Virginia are examples.

26. The elements applied by New Mexico courts are not unlike those applied in other states, such as Colorado, Texas, New York, and North Carolina (among others). *See, e.g.*, *Connolly v. Englewood Post No. 322 VFW of the United States, Inc.* (*In re Phillips*), 139 P.3d 639, 644 (Colo. 2006); *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008); *Bagel Bros. Maple, Inc. v. Ohio Farmers, Inc.*, 279 B.R. 55, 62 (W.D.N.Y. 2002); *Fischer Inv. Cap., Inc. v. Catawba Dev. Corp.*, 689 S.E.2d 143, 147 (N.C. App. 2009). These states have adopted outside reverse veil piercing as well.

27. *Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶ 7, 107 N.M. 118, 753 P.2d 897 (“[T]he subsidiary or other subservient corporation was operated not in a legitimate fashion to serve the valid goals and purposes of that corporation but . . . instead under the domination and control and for the purposes of some dominant party.”); *Cruttenden v. Mantura*, 1982-NMSC-021, ¶ 8, 97 N.M. 432, 640 P.2d 932 (“To find that a subsidiary is the alter ego of the parent corporation, it must be established that the parent control is so complete as to render the subsidiary an instrumentality of the parent.”).

28. A finding of domination or instrumentality will not suffice; “improper purpose must [also] be established.” *Harlow v. Fibron Corp.*, 1983-NMCA-117, ¶ 15, 100 N.M. 379, 671 P.2d 40. *See also Morrissey v. Krystopowicz*, 2016-NMCA-011, ¶ 13, 365 P.3d 20.

misuse of the corporate form caused harm to the plaintiff.²⁹ Veil piercing is an equitable remedy;³⁰ consequently, the rules governing the granting of equitable remedies also operate here. Finally, the burden of proof is on the party “seeking to impose individual liability on the shareholder to demonstrate that the grounds for piercing the corporate veil exist.”³¹ In the subsections that follow, I elaborate on each of the elements required by the doctrine.

A. Instrumentality

To pierce the corporate veil, claimants must show that the corporate form is a mere instrument of another person.³² New Mexico courts often refer to the first element—instrumentality—as the alter ego theory.³³ It has been described as

29. *Harlow*, 1983-NMCA-117, ¶¶ 10–13, 671 P.2d at 43.

30. *Id.* ¶ 9; *Scott*, 1988-NMSC-028, ¶ 7, 753 P.2d at 900. It is less clear whether veil piercing might also provide a separate cause of action. The answer has implications for both pleading and due process. If a shareholder was not named in the underlying complaint, the question becomes whether a judgment creditor may file a second action against the shareholders on an alter ego theory when they did not participate in the underlying litigation, at least not in their personal capacities. While there is no New Mexico Supreme Court case on point, this question was certified to the Nevada Supreme Court, which answered in the affirmative.

The first question asks whether a judgment creditor may bring a claim for alter ego to make a third party liable on the judgment or whether alter ego is only a remedy. The Nevada federal district court predicted that the alter ego doctrine can be a separate cause of action *when the claim is filed as a means for a judgment creditor to pursue the execution of a prior judgment*. We agree. . . . [A] judgment creditor may bring a claim for alter ego to make a third party liable on a judgment.

Magliarditi v. TransFirst Grp., Inc., 450 P.3d 911, *2–3 (Nev. 2019) (unpublished table decision). As a matter of due process, this makes sense. The third party must have the opportunity to defend itself; as such it must have notice and an opportunity to be heard in the original hearing or be named in a subsequent cause of action. *See Petty v. Bank of N.M. Holding Co.*, 1990-NMSC-021, ¶ 7, 109 N.M. 524, 787 P.2d 443; *Garcia v. Coffman*, 1997-NMCA-092, ¶¶ 11, 13, 124 N.M. 12, 946 P.2d 216 (“Under our rules of ‘notice pleading,’ it is sufficient that defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim[.]”) (alteration in original) (citation omitted).

31. *Morrissey*, 2016-NMCA-011, ¶ 13, 365 P.3d at 23 (quoting *Nursing Home Grp. Rehab Servs., L.L.C. v. Suncrest Health Care, Inc.*, 162 Ohio App. 3d 577, 581, 2005-Ohio-3945, 834 N.E.2d 382, ¶ 12). Veil piercing implicates one final due process issue related to courts’ jurisdiction over foreign corporations. Where, for example, a plaintiff’s case is being heard in state A, the corporate defendant is also a resident of state A, but its shareholder is a resident of state B, most courts have not hesitated to find personal jurisdiction. “Put simply, separation of formal corporate identities does not impose a constitutional barrier to the exercise of jurisdiction over a non-resident corporation.” *Alto Eldorado P’ship v. Amrep*, 2005-NMCA-131, ¶ 25, 138 N.M. 607, 124 P.3d 585 (quoting *Energy Reserves Grp., Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 508 (D. Kan. 1978)). Instead, the requirement for personal jurisdiction in New Mexico is the satisfaction of due process, not the application of substantive corporate law. *See Morrissey*, 2016-NMCA-011, ¶¶ 2, 25, 365 P.3d at 21, 26.

32. *Scott*, 1988-NMSC-028, ¶ 7, 753 P.2d at 900 (“[T]he subsidiary or other subservient corporation was operated not in a legitimate fashion to serve the valid goals and purposes of that corporation but . . . instead under the domination and control and for the purposes of some dominant party.”); *Cruttenden*, 1982-NMSC-021, ¶ 8, 640 P.2d at 934. (“To find that a subsidiary is the alter ego of the parent corporation, it must be established that the parent control is so complete as to render the subsidiary an instrumentality of the parent.”).

33. *Scott*, 1988-NMSC-028, ¶ 7, 753 P.2d at 900 (citing *Harlow*, 1983-NMCA-117, ¶ 11, 671 P.2d at 43). *See also Alto Eldorado P’ship v. Amrep*, 2005-NMCA-131, ¶ 19, 138 N.M. 607, 124 P.3d 585

“dominat[ion] . . . to the extent that the corporation does not have a will of its own.”³⁴ Put another way, the shareholder’s control renders the corporation an instrumentality or “mere business conduit” of the shareholder.³⁵ (The corporate shareholder can be an individual or another corporation.)

To satisfy this element, the plaintiff must show that a corporation is the alter ego of its shareholder. In the vocabulary of legal personhood, the plaintiff must show that the shareholder has not in fact treated the corporation as a separate legal entity or person. In deciding whether a corporation is the alter ego or instrumentality of a shareholder, New Mexico courts consider the following factors:

- (1) Does the shareholder own all or a majority of the capital stock of the corporation?
- (2) In the case of a parent and subsidiary, do the parent and subsidiary corporations have common directors or officers?
- (3) Does the shareholder finance the corporation?
- (4) Did the shareholder subscribe to all the capital stock of the subsidiary or otherwise cause its incorporation?
- (5) Is the corporation undercapitalized?
- (6) In the case of a parent and subsidiary, does the parent corporation pay the salaries or expenses or losses of the subsidiary?
- (7) In the case of a parent and subsidiary, does the subsidiary have substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation?
- (8) In the case of a parent and subsidiary, do the papers of the parent corporation and the statements of its officers refer to “the subsidiary” as such, or as a department or division of the parent?
- (9) Do the directors or executives of the corporation act independently in the interest of the corporation or do they take direction from the shareholder?

(finding that alter ego theory may be applied to “pierce the corporate veil . . . to disregard the . . . corporation and its subsidiary for purposes of liability”) (citation omitted).

34. Estate of Bishop v. Mulholland, No. 30,016, 2011 WL 5397134, at *2 (N.M. Ct. App. Sept. 15, 2011) (unpublished).

35. *Cruttenden*, 1982-NMSC-021, ¶ 8, 640 P.2d at 934 (citing *Edgar v. Fred Jones Lincoln-Mercury*, 524 F.2d 162, 166 (10th Cir. 1975)); *Scott*, 1988-NMSC-028, ¶ 7, 753 P.2d at 900.

(10) Are the formal legal requirements of the corporation as a separate and independent corporation observed?³⁶

Courts are clear that these factors are guidelines for consideration; the answer need not be yes to all questions in all cases.³⁷ Nor is the list exhaustive. In *Garcia v. Coffman*, for example, Dr. Coffman argued that the plaintiff had not established his control or domination over the corporation at issue because the plaintiff “did not introduce evidence that: [the corporation]’s shareholders ignored corporate processes or formalities; the corporation was under-capitalized; and shareholder and corporate funds were commingled.”³⁸ Acknowledging that these can be important factors, the Court of Appeals nonetheless found that, “the foregoing considerations [do not] cover the territory with respect to alter ego.”³⁹ Rather, the court’s inquiry focused on whether the domination exercised by Dr. Coffman was “substantially more than the control which would be exercised by any majority shareholder.”⁴⁰ In that case, the court was satisfied that Dr. Coffman’s corporation was his alter ego, relying on the following evidence:

Coffman was the sole shareholder. He established policies designed to limit the judgment of [the corporation’s] employees and to mislead [its] patients as to the need for treatment. [The corporation]’s board of directors was comprised of Coffman, his wife, his brother, and a select group of employees. Coffman’s wife was appointed chief executive officer and boss of [the corporation] without an election. Coffman and his wife determined all salaries. Coffman’s 1991 salary of \$600,000 was more than one-third of the total salaries paid to all employees. Coffman’s wife’s 1991 salary of \$2,308 was increased to \$660,008 in 1992. Coffman borrowed from and loaned money to [the corporation].⁴¹

While the court referenced several of the factors listed above, the court’s focus was on the question of control as a substantive—rather than formal—matter. Courts remain guided by the larger inquiry: Is the corporation an instrument or alter ego of another person or entity? The answer to this question will be heavily fact dependent.

36. *Cruttenden*, 1982-NMSC-021, ¶ 8, 640 P.2d at 934–35 (citing *Int’l Union v. Cardwell Mfg. Co.*, 416 F. Supp. 1267, 1286 (D. Kan. 1976)). These are substantially the same factors famously outlined by Frederick Powell in his study, *PARENT AND SUBSIDIARY CORPORATIONS* 9 (1931).

37. *Cruttenden*, 1982-NMSC-021, ¶ 8, 640 P.2d at 935 (citing *Int’l Union*, 416 F. Supp at 1286). For example, because New Mexico does not require that the corporation be incorporated for an improper purpose to satisfy the second element of the test, the first question takes on more significance than the fourth.

38. *Garcia v. Coffman*, 1997-NMCA-092, ¶ 17, 124 N.M. 12, 946 P.2d 216.

39. *Id.*

40. *Id.* ¶ 19 (citing Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 *DENV. L.J.* 1, 16 (1978)).

41. *Id.* ¶ 16.

B. Improper Purpose

Next, New Mexico courts require some evidence that the corporation is being used in an illegitimate manner or for an improper purpose.⁴² Courts look for “[s]ome form of moral culpability attributable to the [shareholder].”⁴³ This makes sense, given that the policy animating the remedy is a desire to prevent the manipulation of the corporate form to further a shareholder’s interests.⁴⁴ A Denver Law Journal article⁴⁵ frequently cited with approval by New Mexico courts⁴⁶ reminds us that, “[t]he heart of most corporate veil cases, explicitly or implicitly, is that a corporation has been used for such an improper purpose that *equity* will permit its corporate form to be disregarded.”⁴⁷

A careful reading of the cases suggests that there are really two dimensions to a finding of improper purpose. First, courts look for evidence that the shareholder is not using its status as a shareholder “for the purpose of participating in the affairs of the corporation *in the customary and usual manner*, but for the purpose of controlling the [corporation] so that it may be used as a mere agency or instrumentality of the [shareholder].”⁴⁸ Control in and of itself is not necessarily determinative of an improper purpose—if it were, there would be no distinction between the first two elements. Rather, the distinction between the two elements rests on the shareholder’s moral culpability. Courts look behind the act of domination or instrumentality to either a shareholder’s motive for doing business a particular way or to the resulting injustice to third parties if the separate entity is recognized.⁴⁹ The improper purpose element is driven by a concern that if the court recognized a corporation’s separate existence in these circumstances, it would amount to court

42. *Morrissey v. Krystopowicz*, 2016-NMCA-011, ¶ 13, 365 P.3d 20 (explaining that, for policy reasons, this improper purpose must be established before the shareholder can be held liable for the actions of the corporation); *Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶ 9, 107 N.M. 118, 753 P.2d 897.

43. *Scott*, 1988-NMSC-028, ¶ 9, 753 P.2d at 901 (“Some form of moral culpability attributable to the parent, such as use of the subsidiary to perpetrate a fraud is required.”) (citation omitted); *Garcia*, 1997-NMCA-092, ¶ 22, 946 P.2d at 221 (citing *Scott*, 1988-NMSC-028, ¶ 9, 753 P.2d at 901); *Morrissey*, 2016-NMCA-011, ¶ 13, 365 P.3d at 23 (citing *Scott*, 1988-NMSC-028, ¶ 9, 753 P.2d at 901).

44. *Scott Graphics, Inc. v. Mahaney*, 1976-NMCA-038, ¶¶ 17, 18, 89 N.M. 208, 549 P.2d 623 (noting that courts may look behind the corporate form “where the corporation was set up for fraudulent purposes, or where to recognize the corporation would result in inequity”) (citation omitted); *see also* *Harlow v. Fibron Corp.*, 1983-NMCA-117, ¶ 19, 100 N.M. 379, 671 P.2d 40 (stating that it would be improper to pierce the corporate veil where directors, officers, and shareholders did not use or contribute to corporate funds for purpose of perpetuating fraud or “promoting their personal affairs”) (quoting *Hill v. Dearmin*, 609 P.2d 127, 128 (Colo. App. 1980)).

45. Krendl & Krendl, *supra* note 41.

46. *See e.g.*, *Morrissey*, 2016-NMCA-011, ¶ 13, 365 P.3d at 23; *Garcia*, 1997-NMCA-092, ¶ 24, 946 P.2d at 221; *Harlow*, 1983-NMCA-117, ¶ 12, 671 P.2d at 43.

47. Krendl & Krendl, *supra* note 41, at 28 (cited in *Harlow*, 1983-NMCA-117, ¶ 12, 671 P.2d at 43) (emphasis added).

48. *W. G. Platts, Inc. v. Platts*, 298 P.2d 1107, 1110–11 (Wash. 1956) (citing *Platt v. Bradner Co.*, 230 P. 633, 635 (Wash. 1924)) (emphasis added).

49. *Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶¶ 6, 9, 107 N.M. 118, 753 P.2d 897; *Harlow*, 1983-NMCA-117, ¶ 12, 671 P.2d at 43.

sanction of the resulting injustice.⁵⁰ In the words of the Texas Court of Appeals, which also requires findings of instrumentality and improper purpose:

The second element examines whether the corporate form was employed for illegitimate purposes such that holding only the corporation *or* the individual liable *would result in an injustice*. . . . The “injustice” that gives rise to an application of alter ego liability emanates from “the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like.”⁵¹

In looking for evidence of an improper purpose, New Mexico courts consider several factors,⁵² including whether the corporation is undercapitalized,⁵³ fraudulently manipulated,⁵⁴ or mismanaged⁵⁵ in some way, especially if such manipulation or mismanagement results in corporate losses. Courts are also concerned with failures to observe corporate formalities.⁵⁶ On the other hand, even where formalities are observed, courts will accept evidence that the observation of corporate formalities is a sham.⁵⁷ The initial act of incorporation itself may be evidence that the corporate form is being used for an improper purpose where, for example, a corporation is set up to put assets out of the reach of a shareholder’s creditors.⁵⁸ New Mexico law is clear, however, that misuse of the corporate form after incorporation may also satisfy this element of the test.⁵⁹ Finally, while fraud is

50. *Id.* ¶ 15 (quoting Krendl & Krendl, *supra* note 41, at 18); *Scott*, 1988-NMSC-028, ¶ 7, 753 P.2d at 900 (citation omitted). *See also Morrissey*, 2016-NMCA-011, ¶ 13, 365 P.3d at 23.

51. *Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243, 266–67 (Tex. App. 2018) (internal citations omitted) (emphasis added). *See also Garcia*, 1997-NMCA-092, ¶¶ 20–22, 946 P.2d at 220–21.

52. *Jemez Agency, Inc. v. CIGNA Corp.*, 866 F. Supp. 1340, 1345 (D.N.M. 1994) (citing *Scott*, 1988-NMSC-028, ¶ 6, 753 P.2d at 900).

53. *Morrissey*, 2016-NMCA-011, ¶ 21, 365 P.3d at 25 (citing *Mobius Mgmt. Sys., Inc. v. W. Physician Search, L.L.C.*, 175 S.W.3d 186, 189 (Mo. Ct. App. 2005) (“Inadequate capitalization is circumstantial evidence of an improper purpose or reckless disregard for the rights of others.”)).

54. *Scott*, 1988-NMSC-028, ¶ 9, 753 P.2d at 901.

55. An improper purpose occurs when the corporation’s assets are misrepresented to the detriment of creditors. *Scott Graphics, Inc. v. Mahaney*, 1976-NMCA-038, ¶¶ 16–19, 89 N.M. 208, 549 P.2d 623.

56. *See Jemez Agency*, 866 F. Supp. at 1345 (citing *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1362 (10th Cir. 1974) (“Circumstances justify disregard of the corporate entity if separation of the two entities has not been maintained and injustice would occur to third parties if the separate entity were recognized.”)).

57. *Morrissey*, 2016-NMCA-011, ¶ 21, 365 P.3d at 25 (first citing *Scott*, 1988-NMSC-028, ¶ 10, 753 P.2d at 901 (“[A] party seeking to pierce the corporate veil must show that the financial setup of the corporation is a sham and causes an injustice. . . . Mere proof that the corporation is now insolvent is insufficient.”); and then quoting *Fontana v. TLD Builders, Inc.*, 840 N.E.2d 767, 779 (Ill. App. Ct. 2005) (“It is inequitable to allow shareholders to set up a flimsy organization just to escape personal liability.”)).

58. *Addison v. Tessier*, 1959-NMSC-010, ¶ 13, 65 N.M. 222, 335 P.2d 554 (“[W]hen circumstances surrounding the incorporation indicate an intention to hinder, delay or defraud creditors, such corporate entity must be set aside.”) (citation omitted).

59. *Estate of Bishop v. Mulholland*, No. 30,016, 2011 WL 5397134, at *4 (N.M. Ct. App. Sept. 15, 2011) (unpublished) (citing New Mexico case law for the proposition that “mismanagement at any subsequent time may be used to establish evidence of an improper purpose”).

obvious evidence of an improper purpose, it is not necessary to prove fraud to establish an improper purpose.⁶⁰

New Mexico courts have found improper purpose in a variety of circumstances. For example, where a shareholder has used a corporation for the purpose of “promoting [the shareholder’s] personal affairs,”⁶¹ where a subsidiary was used by its parent corporation to perpetrate a fraud,⁶² where an entity was incorporated with “an intention to hinder, delay or defraud creditors,”⁶³ where a corporation’s assets and purposes were misrepresented to third parties,⁶⁴ and where a corporation and shareholder jointly participated in or directed improper activities.⁶⁵

C. Causation

The two leading New Mexico cases on the causation element are *Garcia v. Coffman*⁶⁶ and *Morrissey v. Krystopowicz*.⁶⁷ In *Garcia v. Coffman*, the plaintiff alleged that the defendant chiropractor, Dr. Coffman, individually and through his corporation, “designed and implemented a treatment program for personal injury patients, such as [the] Plaintiff, for the purpose of generating income for [the Defendant] to the detriment of the patients.”⁶⁸ For example, “an excessive number of x-rays were taken, the x-rays were marked up by an unqualified staff member, and the x-ray results were not used in treatment.”⁶⁹ At trial, the jury determined that Dr. Coffman dominated and controlled his corporation for his own purposes and that such conduct caused damage to the plaintiff.⁷⁰ In affirming the jury’s determination to pierce the corporate veil to reach Dr. Coffman, the Court of Appeals found causation and held that “it is sufficient to show some knowing or cooperative effort between the related parties which results in unjust injury to the plaintiff, even though it may not be possible to prove that the defendant’s control directly caused [the] plaintiff’s injury.”⁷¹

More recently, in *Morrissey v. Krystopowicz*, the Court of Appeals confirmed that “a direct causal link to the tort-related acts is not required.”⁷² In that case, the defendant, Krystopowicz, was the sole shareholder of the corporation in question and had created ten limited-liability companies that each owned a nursing

60. *Scott*, 1988-NMSC-028, ¶¶ 8–12, 753 P.2d at 900–01; *Jemez Agency*, 866 F. Supp. at 1345.

61. *Harlow v. Fibron Corp.*, 1983-NMCA-117, ¶ 19, 100 N.M. 379, 671 P.2d 40 (quoting *Hill v. Dearmin*, 609 P.2d 127, 128 (Colo. App. 1980)).

62. *Garcia v. Coffman*, 1997-NMCA-092, ¶ 21, 124 N.M. 12, 946 P.2d 216 (citing *Krendl & Krendl*, *supra* note 41, at 42).

63. *Addison*, 1959-NMSC-010, ¶ 13, 335 P.2d at 557 (citation omitted).

64. *Garcia*, 1997-NMCA-092, ¶ 21, 946 P.2d at 221.

65. *Id.* ¶¶ 21–22.

66. 1997-NMCA-092, 946 P.2d 216.

67. 2016-NMCA-011, 365 P.3d 20.

68. *Garcia*, 1997-NMCA-092, ¶ 4, 946 P.2d 218.

69. *Id.* ¶ 5.

70. *Id.* ¶ 7.

71. *Id.* ¶ 24 (quoting *Krendl & Krendl*, *supra* note 41, at 27); cited with approval in *Morrissey*, 2016-NMCA-011, ¶ 13, 365 P.3d at 23.

72. *Morrissey*, 2016-NMCA-011, ¶ 17, 365 P.3d at 24.

home in New Mexico.⁷³ The plaintiff lived in one of these facilities the year before her death.⁷⁴ Her personal representative sued both Krystopowicz and the corporate defendants for, *inter alia*, wrongful death. The corporate defendants failed to answer the complaint and a default judgment was entered against them.⁷⁵ After a two-day hearing, the district court awarded plaintiff \$4,828,300 in damages. Most of the remaining defendants were dismissed from the suit and the case proceeded to a bench trial against Krystopowicz.⁷⁶

Plaintiff argued that the corporate defendants' veils should be pierced to hold Krystopowicz personally liable for the damages awarded to the plaintiff. The district court found that the first two elements of the doctrine were satisfied but that plaintiff had failed to prove that she had "suffered any damages *as a result of* [Krystopowicz's] domination of [the corporate entities] for an improper purpose."⁷⁷ In other words, his use of the corporations for an improper purpose did not cause her death. The Court of Appeals reversed and held that causation existed based on "*some reasonable relationship* between the injury suffered by the plaintiff and the actions of the defendant."⁷⁸ To establish a "reasonable relationship," the plaintiff must show that some knowing or cooperative effort between the related parties resulted in unjust injury to the plaintiff.⁷⁹ "The question is not whether there is a direct link between Krystopowicz's conduct and [plaintiff's] death but rather whether Krystopowicz's abuse of the corporate form caused *some* injury to plaintiff."⁸⁰ In this case, the unjust injury to the plaintiff was not the underlying tort injury; rather, the plaintiff was injured by the inability of corporate defendants to pay the judgment,⁸¹ and that injury was caused by Krystopowicz's actions.

Beyond *Garcia v. Coffman* and *Morrissey v. Krystopowicz*, there is very little discussion of the causation requirement by New Mexico courts. Outside New Mexico, many states apply tests incorporating the first two elements of the New

73. *Id.* ¶ 3.

74. *Id.* ¶¶ 8–9.

75. *Id.* ¶ 9.

76. *Id.*

77. *Id.* ¶ 11 (emphasis added).

78. *Id.* ¶¶ 13, 26 (quoting Krendl & Krendl, *supra* note 41, at 27) (emphasis added). *See also* Harlow v. Fibron Corp., 1983-NMCA-117, ¶ 11, 100 N.M. 379, 382, 671 P.3d 40, 43; Alto Eldorado P'ship v. Amrep, 2005-NMCA-131, ¶ 19, 138 N.M. 607, 614, 124 P.3d 585, 592 (citing Scott v. AZL Res., Inc., 1988-NMSC-028, ¶ 6, 107 N.M. 118, 121, 753 P.2d 897, 900)

79. *Morrissey*, 2016-NMCA-011, ¶ 13, 365 P.3d at 23.

80. *Id.* ¶ 17 (emphasis added).

81. *Id.* ¶¶ 22, 24.

Mexico test,⁸² but few specifically incorporate causation as a separate requirement.⁸³ Nevertheless, the causation requirement is hardly a significant additional barrier to recovery once the first two elements have been proved. Rather, it focuses the inquiry on injustice and inequity *in the result*—entirely appropriate for an equitable remedy and consistent with other jurisdictions⁸⁴—and limits the doctrine’s application to cases where defendant’s actions have caused *some* unjust harm to plaintiff. This could be harm caused by the underlying breach of contract or tort claim, or harm caused when the defendant corporation is unable to pay the plaintiff’s judgment. Of course, if the controlling shareholder directly caused the harm, the plaintiff may have a direct cause of action against the shareholder as well.

II. OUTSIDE REVERSE PIERCING JURISPRUDENCE

In this section, I survey the jurisdictions that have considered outside reverse piercing—cases where a third party is seeking to hold a corporation liable for the acts of a shareholder—and discuss common themes, concerns, and key debates in order to provide a sense of how courts approach the question of whether to adopt or apply the doctrine.

A. Outside Reverse Piercing in Other Jurisdictions

Not all states have considered reverse piercing,⁸⁵ and even fewer have considered both inside and outside reverse veil piercing. Still, far more states have adopted outside reverse veil piercing than commentators commonly acknowledge.

82. See, e.g., *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 454–55 (Tex. 2008); *Bagel Bros. Maple, Inc. v. Ohio Farmers, Inc.*, 279 B.R. 55, 62 (W.D.N.Y. Mar. 1, 2002) (explaining that, under New York law, a party seeking to pierce the veil between a corporate parent and its subsidiary must show: (1) that the subsidiary is a mere instrumentality of the parent, and (2) that the subsidiary is being used by the parent to commit or conceal fraud or other wrongdoing (citing *Kashfi v. Phibro–Salomon, Inc.*, 628 F.Supp. 727, 732–33 (S.D.N.Y. Feb. 13, 1986))). Colorado courts’ analyses of veil piercing also mirror those of New Mexico courts with respect to the first two elements (alter ego and improper purpose) but diverge as to the third element. Whereas New Mexico courts require a finding of causation as the third element, Colorado courts ask the plaintiff to demonstrate that piercing the veil is required to achieve an equitable result. See *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006) (“Achieving an equitable result is the paramount goal of traditional piercing of the corporate veil.”). Because the causation element can be satisfied indirectly and veil piercing is an equitable remedy in Colorado, it is not clear that this is a meaningful difference in practice.

83. This is not to say causation is irrelevant in other jurisdictions, only that causation is not separately broken out. Instead, something like causation will show up as part of the improper purpose discussion and/or is established in the context of showing that legal remedies are inadequate to redress a plaintiff’s injury.

84. See *supra* note 83.

85. *In re Howland*, 516 B.R. 163, 167 (Bankr. E.D. Ky. 2014) (“Kentucky courts have not accepted or rejected the reverse veil piercing doctrine.” (citing *Turner v. Andrews*, 413 S.W.3d 272, 277 n.4 (Ky. 2013))).

To begin, three of the six states within the Tenth Circuit⁸⁶—Utah,⁸⁷ Wyoming,⁸⁸ and Colorado⁸⁹—have adopted outside reverse veil piercing. The Utah Supreme Court clearly adopted the doctrine in *M.J. v. Wisan*, although the court did not use the language of outside reverse piercing to describe the doctrine applied:

[T]he doctrine of reverse piercing seems to us to “follow[] logically” from the premises of the longstanding doctrine of traditional (direct) veil-piercing. Where an individual so abuses the corporate form that it becomes his alter ego, and where honoring its separate existence “would sanction a fraud or promote injustice,” it would make no sense for the law to preclude a claimant from treating the two as if they were identical.⁹⁰

Similarly, the Wyoming Supreme Court made clear that it would recognize outside reverse veil piercing for the same reasons offered to justify classic veil piercing:

[W]here an individual owns all of the stock of a corporation or substantially so, and that the [*sic*] corporation is in truth and in fact, but the juristic double of its owner and where fraud or injustice will likely operate to the injury of third persons, this situation suffices to dissipate the separate factional identity of the corporation and the law will have no compunction in holding the corporation liable for the acts of its owners or vice versa.⁹¹

Finally, sitting en banc in 2008, the Colorado Supreme Court expressly adopted outside reverse veil piercing.⁹² “Although the certified question of law could be read to encompass both inside and outside reverse piercing claims, we limit our review to outside claims due to the facts presented in this case . . . and hold that Colorado law permits outside reverse piercing when justice so requires.” As with Utah and Wyoming, its holding rested on “the similarities and parallel goals achieved in outside reverse piercing and traditional piercing.”⁹³

86. The territorial jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho. See *General Information*, U.S. CT. APP. TENTH CIR. <https://www.ca10.uscourts.gov/clerk> [<https://perma.cc/4BJG-3784>]. As far as federal courts go, the Tenth Circuit Court of Appeals has been relatively hostile to reverse veil piercing, insisting that it will not apply it unless applicable state law has accepted it. See, e.g., *Weinman v. Hamilton Props. Corp.* (*In re Hamilton*), 186 B.R. 991, 999 (Bankr. D. Colo. 1995).

87. *M.J. v. Wisan*, 2016 UT 13, ¶ 78, 371 P.3d 21, 36 (“[The] doctrine of reverse piercing ‘follow[(s)] logically’ from the premises of the longstanding doctrine of traditional (direct) veil-piercing.” (quoting *Transamerica Cash Reserve, In. v. Dixie Power & Water, Inc.*, 789 P.2d 24, 26 (Utah 1990))).

88. *State ex rel. Christensen v. Nugget Coal Co.*, 144 P.2d 944 (Wyo. 1944).

89. *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006).

90. *Wisan*, 2016 UT 13, ¶ 78, 371 P.3d at 36 (internal citations omitted).

91. *Christensen*, 144 P.2d at 950.

92. *Phillips*, 139 P.3d at 645 (“Colorado law permits outside reverse piercing when justice so requires.”).

93. *Id.*

Of the remaining three Tenth Circuit jurisdictions,⁹⁴ the Oklahoma Supreme Court recently observed in dicta that the state has not adopted the reverse-piercing doctrine,⁹⁵ but the question was not before the court in that case.⁹⁶ Similarly, the Kansas Supreme Court has not decided whether to adopt or reject reverse veil piercing. New Mexico has applied the doctrine without naming it in at least one case.⁹⁷ It is not clear what Oklahoma and Kansas⁹⁸ will do when presented with the question, but this Article suggests that New Mexico is likely to follow Utah, Wyoming, and Colorado and explicitly adopt the doctrine.

Outside the Tenth Circuit, Idaho,⁹⁹ Indiana,¹⁰⁰ Iowa,¹⁰¹ Montana,¹⁰² Nebraska,¹⁰³ Nevada,¹⁰⁴ New York,¹⁰⁵ North Carolina,¹⁰⁶ Pennsylvania,¹⁰⁷

94. I leave Montana and Idaho out of the Tenth Circuit discussion, since the only parts of these states in the Tenth Circuit are the portions of Yellowstone National Park that extend into them. I note, however, that both Montana and Idaho have adopted outside veil piercing. See *infra*, notes 100 and 103, respectively.

95. *Lind v. Barnes Tag Agency, Inc.*, 2018 OK 35, ¶ 22, 418 P.3d 698, 705.

96. *In re Denton*, No. 99-6059, 2000 WL 107376 (10th Cir. Jan. 1, 2000) (unpublished table decision).

97. *Supra*, note 22.

98. In the context of an inside reverse piercing claim, the Tenth Circuit expressed doubt that Kansas would adopt reverse piercing. *Denton*, 2000 WL 107376, at *4.

99. *Minich v. Gem State Devs., Inc.*, 591 P.2d 1078, 1084 (Idaho 1979). *But see* *Jordan v. Hunter*, 865 P.2d 990, 996 (Idaho Ct. App. 1993) (containing the Idaho Court of Appeals' rejection of "insider" reverse piercing.).

100. *Lambert v. Farmers Bank, Frankfort, Ind.* 519 N.E.2d 745, 748–49 (Ind. Ct. App. 1988) ("There was no error in the trial court's decision to disregard the corporate entity of Lambert Enterprises and subject its assets to execution in satisfaction of William Lambert's personal debts, including the judgment in favor of the Farmers Bank."); *see also* Colin E. Flora, *When, How & Why of Piercing the Corporate Veil in Indiana*, RES GESTAE, Nov. 2016, at 13, 16.

101. The court did not use the phrase "reverse piercing," but was willing to disregard "the corporate entity to allow plaintiff judgment creditor to directly reach the corporate assets" of defendant's corporation. *Central Nat'l Bank & Trust Co. v. Wagener*, 183 N.W.2d 678, 681 (Iowa 1971); *see also* Matthew G. Dore, *Lifting the Veil on Iowa Piercing Jurisprudence*, 67 DRAKE L. REV. 619, 664 (2019).

102. *Martinson v. Towe (In re Towe)*, 173 B.R. 197 (Bankr. D Mon. 1994).

103. *Medlock v. Medlock*, 642 N.W.2d 113 (Neb. 2002) (holding that the plaintiff could pierce the veil of her former husband's corporation to reach property held in the name of the corporation). *See also* Christopher W. Peterson, *Piercing the Corporate Veil in Nebraska*, 51 CREIGHTON L. REV. 247, 265 (2018).

104. *LFC Mktg. Grp., Inc. v. Loomis*, 8 P.3d 841 (Nev. 2000) (finding that the alter ego doctrine may apply in reverse to reach corporation's assets and satisfy the controlling individual's debt).

105. *State v. Easton*, 647 N.Y.S.2d 904, 908–09 (N.Y. App. Div. 1995); *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997); *Liberty Synergistics, Inc. v. Microflo Ltd.*, 50 F. Supp. 3d 267, 297 (E.D.N.Y. 2014).

106. *Strategic Outsourcing, Inc. v. Stacks*, 625 S.E.2d 800 (N.C. Ct. App. 2006) (approving outside reverse veil piercing); *Fischer Inv. Cap. Inc. v. Catawba Dev. Corp.*, 689 S.E.2d 143 (N.C. Ct. App. 2009) (applying *Stacks*).

107. *Mass v. Bell Atl. Tricon Leasing Corp. (In re Mass)*, 178 B.R. 626 (M.D. Pa. 1995); *718 Arch Street Assocs., Ltd. v. Blatstein (In re Blatstein)*, 192 F.3d 88 (3rd Cir. 1990) (recognizing outside reverse veil piercing under Pennsylvania law but refusing to apply it under the facts of the case).

Tennessee,¹⁰⁸ Texas,¹⁰⁹ Virginia,¹¹⁰ Washington,¹¹¹ Wisconsin,¹¹² and the District of Columbia¹¹³ have considered and adopted outside reverse veil piercing. The Supreme Court of Connecticut made clear it would adopt the doctrine,¹¹⁴ but the legislature overruled it.¹¹⁵ In *Cargill, Inc. v. Hedge*, the Minnesota Supreme Court adopted inside reverse piercing in furtherance of the public policy aims of the state.¹¹⁶ The court's reasoning in this case suggests that it would be open to an outside reverse piercing claim where it too was consistent with Minnesota public policy.¹¹⁷ Finally, federal courts have applied the outside reverse piercing doctrine as a matter of federal law to "reach the assets of a corporation to satisfy the tax debt of an individual"¹¹⁸ and in circumstances of alleged Medicare and Medicaid fraud.¹¹⁹

108. *Church Joint Venture, L.P. v. Blasingame*, 947 F.3d 925 (6th Cir. 2020) ("Under Tennessee law, there is no basis for a reverse alter ego or reverse veil piercing claim outside the parent-subsiary context.").

109. *Zahra Spiritual Trust v. United States*, 910 F.2d 240 (5th Cir. 1990); *Yamin v. Carroll Wayne Conn, L.P.*, 574 S.W.3d 50 (Tex. Ct. App. 2018).

110. *C.F. Trust, Inc. v. First Flight Ltd.*, 580 S.E.2d 806 (Va. 2003) (holding that Virginia recognizes the concept of outsider reverse piercing); *Dry Handy Invs., Ltd. v. Corvina Shipping Co.*, 988 F.Supp.2d 579 (E.D. Va. 2013) (applying *First Flight Ltd.*).

111. *W. G. Platts, Inc. v. Platts*, 298 P.2d 1107, 1111 (Wash. 1956) (citing *Platt v. Bradner Co.*, 230 P. 633, 635 (1924) ("[W]hen one corporation so dominates and controls another as to make that other a simple instrumentality or adjunct to it, the courts will look beyond the legal fiction of distinct corporate existence, as the interests of justice require; and where stock ownership is resorted to not for the purpose of participating in the affairs of the corporation in the customary and usual manner, but for the purpose of controlling the subsidiary company so that it may be used as a mere agency or instrumentality of the owning company, the court will not permit itself to be blinded by mere corporate form, but will, in a proper case, disregard corporate entity, and treat the two corporations as one.")).

112. *Olen v. Phelps*, 546 N.W.2d 176, 181 (Wis. Ct. App. 1996) (stating alter ego doctrine can be applied in reverse to reach assets of controlled entity).

113. *Valley Fin., Inc. v. United States*, 629 F.2d 162, 171–72 (D.C. Cir. 1980).

114. *McKay v. Longman*, 211 A.3d 20 (Conn. 2019).

115. CONN. GEN. STAT. §§ 33-673a–33-673c (2019).

116. 375 N.W.2d 477 (Minn. 1985).

117. *See also* *Roepke v. Western Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 352 (Minn. 1981) (holding that the corporate veil could be pierced to hold that driver was the "insured" under corporate policies, where deceased driver of van was the president and sole shareholder of the named insured corporation, the vehicles insured were used as family vehicles, neither the driver nor his household owned any other vehicles, and no shareholder or creditor would be adversely affected).

118. *United States v. Stephens*, 670 F. Supp. 2d 1145, 1151–52 (D. Mont. 2009); *Tarpey v. United States*, CV-17-94-BMM, 2019 WL 5820727 (D. Mont. Nov. 7, 2019); *see also* *Lunnon v. United States*, 2020 WL 8413557 (D.N.M. Dec. 18, 2020) (citing *United States v. Scherping*, 187 F.3d 796, 803 (8th Cir. 1999)) (explaining that reverse piercing is a well-established theory in the federal tax realm). Federal courts have also adopted and applied inside reverse piercing doctrine in the context of remedial social legislation such as the Occupational Health and Safety Act. *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005).

119. *Smith v. Carolina Med. Ctr.*, 274 F. Supp. 3d 300 (E.D. Pa. 2017).

A handful of states have rejected reverse piercing in one form or another.¹²⁰ However, in others states—such as Delaware,¹²¹ Illinois,¹²² and Florida¹²³—it is less clear whether some form of reverse piercing has been (or will be) adopted or rejected, either because there are conflicting decisions or because cases are ambiguously written.¹²⁴ In Florida, for example, at least one court has held that veil piercing may occur in either direction,¹²⁵ but other courts in the state have been less clear. Louisiana and Maine have rejected inside reverse piercing but have not decided on outside reverse piercing.¹²⁶ Similarly, the Illinois Supreme Court rejected inside veil piercing,¹²⁷ but the Seventh Circuit, applying Illinois law, stated that outside veil piercing likely would be acceptable under Illinois law: “The question is whether, because the corporations were [the defendant’s] alter egos, they could be made liable for his debts, and we assume the answer is yes.”¹²⁸

No Delaware court has adopted outside reverse piercing.¹²⁹ Accordingly, most federal courts asked to apply Delaware law have declined to reverse veil pierce in the absence of a state court decision adopting the doctrine.¹³⁰ But in 2018, the

120. Ohio, Georgia, and California have mostly made it clear that they reject the doctrine, but I say “mostly” because, in the case of Georgia and California, there are some decisions that call that rejection into question. *See Curci Invs., LLC v. Baldwin*, 221 Cal. Rptr. 3d 847, 848 (Cal. Ct. App. 2017); *see also Acree v. McMahan*, 585 S.E.2d 873, 874 (Ga. 2003).

121. *Sky Cable, LLC v. Coley*, No. 5:11cv00048, 2016 WL 3926492, at *58 (W.D. Va. July 18, 2016) (“[G]iven the particular facts of this case . . . Delaware law would recognize the reverse veil-piercing theory and apply it here, finding that [the shareholder] is the *alter ego* of his limited liability companies.”); *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 388 (4th Cir. 2018) (“Delaware would recognize outsider reverse piercing of an LLC’s veil when the LLC is the alter ego of its sole member.”). *But see, Crystallex Int’l Corp. v. Petróleos de Venezuela, S.A.*, 213 F.Supp.3d 683, 691 n.7 (D. Del. 2016), *reversed on other ground by Crystallex Int’l Corp. v. Petróleos de Venezuela, S.A.*, 879 F.3d 79 (3rd Cir. 2018) (stating that whether Delaware law recognizes reverse veil piercing is an unsettled question).

122. *See e.g., Scholes v. Lehmann*, 56 F.3d 750, 758 (7th Cir. 1995) (“The question is whether, because the corporations were Douglas’s alter egos, they could be made liable for his debts, and we assume the answer is yes.”). This would ordinarily limit its application to “one-man corporations” because “if there is more than one shareholder the seizing of the corporation’s assets to pay a shareholder’s debts would be a wrong to the other shareholders.” *Id.* at 758. *But see Gierum v. Glick (In re Glick)*, 568 B.R. 634 (2017) (providing that Illinois law does not recognize outsider reverse piercing theory.).

123. *Estudios, Proyectos e Inversiones de Centro America, S.A. (EPICA) v. Swiss Bank Corp. (Overseas) S.A.*, 507 So. 2d 1119 (Fla. Dist. Ct. App. 1987).

124. In Maine, for example, the Supreme Judicial Court declined to adopt reverse piercing in circumstances of attempted inside reverse piercing for reasons that were clearly specific to inside reverse piercing; thus, it is not clear that the reasoning would apply in the context of outside reverse piercing. *Sturtevant v. Town of Winthrop*, 1998 ME 84, ¶ 21, 732 A.2d 264, 270 (Me. 1999); *see also Mar-Kay Plastics, Inc. v. Reid Plastics, Inc. (In re Mar-Kay Plastics, Inc.)*, 234 B.R. 473, 481 (Bankr. W.D. Mo. 1999) (“The general rule is that alter ego claims belong to third parties and that corporate veil should never be pierced for the benefit of corporation or its stockholders.”).

125. *Swiss Bank*, 507 So.2d 1119.

126. *Sturtevant*, 732 A.2d at 270; *Smith v. Cotton’s Fleet Serv., Inc.*, 500 So. 2d 759, 762 (La. 1987).

127. *In re Rehabilitation of Centaur Ins. Co.*, 632 N.E.2d 1015, 1018 (Ill. 1994); *Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 241–42 (Ill. 2007) (approving *In re Rehabilitation of Centaur Ins. Co.*).

128. *Scholes v. Lehmann*, 56 F.3d 750, 758 (7th Cir. 1995). *But see Gierum v. Glick (In re Glick)*, 568 B.R. 634, 663 (Bankr. N.D. Ill. 2017).

129. *But see Sky Cable, LLC v. Coley*, No. 5:11cv00048, 2016 WL 3926492 (W.D. Va. July 18, 2016); *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375 (4th Cir. 2018).

130. *See PNC Bank v. Udell*, No. 16 C 5400, 2017 WL 3478814 (N.D. Ill.).

Fourth Circuit concluded that Delaware would recognize outside reverse piercing of an LLC's veil where an LLC was a sham and the alter ego of its sole member that was being used to defraud creditors.¹³¹ The Fourth Circuit did so, at least in part, because Delaware courts had signaled an openness to the doctrine.¹³²

B. Common Themes

While many outside reverse piercing cases have been decided in the United States, a careful review reveals common themes across most jurisdictions: (1) courts regularly observe that outside reverse piercing and traditional veil piercing share crucial similarities and parallel policy goals; (2) courts often find the decision to reverse pierce is heavily fact dependent; (3) courts generally grant tort and other involuntary creditors greater leniency in piercing the corporate veil than they do to contract and other voluntary creditors; and (4) courts express concern about the effects of reverse piercing on nonculpable shareholders and creditors. In this section, I briefly examine each of these themes in turn.

1. *Similarities between outside reverse and traditional veil piercing warrant the adoption of the former where the latter is recognized*

Outside reverse piercing and traditional veil piercing share crucial similarities and parallel policy goals,¹³³ which is not the case with inside reverse piercing.¹³⁴ Outside reverse veil piercing claims—like traditional veil piercing claims—are brought by third-party creditors who have been harmed by a shareholder's use of the corporate form for an improper purpose. Writing for the Colorado Supreme Court in *In Re Phillips*,¹³⁵ Justice Martinez stated:

Both types of piercing strive to achieve an equitable result. In traditional piercing, equity requires the veil be pierced to impose liability on a shareholder who has abused the corporate form for his or her own advantage. Similarly, in outside reverse piercing,

131. *Coley*, 2016 WL 3926492; *DIRECTV, Inc.*, 886 F.3d 375. For a discussion of this case and its implications for Delaware law, see David G. Epstein & Jake Weiss, *The Fourth Circuit, "Suem" and Reverse Veil Piercing in Delaware*, 70 S.C. L. REV. 1189 (2019).

132. *DIRECTV, Inc.*, 886 F.3d at 387–88 (citations omitted):
In *Spring Real Estate, LLC v. Echo/RT Holdings, LLC*, the Court of Chancery of Delaware noted that "where [a] subsidiary is a mere alter ego of the parent to the extent that the Court may engage in 'reverse veil-piercing,' the Court may treat the assets of the subsidiary as those of the parent" for certain purposes. And, in another decision, the Delaware Chancery Court observed that a claim of traditional veil piercing "might have prevailed" had it been presented properly as a claim of reverse veil piercing.

133. The Fourth Circuit Court of Appeals observed that "outsider reverse piercing 'follows logically the premises of traditional veil piercing.'" *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 386 (4th Cir. 2018) (citing HODGE O'NEAL & ROBERT B. THOMPSON, *CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE* § 8:18 (Rev. 3d ed. 2020)).

134. By definition, inside reverse piercing claims are brought by a corporate insider or shareholder, who presumably benefited as a shareholder of the corporation whose veil it seeks to pierce. See, e.g., *supra* note 11.

135. *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006) (en banc).

an equitable result is achieved by ignoring the corporate fiction to attach liability to the corporation. “Indeed, it is particularly appropriate to apply the alter ego doctrine in ‘reverse’ when the controlling party uses the controlled entity to hide assets or secretly to conduct business to avoid the preexisting liability of the controlling party.” Thus, the purpose of obtaining a just result is furthered by permitting outside reverse piercing in Colorado.¹³⁶

The Virginia Supreme Court came to the same conclusion in *C.F. Trust, Inc. v. First Flight L.P.*:¹³⁷

We conclude that there is no logical basis upon which to distinguish between a traditional veil piercing action and an outsider reverse piercing action. In both instances, a claimant requests that a court disregard the normal protections accorded a corporate structure to prevent abuses of that structure.¹³⁸

This is consistent with the approaches of Texas and Washington courts.¹³⁹ Ultimately, the argument for adopting outside reverse piercing in New Mexico is the same as the argument for continuing to apply traditional veil piercing. Indeed, judgments refusing to adopt outside reverse veil piercing are often grounded in a clear commitment to shrink the opportunities for any kind of veil piercing.

2. Reverse veil piercing is heavily fact dependent

Veil piercing is an equitable and heavily fact dependent remedy.¹⁴⁰ As with traditional veil piercing, the decision to reverse pierce and disregard a corporate structure to impose liability is a fact-specific determination, and the factual circumstances surrounding the corporation and the questioned act will be closely scrutinized in each case.¹⁴¹ Courts emphasize that “[t]here is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case.”¹⁴² Veil piercing is a purpose-driven, results-based doctrine with a clear substantive goal: prevent the abuse of the corporate form. Veil piercing is necessary for the proper functioning of both corporate law and the economy in general. The complexity of corporate formalities and corporate

136. *Id.* (internal citations omitted).

137. 580 S.E.2d 806 (Va. 2003).

138. *Id.* at 810.

139. *Yamin v. Carroll Wayne Conn, L.P.*, 574 S.W.3d 50, 66–67 (Tex. Ct. App. 2018) (“We have recognized that reverse veil-piercing is appropriate in circumstances analogous to those that justify traditional veil-piercing.”); *see also* *W. G. Platts, Inc. v. Platts*, 298 P.2d 1107 (Wash. 1956).

140. *See, e.g.*, *Alto Eldorado P’ship v. Amrep*, 2005-NMCA-131, 138 N.M. 607, 616, 124 P.3d 585, 594 (2005) (demonstrating that corporate formation for an improper purpose is highly fact specific); *In re Raymond*, 529 B.R. 455, 475 (Bkrcty.D.Mass. 2015) (“In Massachusetts, piercing the corporate veil is a well-recognized, yet fact specific, remedy.”); *see also* *Zimmerman v. Puccio*, 613 F.3d 60, 74 (1st Cir. 2010); *My Bread Baking Co. v. Cumberland Farms, Inc.*, 233 N.E.2d 748, 752 (Mass. 1968).

141. *Yamin*, 574 S.W.3d at 66; *C.F. Trust*, 580 S.E.2d at 810.

142. *LFC Mktg. Grp., Inc. v. Loomis*, 8 P.3d 841, 847 (Nev. 2000) (quoting *Polaris Indus. Corp. v. Kaplan*, 747 P.2d 884, 887 (Nev. 1987)); *see also* *Yamin*, 574 S.W.3d at 66.

compliance create the potential for misbehavior. Furthermore, this complexity provides a variety of circumstances under which misbehavior can occur.

The doctrine's fact dependency may enable trial lawyers to distinguish past decisions where courts refused to apply the doctrine based on the facts of their cases. This fact dependency may also explain why some jurisdictions have contradictory decisions that purport to both adopt and reject the reverse piercing doctrine. Finally, the doctrine's fact dependency should provide the New Mexico Supreme Court with some comfort that, if adopted, outside reverse veil piercing would not open the floodgates because courts would still be required to carefully consider and articulate fact-specific reasons for piercing the veil in either direction.

3. *Greater leniency is given in tort cases*

It appears that courts across the United States generally grant tort victims, and other involuntary creditors, greater leniency in piercing the corporate veil than they do contract claimants, especially financial institutions. In an empirical study of 2,908 cases from 1958 to 2006, Professor Peter Oh confirmed that outside reverse piercing claims not only prevail more often in tort than contract, but they also adhere to the voluntary/involuntary creditor distinction.¹⁴³ This makes sense when incentives are considered. Professor Christopher Peterson succinctly summarized such considerations in his study of Nebraska law:

The policy justifications for the trend are fairly straight forward [sic]: companies have an incentive to engage in excessive risk taking and to shift the costs of such risks to unwary third parties. Involuntary creditors are therefore, in effect, subsidizing incorporations for their excessive risk taking. And as compared to voluntary contract creditors, a court of equity should be less willing to grant relief to a creditor that has the prospective ability to protect itself through verifying information and obtaining security interests and guarantees.¹⁴⁴

The observation that courts appear to be less willing to pierce the corporate veil for voluntary creditors is also consistent with a public policy commitment to freedom of contract.¹⁴⁵ Under contract law, voluntary arrangements, once formed, should be respected except in rare cases; parties should be assumed to have allocated risks for contingencies among themselves. The established defenses to contract formation—duress, undue influence, misrepresentation, and unconscionability—serve as gatekeepers to ensure voluntariness.

Conversely, a greater willingness to pierce the corporate veil for involuntary creditors is consistent with the public policy underlying tort law. In New Mexico,

143. Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 90 (2010).

144. Christopher W. Peterson, *Piercing the Corporate Veil in Nebraska*, 51 CREIGHTON L. REV. 247, 276 (2018); *see also* Christopher W. Peterson, *Piercing the Corporate Veil by Tort Creditors*, 13 J. BUS. & TECH. L. 63, 79 (2017). Interestingly, the concerns described by Peterson echo those raised in inside reverse piercing cases. This makes sense as insiders are voluntary in many of the same ways one might describe voluntary creditors and presumably may prospectively protect themselves.

145. New Mexico's public policy strongly favors freedom of contract. *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, ¶ 8, 108 N.M. 467, 775 P.2d 233 (1987).

courts have adopted a fault-based system of tort law that holds tortfeasors responsible for the loss they cause.¹⁴⁶ Specifically, tort law in New Mexico is based on four principles: (1) redistributing the economic burden¹⁴⁷ of loss from the victim; (2) deterring conduct that society regards as unreasonable or immoral;¹⁴⁸ (3) creating a means for the victim to obtain compensation for wrongs committed against them; and (4) providing a venue to condemn and prevent certain behaviors in society.¹⁴⁹ The objectives of tort law are based on the societal benefit of holding “wrongdoers responsible for the harmful consequences of their own behavior.”¹⁵⁰ These objectives are consistent with the veil piercing doctrine, which seeks to hold the wrongdoer-in-fact responsible for the harmful consequences of its behavior.

According to Professor Peterson, courts do not apply a different test for cases involving tort victims; rather, courts apply the same test more leniently.

Courts’ leniency with respect to tort creditors is exhibited in the weight such courts afford the tort creditors’ policy justifications. Courts are generally not applying different veil-piercing tests to tort creditors, but administer the same tests more leniently. This occurs as veil-piercing factors are re-weighted in favor of the tort creditor. The court also takes into account persuasive policy justifications for such creditors because these courts generally do not limit themselves to consideration of only a closed set of factors.¹⁵¹

Veil piercing is a flexible and equitable doctrine. Its flexibility gives courts space to use it differently in cases involving voluntary and involuntary creditors. But it may be a mistake to understand this as leniency *per se*, at least in any formal sense. Differing outcomes are more likely a function of the doctrine’s fact-dependent inquiry and equitable goals.

4. Concerns about the effect on nonculpable shareholders and creditors

Courts have rejected outside reverse piercing for a few key reasons, none of which ultimately hold up under scrutiny. Some courts view any extension of veil piercing as an unacceptable threat to limited liability. But outside reverse piercing presents no greater risk to limited liability than traditional veil piercing.

146. *Gutierrez v. City of Albuquerque*, 1998-NMSC-027, ¶ 11, 125 N.M. 643, 964 P.2d 807 (1998).

147. The goal of providing a victim with adequate compensation exists for both economic and physical injury. *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶¶ 21–22, 134 N.M. 341, 76 P.3d 1098 (2003).

148. New Mexico seems to be moving away from a focus on morality and, instead, embracing the idea of risk allocation, at least in the context of negligence. “In this regard it should be remembered that the policy behind the law of torts does more than compensate victims—it encourages reasonable safeguards against the risk of harm.” *Saiz v. Belen School Dist.*, 1992-NMSC-018, ¶ 26, 113 N.M. 387, 827 P.2d 102 (1992).

149. *Trujillo v. Albuquerque*, 1990-NMSC-083, ¶ 10, 110 N.M. 621, 798 P.2d 571 (1990), *rev’d on other grounds*, 965 P.2d 305.

150. *United Rentals NW., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 20, 148 N.M. 426, 237 P.3d 728 (2010).

151. Peterson, *Piercing the Corporate Veil in Nebraska*, *supra* note 145, at 276; *see also* Peterson, *Piercing the Corporate Veil by Tort Creditors*, *supra* note 145, at 78–79.

Other courts refusing to adopt outside reverse piercing have expressed concern that no matter its similarity to traditional veil piercing, it presents at least two problems that a standard pierce does not.¹⁵² First, the Tenth Circuit has expressed concern that a reverse pierce “bypasses normal judgment-collection procedures.”¹⁵³ This is true, but only in circumstances where normal judgment-collection procedures are inadequate to compensate the plaintiff and the court has made a finding that the corporation is the alter ego of the shareholder.¹⁵⁴ If that is the case, then judgment-collection procedures should give the plaintiff access to both the shareholder’s and the corporation’s property as one and the same.

Second, the Tenth Circuit has been troubled by the potential for prejudice to nonculpable shareholders and creditors if the corporation’s assets are attached directly.¹⁵⁵ This concern is rational. In an outside reverse pierce, a corporation is liable for the acts of a shareholder. If that corporation is a multi-shareholder corporation, then any order requiring a corporation to pay for the actions of a single shareholder will likely come at the expense of nonculpable shareholders to the extent that the value of their shares diminish. Similarly, if assets of a corporation are used to satisfy the debts of a shareholder, then creditors of the corporation are similarly prejudiced. But these risks are ones that courts are well equipped to handle. For one thing, this concern should not foreclose the possibility of outside reverse veil piercing where the corporation is held by a single shareholder and/or there is sufficient remaining value in the corporation to satisfy the claims of corporate creditors. Furthermore, veil piercing is an equitable remedy that empowers the court to consider the totality of the circumstances—including the number and interests of shareholders and creditors, for example—and balance competing harms before deciding to pierce the veil.

One of the simplest and best challenges to courts that reject reverse piercing on this basis was made by Judge Faris in *In re Rolloffs Hawaii, LLC*:

Speaking metaphorically, the prohibition on reverse piercing means that a court can punch holes in the veil separating the corporation from its shareholders, but must install a one-way valve that allows liabilities to flow only from the corporation to one or more shareholders, but not in the opposite direction. Few cases explain why the one-way valve should *always* be required, or (in other words) why a court could not ever let liabilities flow in the opposite direction or simply tear down the veil altogether. The only explanation I have seen states that reverse piercing could force nonculpable shareholders of a corporation to bear the cost of the culpable shareholder’s wrongdoing. But this does not explain why reverse piercing should be prohibited even where there is only

152. *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1576–78 (10th Cir. 1990).

153. *Id.* at 1577 (cited with approval by Justice Eid writing for the dissent, *In re Phillips*, 139 P.3d 639, 649 (Colo. 2006)).

154. For arguments against expanding veil piercing doctrine to include outside reverse piercing, see Stephen M. Bainbridge & M. Todd Henderson, *LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS* 187–90 (2016).

155. *Cascade Energy*, 896 F.2d at 1576–78; see also *Floyd v. IRS*, 151 F.3d 1295, 1299 (10th Cir. 1998).

one shareholder, or all shareholders are culpable, or the court could fashion a remedy that would protect the nonculpable shareholders.¹⁵⁶

It would be a mistake to assume that courts adopting reverse piercing are not cognizant of the potential harm to nonculpable investors and creditors. In fact, courts adopting the doctrine acknowledge these concerns and have either limited the doctrine's application to protect nonculpable investors and creditors¹⁵⁷ or specifically counseled trial courts to consider the potential implications for nonculpable investors and creditors as a factor when deciding whether to grant the equitable remedy.¹⁵⁸

IV. PROPOSED APPROACH FOR NEW MEXICO

It seems likely that New Mexico will adopt outside reverse veil piercing if presented with circumstances justifying its application. New Mexico has in fact already used the doctrine without naming it. In *Addison v. Tessier*,¹⁵⁹ the defendant shareholder had transferred assets to a corporation, in which he had a 98 percent interest, to avoid paying creditors. The New Mexico Supreme Court held that “the legal entity of the corporation must be disregarded for purposes of satisfying appellant’s judgment [against the shareholder].”¹⁶⁰ Without using the vocabulary of outside reverse veil piercing, the court permitted the creditor to pierce the corporate veil and reach the assets of the corporation to satisfy the debts of its controlling shareholder.¹⁶¹ It did so even though the creditor had not attempted to attach the stock to satisfy its judgment.¹⁶² Of particular relevance to the court was the fact that the defendant had used the corporation to hinder and defraud his creditors.

If New Mexico were to explicitly adopt the doctrine of outside reverse veil piercing, a review of relevant case law suggests the following approach. First, as with traditional piercing, courts should consider the decision to ignore the separate existence of a corporate entity and impose personal liability upon shareholders for debts of the corporation an extraordinary act to be taken only when necessary to

156. *In re* Roloffs Hawaii, LLC, No. 16-01294, 2019 WL 2621767, at *10 n.34 (Bankr. D. Haw. June 25, 2019) (emphasis added).

157. In *In re Moore*, for example, the court held that, “reverse veil piercing should only be applied when it is clear that it will not prejudice non-culpable shareholders or other stakeholders (such as creditors) of a corporation.” 379 B.R. 284, 295 (Bkrcty. N.D. Tex. 2007).

158. *In re Phillips*, 139 P.3d 639, 645–46 (Colo. 2006) (en banc) (“We recognize that some jurisdictions refuse to allow outside reverse piercing of the corporate form because, when inartfully performed, outside reverse piercing has the potential to prejudice innocent shareholders and creditors, and to bypass normal judgment procedures. See, e.g., *Cascade Energy*, 896 F.2d at 1577 . . . [T]his concern is effectively alleviated by the requirement that piercing obtain an equitable result. . . . When innocent shareholders or creditors would be prejudiced by outside reverse piercing, an equitable result is not achieved. Innocent shareholders possess legitimate expectations that corporate assets will be insulated from the claims of a controlling insider’s creditors. Similarly, secured and unsecured creditors of the corporation have a cognizable legal interest in corporate assets, upon which they relied in lending money and selling goods and services to the corporation. Accordingly, equity requires that innocent shareholders and creditors be adequately protected before outside reverse piercing is appropriate under Colorado law.”).

159. 1959-NMSC-010, ¶ 1, 65 N.M. 222, 335 P.2d 554.

160. *Id.*

161. *Id.* at ¶ 16, 335 P.2d at 228.

162. *Id.* at ¶ 15, 335 P.2d at 227.

avoid injustice.¹⁶³ Second, when determining whether outside reverse piercing is appropriate, courts should consider the same factors that are considered when determining whether traditional veil piercing should be permitted.¹⁶⁴ In New Mexico, the corporate form may be disregarded where three elements are met:

(a) The corporate form is determined to be a mere instrument (alter ego) of an individual.¹⁶⁵ The plaintiff creditor must establish a unity of interest and ownership¹⁶⁶ such that the shareholder's control renders the corporation a mere instrumentality of the shareholder.¹⁶⁷ The corporate shareholder could be an individual or another corporation. Trial courts should consider the factors set out in *Cruttenden* when deciding whether a corporation is the alter ego or instrumentality of a shareholder,¹⁶⁸ understanding that the list is neither exhaustive nor determinative.

(b) The corporate form has been used for an improper purpose or adherence to its separate existence would create an injustice.¹⁶⁹ Even though no single rule or criterion is dispositive, the litigant who seeks to disregard a limited liability entity must show, for example, that the entity has been controlled or used by the debtor/defendant to evade a personal obligation, to perpetrate a fraud or a crime, to create injustice or inequity,¹⁷⁰ or to gain an unfair advantage.¹⁷¹

163. *Scott v. AZL Resources*, 1988-NMSC-028, ¶ 6, 107 N.M. 118, 753 P.2d 897, 900 (“Only under special circumstances will the courts disregard the corporate entity to pierce the corporate veil holding individual shareholders or a parent corporation liable. This is done where the corporation was set up for fraudulent purposes or where to recognize the corporation would result in injustice.”); *C.F. Trust Inc. v. First Flight L.P.*, 580 S.E.2d 806, 809–10 (2003); *In re Phillips*, 139 P.3d at 646.

164. *C.F. Trust Inc.*, 580 S.E.2d at 810; *In re Phillips*, 139 P.3d at 646. *See also* *Zahra Spiritual Trust v. U.S.*, 910 F.2d 240, 243–44 (5th Cir. 1990); *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 386 F.Supp.2d 461, 461–465 (S.D.N.Y. 2005); *Liberty Synergistics, Inc. v. Microflo Ltd.*, 50 F.Supp.3d 267, 297–98 (E.D.N.Y. 2014).

165. *Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶ 7, 107 N.M. 118, 753 P.2d 897; *Cruttenden v. Mantura*, 1982-NMSC-021, ¶ 8, 197 N.M. 432, 640 P.2d 932, 935.

166. *C.F. Trust Inc.*, 580 S.E.2d at 811.

167. *Cruttenden*, 1982-NMSC-021, ¶ 8, 640 P.2d at 934 (citing *Edgar v. Fred Jones Lincoln-Mercury*, 524 F.2d 162, 166 (10th Cir. 1975)); *Scott*, 1988-NMSC-028, ¶ 7, 753 P.2d at 900.

168. *Cruttenden*, 1982-NMSC-021, ¶ 8, 753 P.2d at 934–35 (citing *Int'l Union v. Cardwell Mfg. Co.*, 416 F. Supp. 1267, 1286 (D. Kan. 1976)). These are substantially the same factors famously outlined by Frederick Powell. *See* FREDERICK POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY 9 (1931).

169. *Scott Graphics, Inc. v. Mahaney*, 1976-NMCA-038, ¶¶ 17–18, 89 N.M. 208, 549 P.2d (Courts may look behind the corporate form “where the corporation was set up for fraudulent purposes, or where to recognize the corporation would result in inequity.”); *Harlow v. Fibron Corp.*, 1983-NMCA-117, ¶ 15, 100 N.M. 379, 671 P.2d 40, 43; *Morrissey v. Krystopowicz*, 2016-NMCA-011, ¶ 13, 365 P.3d 20; *C.F. Trust Inc.*, 580 S.E.2d at 811.

170. *Garcia*, 1997-NMCA-092, ¶¶ 20–22, 124 N.M. 12, 946 P.2d 216, 220–21.

171. *C.F. Trust Inc.*, 580 S.E.2d at 811; *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006) (en banc); *In re Blatstein*, 192 F.3d 88, 100 (3d Cir. 1999); *In re Kaycee Land & Livestock v. Flahive*, 46 P.3d 323, 326 (Wyo. 2002).

(c) The misuse of the corporate form caused harm to the plaintiff.¹⁷² This does not necessarily mean that it directly caused the underlying harm—breach of contract damages or tort-related harm, for example—but causation is to be construed broadly in accordance with *Morrissey v. Krystowicz*.¹⁷³ The plaintiff must show that it was harmed by defendant’s actions. This could be harm caused by the underlying breach of contract or tort, or harm caused when a shareholder is unable to pay the plaintiff’s judgment by virtue of its misbehavior.

If these elements are met, courts must still balance the equities to determine whether to grant the relief sought, including the impact of such action upon innocent investors (ie, non-implicated shareholders) and innocent creditors, as well as the availability of other remedies to the plaintiff.¹⁷⁴ Finally, a litigant who seeks the remedy of outside reverse veil piercing will have to prove the necessary standards by clear and convincing evidence.¹⁷⁵

VI. CONCLUSION

The case for adopting outside reverse veil piercing in New Mexico is the same case for continuing to apply traditional veil piercing in the state. The potential tensions between New Mexico’s commitment to limited liability¹⁷⁶ and freedom of contract,¹⁷⁷ on the one hand, and equity¹⁷⁸ on the other, are virtually the same whether applying traditional or outside reverse piercing. Either equity will overcome public policy arguments in favor of limited liability and freedom of contract, or it will not, but the direction of the pierce should not be determinative. While it is true that outside reverse piercing potentially implicates nonculpable shareholders and creditors, courts are well-equipped to account for such concerns in their application of the doctrine. And if anything, the state’s commitment to equity should favor the expansion of the veil piercing doctrine to explicitly include outside reverse piercing. Again, borrowing from the decision of Justice Martinez writing for the majority of

172. *Harlow*, 1983-NMCA-117, ¶¶ 10-13, 671 P.2d 40, 43. See also *Fischer Inv. Capital, Inc. v. Catawba Development Corp.*, 689 S.E.2d 143, 147 (N.C. Ct. App. 2009).

173. 2016-NMCA-011, ¶¶ 13, 17, 365 P.3d at 23.

174. *C.F. Trust Inc.*, 580 S.E.2d at 811; *In re Phillips*, 139 P.3d at 645.

175. *C.F. Trust Inc.*, 580 S.E.2d at 811; *In re Phillips*, 139 P.3d at 644. This is consistent with the language used in *Harlow*, 1983-NMCA-117, ¶¶ 31, 671 P.2d at 46 (noting the “intent to deceive not established by clear and convincing evidence”).

176. In New Mexico, “limited liability is the rule, not the exception.” *S. Union Expl. Co. v. Wynn Expl. Co.*, 1981-NMCA-006, ¶ 26, 95 N.M. 594, 624 P.2d 536.

177. In New Mexico, there is a strong public policy in favor of freedom of contract. *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, ¶ 14, 108 N.M. 467, 775 P.2d 233.

178. Equity is used by New Mexico courts where justice necessitates it, including in the context of corporate law. *Torres v. Montano*, No. 30,207, 2012 WL 868941, at *6 (N.M. Ct. App. Feb. 20, 2012) (unpublished opinion). Equity will intervene and overcome the public policy presumptions in favor of limited liability and freedom of contract where there is obvious “fraud, real hardship, oppression, mistake, or unconscionable results,” and the other grounds of righteousness, justice, and morality. *Id.* *6. Veil piercing is just such an equitable doctrine.

the Colorado Supreme Court, “[T]he purpose of obtaining a just result is *furthered* by permitting outside reverse piercing.”¹⁷⁹

One commentator has suggested that New Mexico “appears to be a conservative veil-piercing jurisdiction.”¹⁸⁰ A close reading of the cases suggests otherwise. New Mexico courts are rightfully concerned with respecting the separate entity status of corporations, but they also evince a willingness to use their equitable powers to pierce the corporate veil in circumstances where a corporation is “operated not in a legitimate fashion to serve the valid goals and purposes of that corporation but . . . instead under the domination and control and for the purposes of some dominant party.”¹⁸¹ Both public policy and logic suggest New Mexico courts will be equally open to outside reverse veil piercing in similar circumstances, “where to recognize the [separate entity status of the] corporation would result in inequity.”¹⁸²

179. *In re Phillips*, 139 P.3d at 645 (emphasis added) (internal citations omitted).

180. STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 2:32 (2020).

181. *Morrissey v. Krystopowicz*, 2016-NMCA-011, ¶ 13, 365 P.3d 20, 23 (citing *Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶ 7, 107 N.M. 118, 753 P.2d).

182. *Scott Graphics, Inc. v. Mahaney*, 1976-NMCA-038, ¶¶ 17–18, 89 N.M. 208, 549 P.2d 623.