

# THE CORPORATE CONSPIRACY VACUUM

J.S. Nelson<sup>†</sup>

*In the absence of charges available for traditional conspiracy, public and judicial frustration with agents' lack of accountability has led to the distortion of alternative doctrines in efforts to impose liability on what should have been traditional conspiracy prosecutions. This paper examines those efforts and their impact on these alternative doctrines.*

## TABLE OF CONTENTS

INTRODUCTION .....	250
I. THE POWER OF THE INTRACORPORATE CONSPIRACY DOCTRINE.....	255
A. Details of the Intracorporate Conspiracy Doctrine .....	255
B. The Current Power of the Intracorporate Conspiracy Doctrine: A Widespread Element of the Common Law Across State and Federal Courts .....	257
C. The Social Cost of Corporate Conspiracy .....	259
II. CURRENT STATE OF SCHOLARSHIP AND PRESSURES TO EXPAND THE INTRACORPORATE CONSPIRACY DOCTRINE .....	262
A. Current State of Scholarship .....	262
B. The Lawyers' Push: Attorneys' Arguments and Responses .....	264
C. Caseload Pressures .....	269

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<sup>†</sup> J.S. Nelson, Esq. B.A., Yale University; J.D., Harvard Law School, Former Supreme Court Co-Chair of the *Harvard Law Review*; Advisor, Center for Entrepreneurial Studies, Stanford University, Graduate School of Business. The Author is grateful to the 2015 Academy of Legal Studies in Business conference for awarding this Article its "Outstanding Proceedings" award, and to the 2014 Pacific Southwest Academy of Legal Studies conference for awarding this Article its "Outstanding Paper" prize. The Author conveys special gratitude for the development of ideas and funding from The Wharton School at the University of Pennsylvania's Normative Business Ethics Workshop Series as sponsored by the Carol and Lawrence Zicklin Center for Business Ethics Research, and The Huber Hurst Research in Legal Studies and Ethics Seminar. Finally, the Author would like to thank family, friends, and other colleagues who contributed to the development of this Article. The viewpoints expressed in the Article, and any errors, are my own.

III. HOW OVEREXPANSION OF THE INTRACORPORATE CONSPIRACY DOCTRINE HAS WARPED RELATED DOCTRINES IN THE LAW .....	270
A. <i>Conflating the Liability of Officers with Their Liability as Shareholders: Piercing the Corporate Veil</i> .....	271
B. <i>Individual Officer Liability to Third Parties: Growth of Responsible Corporate Officer Doctrine</i> .....	283
C. <i>Fracturing the Principal: Reactions to Retroactive Imposition of the Corporate Veil and the Spread of “Reverse” Piercing of the Corporate Veil</i> .....	291
1. Doors Open to Fracturing the Principal .....	293
2. Two Approaches to Fracturing the Principal .....	295
a. Retroactive Imposition of the Corporate Veil .....	296
b. Reverse Piercing of the Corporate Veil .....	301
CONCLUSION .....	304

## INTRODUCTION

The intracorporate conspiracy doctrine immunizes an enterprise<sup>1</sup> and its agents from conspiracy prosecution based on the legal fiction that an enterprise and its agents are a single actor incapable of the meeting of two minds to form a conspiracy.<sup>2</sup> This common-law doctrine has grown from its limited origins in antitrust and sovereign immunity cases to swallow criminal law and tort claims. The doctrine, however, misplaces principal and agent incentives in contravention of agency law, criminal law, tort law, and public policy.<sup>3</sup> As a result, harmful behavior is ordered and performed without consequences, and the victims of the behavior suffer without appropriate remedy.

The limited exception to the intracorporate conspiracy doctrine’s immunity applies when an agent’s actions fall outside the scope of the

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<sup>1</sup> Enterprises covered by the intracorporate conspiracy doctrine are all types of associations. See, e.g., Robin Miller, Annotation, *Construction and Application of “Intracorporate Conspiracy Doctrine” as Applied to Corporation and Its Employees—State Cases*, 2 A.L.R. 6th 387, § 3 (2005) (“While the intracorporate conspiracy doctrine is typically applied to business corporations, it applies to corporations generally, including religious corporations and municipal corporations and other governmental bodies. The doctrine applies to all levels of corporate employees, including a corporation’s officers and directors and owners who are individuals.” (footnotes omitted)). Accordingly, this Article uses the term “corporation” to cover the same enterprises.

<sup>2</sup> See 16 AM. JUR. 2D *Conspiracy* § 56 (2015) (“[A] corporate entity cannot conspire with itself because employees of a corporation are considered part of the corporate entity . . .” (footnotes omitted)) [hereinafter *Conspiracy*].

<sup>3</sup> These arguments about tort, criminal, and agency law were fully developed in the sister work to this Article. See J.S. Nelson, *The Intracorporate Conspiracy Trap*, 36 CARDOZO L. REV. 969 (2015).

principal's interest: when the agent acts for his own benefit and not for the benefit of the principal. However, the more the agent, for example, intends to protect the reputation and interests of the principal, the more the agent and the principal share a common purpose in performing their illegal acts, which is an essential test of whether a conspiracy exists. Yet the intracorporate conspiracy doctrine's provision of immunity from prosecution is strongest when an agent is acting on behalf of a principal.<sup>4</sup> The more this exception to the intracorporate conspiracy doctrine applies, the more it undermines the common intent requirement of criminal and tort law.<sup>5</sup>

The failure of the prosecution of Monsignor Lynn, for example, demonstrates how the doctrine insulates harmful conspiratorial behavior within business organizations. Monsignor Lynn spent twelve years methodically transferring predator priests within the Roman Catholic Archdiocese of Philadelphia to hide the impact of their sexual abuse on victims.<sup>6</sup> The sister work to this Article closely details how the intracorporate conspiracy doctrine has blocked that prosecution and many others like it.<sup>7</sup>

This Article contributes to the debate over the intracorporate conspiracy doctrine by showing how the strength of the doctrine has affected and warped related doctrines in the law on corporate and individual responsibility for wrongdoing. Only one other commentator has identified the doctrinal connection between the intracorporate conspiracy doctrine and the doctrine of piercing the corporate veil, but he failed to note how one distorts the other.<sup>8</sup>

In addition, where academic articles have called for greater liability for non-director corporate officers,<sup>9</sup> they have missed the central

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<sup>4</sup> See Miller, *supra* note 1.

<sup>5</sup> See generally Nelson, *supra* note 3.

<sup>6</sup> See, e.g., *US Court Quashes Priest's Conviction for Abuse Cover-Up*, BBC NEWS (Dec. 26, 2013), <http://www.bbc.co.uk/news/world-us-canada-25523221>.

<sup>7</sup> See generally Nelson, *supra* note 3.

<sup>8</sup> See Barry Horwitz, Note and Comment, *A Fresh Look at a Stale Doctrine: How Public Policy and the Tenets of Piercing the Corporate Veil Dictate the Inapplicability of the Intracorporate Conspiracy Doctrine to the Civil Rights Arena*, 3 NW. J.L. & SOC. POL'Y 131, 133 (2008).

<sup>9</sup> Other recent academic efforts have focused solely on bolstering the jurisprudence of piercing the corporate veil and limited enterprise liability. Because the doctrine of piercing the corporate veil relies heavily on formalities, however, its application "neither guide[s] good decision-making nor produce[s] consistent or defensible results." Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 637 (2005). Another commentator would react in frustration to the doctrine of piercing the corporate veil by paradoxically increasing the single entity analysis of enterprises. See, e.g., Meredith Dearborn, Comment, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195, 202-11 (2009) (expressing frustration with the limits of piercing the corporate veil and other existing frameworks, but then proposing an "enterprise liability" vision of the law which would paradoxically strengthen the unity analysis of commercial enterprises). Compare *id.* at 210

importance of reforming the intracorporate conspiracy doctrine.<sup>10</sup> Compared to reducing the power of the intracorporate conspiracy doctrine, no other approach now being debated properly identifies and solves the problem of corporate conspiracies.

The argument to roll back the intracorporate conspiracy doctrine needs to be made especially now as the intracorporate conspiracy doctrine becomes increasingly established and powerful. Movements like Occupy Wall Street,<sup>11</sup> regulators,<sup>12</sup> and forums that question why no institutions<sup>13</sup> or top executives<sup>14</sup> have been found criminally liable for

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("[E]ntity theory, governed by principles of limited liability and piercing the corporate veil, can no longer cabin the realities of a globalized market dominated by mega-corporations in which extensive and fractured subsidiarization is the norm."), *with id.* ("Enterprise theory views the corporate group as a singular unit, rather than viewing each subsidiary or affiliated corporation as a separate legal entity."). This approach, however, would replicate the unpredictable and overly severe nature of the piercing the corporate veil doctrine. *Cf.* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) ("Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled."). *See also* Jennifer Stewart, Comment, *The Intra-Enterprise Conspiracy Doctrine after Copperweld Corp. v. Independence Tube Corp.*, 86 COLUM. L. REV. 198, 198 (1986) (arguing for breaking enterprises into smaller components for purposes of assessing liability in the wake of the U.S. Supreme Court's decision on the unity of parent and subsidiary corporations).

<sup>10</sup> *See, e.g.,* Z. Jill Barclift, *Scheme Liability and Common-Law Fraud under State Law: Holding Corporate Officers and Their Co-Conspirators Accountable to Shareholders*, 26 T.M. COOLEY L. REV. 273, 278 (2009) (failing to note either the intracorporate conspiracy doctrine or the agent's immunity rule in general).

<sup>11</sup> *See Occupy Wall Street*, NEWS-BASICS, <http://news-basics.com/2011/occupy-wall-street> (last updated Sept. 18, 2012).

<sup>12</sup> The lack of successful enforcement actions against financial institutions has been an embarrassment to regulatory officials. *See, e.g.,* Adam Liptak, *Stern Words for Wall Street's Watchdogs, From a Judge*, N.Y. TIMES (Dec. 16, 2013), <http://www.nytimes.com/2013/12/17/us/judge-raises-questions-on-the-paltry-effort-to-prosecute-wall-street-executives.html> ("And what of the recent financial crisis? The statute of limitations on most plausible charges is running out, and it seems there will not be a single prosecution of a prominent figure in the entire mess."); Ben Protess & Susanne Craig, *S.E.C. Hopes for Validation in Goldman Sachs Trader Case*, N.Y. TIMES (July 9, 2013, 8:58 PM), <http://dealbook.nytimes.com/2013/07/09/s-e-c-seeks-validation-in-goldman-sachs-trader-case>.

<sup>13</sup> There is considerable frustration with what many people see as "significant deception and fraud that should be prosecuted." Peter Lattman, *A Star Panel Debates Financial Crisis Prosecutions*, N.Y. TIMES (Feb. 8, 2012, 4:01 PM), <http://dealbook.nytimes.com/2012/02/08/a-star-panel-debates-financial-crisis-prosecutions> (quoting former New York Governor and former New York Attorney General Eliot Spitzer). A concern is that "[c]orporations are not held accountable." *Id.*; *see also* Ben Protess, *Geithner Faces Senate on Rate-Rigging Scandal*, N.Y. TIMES (July 26, 2012, 12:29 PM), <http://dealbook.nytimes.com/2012/07/26/geithner-faces-senate-on-rate-rigging-scandal> ("For his part, [U.S. Treasury Secretary] Geithner acknowledged that Libor was the most recent scandal in a string of Wall Street blowups. The problems, he said, have delivered an enduring black eye to the financial industry. 'We've seen a devastating loss of trust in the integrity of the financial system.'").

<sup>14</sup> This is the major objection of federal district court judge Jed Rakoff's recent opinion piece in the New York Review of Books. *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS, Jan. 9, 2014, <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions>. In agreement, practicing attorney Solomon Wisenberg writes that

their manipulations leading to the financial market crash, need tools such as those presented in this Article to reevaluate the expanding protections that associations have built into the unlegislated common law.

Frustration with the impact of the intracorporate conspiracy doctrine continues to rise. Judge Rakoff of the Southern District of New York, for example, decries this change in accountability over time. After describing a series of prosecutions that took place before the growth of the intracorporate conspiracy doctrine, he writes that “[i]n striking contrast with these past prosecutions, not a single high-level executive has been successfully prosecuted in connection with the recent financial crisis.”<sup>15</sup> Professor Garrett’s new book documents that, between 2001 and 2012, the U.S. Department of Justice (DOJ) failed to charge any individuals at all for crimes in sixty-five percent of the 255 cases it prosecuted.<sup>16</sup> The data are even more stark in cases involving publicly held companies, which tend to be larger. The DOJ failed to prosecute individuals for crimes in seventy-five percent of those 125 convictions or pleas.<sup>17</sup> Similarly, Professor Larcker and his co-author, Brian Tayan, note how often in modern times the same businesses are fined for repeat behavior, effectively making such fines a mere slap on the wrist and a routine cost of doing business rather than a mechanism of deterrence for executives.<sup>18</sup>

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[t]he judge’s most salient point . . . is his observation that there is no substitute for holding financial elites responsible for their major criminal misdeeds. The compliance and deferred prosecution agreements favored today are simply a cost of doing business for most big corporations. What’s worse, in the current environment, DOJ is giving a walk to elite financial actors and simultaneously prosecuting middle-class pikers with a vengeance that is sickening to behold. The elite financial actors may not have committed criminal fraud, but many of them bear heavy responsibility for the ensuing mess. It is so much easier for DOJ to rack up the stats by picking the low hanging fruit.

Solomon Wisenberg, *Judge Rakoff Wades In*, WHITE COLLAR CRIME PROF BLOG (Dec. 27, 2013), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2013/12/judge-rakoff-wades-in.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2013/12/judge-rakoff-wades-in.html).

<sup>15</sup> Rakoff, *supra* note 14.

<sup>16</sup> BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Michael Rothfeld, *Firms Are Penalized, But Workers Aren’t*, WALL ST. J. (Jan. 17, 2014, 12:25 AM), <http://online.wsj.com/news/articles/SB20001424052702304419104579324962459771186>.

<sup>17</sup> See sources cited *supra* note 16.

<sup>18</sup> See, e.g., DAVID LARCKER & BRIAN TAYAN, A REAL LOOK AT REAL WORLD CORPORATE GOVERNANCE 11–12 (2013) (“Approximately 8 percent of publicly traded companies each year have to restate their financial results due to previous manipulation or error. Approximately 10 percent of Chapter 11 bankruptcy cases involve allegations of fraud. . . . These are shocking figures that suggest agency problems are widespread and should not be ignored.”); see also David Gillen & Channon Hodge, *Business Behaving Badly*, N.Y. TIMES (Dec. 30, 2013), <http://www.nytimes.com/video/business/100000002614034/business-behaving-badly.html>

Public and judicial frustration with the intracorporate conspiracy doctrine's grant of immunity to corporate agents in criminal and tort cases has led to over-reliance on alternative methods of holding employees responsible for their actions. Examples of such alternative doctrines include piercing the corporate veil, responsible corporate officer doctrine, and permutations in equity such as denying retroactive imposition of the corporate veil and adopting "reverse" piercing of the corporate veil. These doctrines, however, were mainly developed and adapted for other circumstances. They do not take into account the coordination of actions within an enterprise and the unique nature of conspiracy that fall—and should fall—into the heart of behavior that would trigger liability if not for the intracorporate conspiracy doctrine.

Using alternative doctrines to impose liability on behavior that would otherwise be prosecuted as intracorporate conspiracy results in inconsistent decisions and disproportionate awards. As one commentator noted about these distorted doctrines, they appear "[l]ike lightning, . . . rare, severe, and unprincipled."<sup>19</sup> In sum, the overexpansion of the intracorporate conspiracy doctrine triggers the wrong inquiries and imposes inappropriate liabilities throughout the law on corporate and individual responsibility.

Finally, rolling back the intracorporate conspiracy doctrine would paradoxically benefit even the groups that have pushed for the doctrine's expansion. In recent years, some attorneys have pushed for broad expansion of the doctrine because they argue that attorneys should be doctrinally immune for the actions that they take as client's agents.<sup>20</sup> But the attorneys' concern is misplaced. As described in this Article,<sup>21</sup> other legal doctrines and the rules of ethics already harbor attorney behavior within ethical boundaries, and they better help maintain the profession's reputation.

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(reporting in a video describing "serial bad-behaving . . . companies" in the context of modern corporate fines).

<sup>19</sup> Easterbrook & Fischel, *supra* note 9; *accord* Dearborn, *supra* note 9, at 202–10 (expressing frustration with the unpredictability of alternate methods of imposing liability on enterprises).

<sup>20</sup> See, e.g., Allon Kedem, Case Comment, *Can Attorneys and Clients Conspire?* *Farese v. Scherer*, 342 F.3d 1223 (11th Cir. 2003), 114 YALE L.J. 1819, 1819–20 (2005) (describing the push, for example, behind *Farese v. Scherer*, which held that it is impossible for a conspiracy that violates federal civil rights to exist between attorney and client); see also *Heffernan v. Hunter*, 189 F.3d 405, 412–13 (3d Cir. 1999) (holding that attorney-client conspiracy is impossible by analogy to the intracorporate conspiracy doctrine); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 110–11 (7th Cir. 1990) (holding that a corporation and its outside counsel could not conspire under the intracorporate conspiracy doctrine).

<sup>21</sup> E.g., Kedem, *supra* note 20, at 1819 ("This Comment argues that the Eleventh Circuit's limitation on attorney-client conspiracies is illegitimate as a matter of statutory interpretation and ill advised as a matter of policy. . . . [A] categorical rule against attorney-client conspiracies is misguided.").

This Article makes its argument in an Introduction, three Parts, and a Conclusion. The Introduction explains how the intracorporate conspiracy doctrine is a problem in corporate conspiracy prosecutions. Part I details the recent spread of the intracorporate conspiracy doctrine and documents the escalating social cost of corporate conspiracy. Part II describes the current state of scholarship and practical pressures to expand the intracorporate conspiracy doctrine. Part III illustrates how overexpansion of the intracorporate conspiracy doctrine has warped related doctrines in the law. The Conclusion establishes that rolling back the intracorporate conspiracy doctrine would be the most efficient and reliable means of realigning the law to prevent the facilitation of illegal activity through the principle-agent relationship. This simple change would both better prevent corporate crime and more consistently mitigate the impact of wrongdoing on victims who are now being injured without predictable recourse.

#### I. THE POWER OF THE INTRACORPORATE CONSPIRACY DOCTRINE

This Part describes the intracorporate conspiracy doctrine in more detail as well as its recent spread and social costs.

##### A. *Details of the Intracorporate Conspiracy Doctrine*

The intracorporate conspiracy doctrine holds that because an association and its agents, such as its employees, are one legal entity, there are no two distinct minds that can meet to conspire. As the American Jurisprudence (Second) entry on conspiracy explains: “a corporate entity cannot conspire with itself because employees of a corporation are considered part of the corporate entity.”<sup>22</sup> Thus, for example, the “intracorporate conspiracy doctrine prevents liability from being imposed under the federal civil rights conspiracy statute for actions of coemployees of a governmental entity.”<sup>23</sup>

More generally, according to the American Jurisprudence (Second),

a corporation cannot conspire with its agent when the agent is acting within the scope of his or her authority, or in his or her official capacity, and a corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction, and control of the corporate affairs where

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<sup>22</sup> *Conspiracy*, *supra* note 2 (footnote omitted).

<sup>23</sup> *Id.*

the individuals are acting only for the corporation and not for any personal purpose of their own.<sup>24</sup>

The term “corporation” is used broadly in discussions of the doctrine to refer to all types of organizations, including religious corporations and governmental agencies.<sup>25</sup>

The way to circumvent the protection provided by the intracorporate conspiracy doctrine is to allege that the agent of an enterprise is acting outside the scope of his duties. Thus “[a] corporate official may . . . conspire with his or her corporation if he or she is acting in his or her individual capacity or outside the scope of his or her employment.”<sup>26</sup> But this standard requires more than that the agent merely interprets orders: the agent of a corporation loses immunity from prosecution only when he “has an ‘independent personal stake’ in achieving the corporation’s impermissible objectives.”<sup>27</sup> In other words, to overcome immunity “the complaint must allege that the corporate officials, employees, or other agents acted outside the scope of their employment and engaged in conspiratorial conduct to further their own personal purposes and not those of the corporation.”<sup>28</sup>

Most courts have interpreted acting “outside the scope” of an agent’s authority very narrowly. For example, even in civil rights litigation under 42 U.S.C. § 1985(1) & (2), the U.S. Court of Appeals for the Third Circuit has held that a conspiracy between a corporation and its officer may exist solely “if the officer is acting in a personal, as opposed to official, capacity.”<sup>29</sup> Thus, according to the Third Circuit, the fact that the agent may have acted in bad faith or even with illegitimate purpose toward the principal, does not, by itself, situate the agent’s actions outside the scope of the agency relationship. As long as the agent is not acting in a purely “personal” capacity, the intracorporate conspiracy doctrine immunizes the agent’s actions.<sup>30</sup>

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<sup>24</sup> *Id.* (footnotes omitted).

<sup>25</sup> *See, e.g., Miller, supra* note 1.

<sup>26</sup> *Conspiracy, supra* note 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Heffernan v. Hunter*, 189 F.3d 405, 412 (3d Cir. 1999) (quoting *Robison v. Canterbury Vill., Inc.*, 848 F.2d 424, 431 (3d Cir. 1988)); *see also Nelson, supra* note 3, at 1016–19 (noting similarities to the test for qualified sovereign immunity doctrine).

<sup>30</sup> *Gen. Refractories Co. v. Fireman’s Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003).



B. *The Current Power of the Intracorporate Conspiracy Doctrine:  
A Widespread Element of the Common Law Across  
State and Federal Courts*

The current power of intracorporate conspiracy doctrine in the courts is sweeping. To illustrate the doctrine's power, in an opinion criticized by other appellate courts, the U.S. Court of Appeals for the Eleventh Circuit has been unique in halting the application of the intracorporate conspiracy doctrine at the door of criminal liability.<sup>31</sup> The few commentators other than Professor Pritikin<sup>32</sup> who have argued against application of the intracorporate conspiracy doctrine have primarily limited their objection to applying the doctrine to suits under section 3 of the Ku Klux Klan Act of 1871, now codified as 42 U.S.C. § 1985(3).<sup>33</sup>

The intracorporate conspiracy doctrine is now applied beyond the U.S. Supreme Court's antitrust context of a parent and wholly owned subsidiary, as approved in *Copperweld Corp. v. Independence Tube Corp.*,<sup>34</sup> by courts across the country to contexts spanning from civil rights<sup>35</sup> to economic frauds<sup>36</sup> and other conspiracies.<sup>37</sup> Even pro-

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<sup>31</sup> Compare *United States v. Hartley*, 678 F.2d 961, 968–72, 979 (11th Cir. 1982), *abrogated by* *United States v. Goldin Indus., Inc.*, 219 F.3d 1268 (11th Cir. 2000), *with* *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 789–90 (D.C. Cir. 1988) (distinguishing *Hartley*), *vacated*, 492 U.S. 914 (1989), *and* *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633–34 (3d Cir. 1984) (declining to follow *Hartley*), *abrogated by* *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995).

<sup>32</sup> See discussion *infra* Part II.A.

<sup>33</sup> See, e.g., Catherine E. Smith, (Un)Masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act, 11 VA. J. SOC. POL'Y & L. 129, 166–72 (2004) (arguing solely against application of the intracorporate conspiracy doctrine to the particular wording and history of the Ku Klux Klan Act); Geoff Lundeen Carter, Comment, *Agreements within Government Entities and Conspiracies under § 1985(3)—A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. CHI. L. REV. 1139 (1996) (arguing to limit application of the intracorporate doctrine to litigation under Section 1985(3)); Horwitz, *supra* note 8.

<sup>34</sup> 467 U.S. 752, 770–71 (1984) (applying the intracorporate conspiracy doctrine in the antitrust context and holding that a parent corporation and its wholly owned subsidiary cannot conspire under Section 1 of the Sherman Act).

<sup>35</sup> See, e.g., *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839–41 (6th Cir. 1994) (citing *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 510 (6th Cir. 1991)) (applying the intracorporate conspiracy doctrine in the context of civil rights).

<sup>36</sup> See, e.g., *Transocean Grp. Holdings Pty Ltd. v. S.D. Soybean Processors, LLC*, 663 F. Supp. 2d 731, 745–46 (D. Minn. 2009) (dismissing a claim against a soybean processor for civil conspiracy).

<sup>37</sup> See, e.g., *Renner v. Wurdeman*, 434 N.W.2d 536, 542 (Neb. 1989) (“A corporation cannot conspire with an agent when that agent is *acting within the scope of his authority*.” (quoting *Dixon v. Reconciliation, Inc.*, 291 N.W.2d 230, 234 (1980))); *Collins v. Union Fed. Sav. & Loan Ass'n*, 662 P.2d 610, 622 (Nev. 1983) (“Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.”); *Gray v. Marshall Cty. Bd. of Educ.*, 367 S.E.2d 751, 755 (W. Va. 1988) (“A corporation, as a single business entity, acts

consumer states such as California apply the intracorporate conspiracy doctrine broadly.<sup>38</sup> In line with this broad application of the intracorporate conspiracy doctrine, Virginia courts have held that a bank and its agent are the same person for purposes of proving conspiracy.<sup>39</sup> In the middle of the country, two subsidiaries of the same corporation cannot conspire for the same reason.<sup>40</sup> In that case, the court was interpreting claims based on Missouri law, but the reasoning it relied upon “was not based on any concept unique to Missouri.”<sup>41</sup> In support of applying the intracorporate conspiracy doctrine, the court cited both U.S. Supreme Court and Eighth Circuit precedent.<sup>42</sup> Further, articulating the position of many courts, the Supreme Court of Tennessee broadly promulgates: “we hold that there can be no actionable claim of conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents, each acting within the scope of his or her employment.”<sup>43</sup>

A last holdout exists in the federal courts of appeal on the application of the intracorporate conspiracy doctrine to the section of the RICO<sup>44</sup> statute that specifically lists “a principal” when it articulates a prohibition on conspiring with others.<sup>45</sup> The U.S. Courts of Appeal for the Seventh,<sup>46</sup> Ninth,<sup>47</sup> and Eleventh<sup>48</sup> Circuits have held that civil RICO

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with one ‘mind’ and the unilateral acts of a corporation will not satisfy the requirement of a . . . ‘conspiracy.’”).

<sup>38</sup> Among state courts, courts in California have applied the intracorporate conspiracy doctrine particularly broadly to immunize corporate actors when they act within the scope of their employment and on behalf of the corporation. *See, e.g., Black v. Bank of Am. N.T. & S.A.*, 35 Cal. Rptr. 2d 725, 726, 728 (Ct. App. 1994) (holding that “there is no entity apart from the employee with whom the employee can conspire” among the bank and its officers when bank allegedly conspired to fail to renew loans or to grant new loans to debtors).

<sup>39</sup> *See Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 466 S.E.2d 382, 387 (Va. 1996).

<sup>40</sup> *See Davidson & Schaaff, Inc. v. Liberty Nat. Fire Ins. Co.*, 69 F.3d 868, 870–71 (8th Cir. 1995).

<sup>41</sup> *Id.* at 870.

<sup>42</sup> *See id.* at 870–71.

<sup>43</sup> *See Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703–04 (Tenn. 2002) (emphasis omitted).

<sup>44</sup> RICO is the Racketeer Influenced and Corrupt Organizations Act, first passed in 1970 to combat organized crime. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961–1968 (2012)).

<sup>45</sup> RICO’s section 1962(d) states: “It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” Subsection (a) specifically mentions a principal, for which the person in subsection (d) might be the agent.

<sup>46</sup> *See Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (holding that, in contrast with the goals of antitrust laws, “intracorporate conspiracies do threaten RICO’s goals of preventing the infiltration of legitimate businesses by racketeers”).

<sup>47</sup> *See Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996).

<sup>48</sup> *See Kirwin v. Price Commc’ns Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004) (“Corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions.”).

claims for conspiracy under § 1962(d)<sup>49</sup> are not barred by the intracorporate conspiracy doctrine. The Courts of Appeal for the Fourth<sup>50</sup> and Eighth<sup>51</sup> Circuits, however, have held that the intracorporate conspiracy doctrine bars these civil RICO claims.

In sum, the wall to victims' recovery from the intracorporate conspiracy doctrine appears most impenetrable in the state courts. At the federal level, beyond the argument about civil RICO conspiracy that will soon be lost, there is still some room to pursue criminal cases in the Eleventh Circuit, and some small flexibility in how narrowly federal courts define the scope of an employee's work.

### C. *The Social Cost of Corporate Conspiracy*

In attempting to quantify the price of corporate conspiracies to society, economists are at a loss for ways to estimate the full cost of the harms and lost opportunities resulting from conspiratorial behavior. The cost of antitrust conspiracies to U.S. consumers alone, for example, rises into the billions.<sup>52</sup> One single, famous antitrust conspiracy involving the price of vitamins cost U.S. consumers in the decade from 1989 to 1999 an estimated \$1.2 to \$1.5 billion.<sup>53</sup>

Intracorporate conspiracies are the segment of conspiracies causing damage to the public and other businesses that are executed within an enterprise or by an enterprise and its agents. The number and extent of intracorporate conspiracies are notoriously difficult to quantify, but a recent survey of global business activity found that forty-two percent of directors and senior managers were aware of corruption within their own companies in the form of improperly recorded revenues, underreported costs, or requiring customers to buy unneeded items.<sup>54</sup>

In cases of physical or emotional harm from intracorporate conspiracies, the damage to members of society may be greater and more difficult to quantify than from purely economic crimes. In the

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<sup>49</sup> § 1962(d).

<sup>50</sup> See *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997).

<sup>51</sup> See *Fogie v. Thorn Ams., Inc.*, 190 F.3d 889, 899 (8th Cir. 1999).

<sup>52</sup> See e.g., MICHAEL A. UTTON, CARTELS AND ECONOMIC COLLUSION: THE PERSISTENCE OF CORPORATE CONSPIRACIES 70 (2011).

<sup>53</sup> *Id.* It will be noted that antitrust violations require a unique analysis. See Nelson, *supra* note 3, at 974–75, 1016–19; see also discussion *infra* Part II.C. But these high damage figures do illustrate the pervasiveness of corporate conspiracy in general, of which intracorporate conspiracy is a part.

<sup>54</sup> Floyd Norris, *A Troubling Survey on Global Corruption*, N.Y. TIMES (May 17, 2013), <http://www.nytimes.com/2013/05/18/business/economy/a-troubling-survey-on-global-corruption.html>; accord *Cooking the Books*, N.Y. TIMES (May 17, 2013), <http://www.nytimes.com/interactive/2013/05/17/business/Cooking-the-Books.html>.

alleged corporate conspiracy regarding the Roman Catholic Church hiding sexual abuse by priests throughout the United States, the cost to victims of the sexual abuse has been billions of dollars in mental health therapy, lost wages, and other long-term damage.<sup>55</sup> In the single year of 2002, for example, files turned over by the Roman Catholic Archdiocese of Boston to the Office of the Massachusetts Attorney General revealed that 789 victims had complained of sexual abuse by priests.<sup>56</sup> Two hundred fifty priests and church workers in that one archdiocese had allegedly raped and sexually assaulted children.<sup>57</sup> Resulting settlement payments by the Archdiocese of Boston amounted to \$85 million.<sup>58</sup> In 2004, settlement payments by the Roman Catholic Church across the county were \$750 million and growing.<sup>59</sup> As of 2013, experts' estimates of these damages confirmed by settlements are in the billions.<sup>60</sup>

The Massachusetts Attorney General's report concludes that the widespread, unchecked, and long-term sexual abuse of children by priests and church workers had been "due to an institutional acceptance of abuse and a massive and pervasive failure of leadership" within the Archdiocese.<sup>61</sup> Leaders of other archdioceses across the country have admitted that the scale of sexual abuse by priests and other church workers was partially due to the leaders' decisions in supervising their employees.<sup>62</sup> If the organization of the Church had not covered up the behavior of its priests and workers, much of the sexual abuse of those children would have been preventable.<sup>63</sup> Thus it is a particular tragedy that, in the neighboring state of Connecticut, five years before release of the Attorney General's report, records reveal that the Church successfully used the intracorporate conspiracy doctrine to block

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<sup>55</sup> See generally THOMAS F. REILLY, OFF. OF THE ATT'Y GEN.: COMMONWEALTH OF MASS., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON 2 (2003) [hereinafter ATTORNEY GENERAL REPORT]; *US Court Quashes Priest's Conviction for Abuse Cover-Up*, *supra* note 6 ("Child sex abuse cases across Roman Catholic churches in the US have cost billions in settlements . . .").

<sup>56</sup> See ATTORNEY GENERAL REPORT, *supra* note 55, at introductory letter page 1.

<sup>57</sup> See *id.* at 2-3.

<sup>58</sup> Karen R. Long, *118 Accused in Diocese; Pilla Admits Mistakes*, PLAIN DEALER (Cleveland) (Feb. 28, 2004), <http://www.cleveland.com/abuse/index.ssf/?/abuse/more/1077975029236480.html>.

<sup>59</sup> See *id.*

<sup>60</sup> See, e.g., *US Court Quashes Priest's Conviction for Abuse Cover-Up*, *supra* note 6 ("Child sex abuse cases across Roman Catholic churches in the US have cost billions in settlements, driving some US dioceses into bankruptcy.").

<sup>61</sup> ATTORNEY GENERAL REPORT, *supra* note 55, at 73.

<sup>62</sup> See, e.g., Long, *supra* note 58 (reporting that the Roman Catholic bishop of Cleveland regretted his part in the sex abuse scandal, and that he personally admitted transferring "about" three priests after learning of sex abuse charges against them).

<sup>63</sup> See *id.*

discovery of sex abuse claims and the pursuit of conspiracy charges against the Church for its role in covering up the abuse.<sup>64</sup>

Other types of alleged intracorporate conspiracy may be smaller-scale and less heavily reported, but are also damaging to the victims involved. In a classic case from California, where state courts strongly enforce the intracorporate conspiracy doctrine, a group of six agricultural companies and two stakeholders sued a bank for civil conspiracy when bank employees induced the companies to continue investing in crops with the expectation, developed over seventeen years of business, that the bank would float the agricultural companies loans at harvest time.<sup>65</sup> The bank missed its contractual deadline to inform the agricultural companies that it would not float them a loan that year.<sup>66</sup> Meanwhile, bank employees repeatedly assured the agricultural companies that the bank would float the loan when harvest time came.<sup>67</sup> These assurances from bank employees had the allegedly calculated effect of ensuring that the crops would be more valuable when the agricultural companies were forced to declare bankruptcy without the promised loan and the bank could foreclose on the harvest.<sup>68</sup> Three of the six agricultural companies filed for bankruptcy as a direct result of the bank employee actions.<sup>69</sup> All eight entities then sued the bank and its employees for civil conspiracy, including fraud, breach of the covenant of good faith and fair dealing, and the intentional infliction of emotional distress.<sup>70</sup> The case was dismissed under the intracorporate conspiracy doctrine without examination of the claims,<sup>71</sup> leaving the plaintiffs without remedy.<sup>72</sup>

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<sup>64</sup> See *See v. Bridgeport Roman Catholic Diocesan Corp.*, No. CV 930302072S, 1997 WL 466498, at \*12 (Conn. Super. Ct. July 31, 1997) (holding that the intracorporate conspiracy doctrine barred victims' claims without further analysis). For more discussion of this case and subsequent events, see Nelson, *supra* note 3 (discussing application of the intracorporate conspiracy doctrine to this case).

<sup>65</sup> See *Black v. Bank of Am. N.T. & S.A.*, 35 Cal. Rptr. 2d 725, 726, 729 (Ct. App. 1994).

<sup>66</sup> See *id.* at 726.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* at 727 ("It has long been the rule in California that '[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.'" (quoting *Wise v. S. Pac. Co.*, 35 Cal. Rptr. 652, 665 (Dist. Ct. App. 1963), *disapproved on other grounds by* *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P. 2d 454, 458 n.4 (Cal. 1994) (in bank))); see also *id.* at 728 ("When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire.").

<sup>72</sup> See *id.* at 729.

## II. CURRENT STATE OF SCHOLARSHIP AND PRESSURES TO EXPAND THE INTRACORPORATE CONSPIRACY DOCTRINE

Academic theories, attorneys' fear of prosecution, and caseload pressures have all contributed to the growth of the intracorporate conspiracy doctrine. This Article will return in particular at the end of Part III to how reaction to the lawyers' push has warped alternative doctrines.

### A. *Current State of Scholarship*

The intracorporate conspiracy doctrine is now broadly applied by courts to all types of cases. Furthermore, the majority of commentators have pushed for its expansion.<sup>73</sup> Amongst these commentators, Professor Martin has made one of the boldest arguments to expand the doctrine<sup>74</sup> since the *Copperweld* Court<sup>75</sup> permitted application of the intracorporate conspiracy doctrine in antitrust matters. He argues for broadening the intracorporate conspiracy doctrine into the realm of criminal law because corporations should be protected from what Professor Martin considers a framework too close to vicarious liability.<sup>76</sup> As Professor Martin explains, "[u]nder respondeat superior agency principles, a corporation is liable for the conduct of its agents because it has 'taken their place.'"<sup>77</sup> The problem with applying conspiracy laws to a corporation is, therefore, that "the corporation becomes identical to, and stands in the shoes of, all of the conspirators. As a result, when analyzing the corporation's involvement in the conspiracy, there is only one conspirator: the corporation, acting, as it must, through its agents."<sup>78</sup>

Although the larger question of when vicarious liability for corporate acts may be appropriate is too broad for this Article, the law of conspiracy requires a meeting of the minds. This requirement implies

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<sup>73</sup> See, e.g., Douglas G. Smith, Comment, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125, 1149 (1996) (applauding the majority of courts for applying the intracorporate conspiracy doctrine even in the case of civil rights violations). But see Horwitz, *supra* note 8 (arguing for not applying the intracorporate conspiracy doctrine in civil rights cases).

<sup>74</sup> See Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 399, 401 (1998).

<sup>75</sup> See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767-71 (1984).

<sup>76</sup> See Martin, *supra* note 74, at 401 ("[This article] critically examines the values alleged to be enhanced by criminal punishment of intracorporate conspiracies and concludes that there is no substantial justification for imposing vicarious corporate criminal liability for wholly internal agreements.").

<sup>77</sup> *Id.* at 441.

<sup>78</sup> *Id.* at 442.

a burden of proof that the corporation is being represented by sufficient behavior within the corporation to be considered the corporation's policy. That sufficient behavior is much more extensive than mere vicarious liability from the corporation standing in each of its agents' shoes.

Moreover, the various agents of the corporation perform different functions: it is a fallacy to see all agents of a corporation as interchangeable. Professor Martin's argument would put the same face of the corporation on all its bodies and in all of its shoes, whether the agent is the chief operating officer or the operator of a forklift.<sup>79</sup>

Professor Pritikin has been one of the very few voices to challenge the rationale behind the agent's immunity rule, which is based, in part, on the intracorporate conspiracy doctrine.<sup>80</sup> He argues broadly that because "[t]he principal is not 'privileged' to commit fraud, so the agent is not privileged to induce the principal to commit fraud, and likewise should not be immune from conspiring with the principal to commit it."<sup>81</sup> Furthermore, as a matter of logic, if "the defendant can be held directly liable for committing the tort, she should also be subject to secondary liability for conspiring with another to commit that tort."<sup>82</sup> Professor Pritikin continues that, "just as acting in concert cannot destroy a privilege or 'abrogate an immunity,' it should likewise not create a privilege or immunity."<sup>83</sup> He does not, however, address the dramatic expansion of the intracorporate conspiracy doctrine into criminal law;<sup>84</sup> how the Restatements of Torts and Agency should curtail the doctrine's application;<sup>85</sup> or how the expansion of the

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<sup>79</sup> See *id.* at 442 ("[T]he corporation becomes identical to, and stands in the shoes of, all of the conspirators." (emphasis added)).

<sup>80</sup> See Martin H. Pritikin, *Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent's Immunity Rule*, 84 NEB. L. REV. 1, 3–4 (2005) ("A trace of the historical roots of the agent's immunity rule reveals that the rule is based on two distinct but related rationales. . . . [W]hen agents act on behalf of the corporation, the corporation is deemed to be the sole legal actor; thus, there can be no conspiracy because the corporation cannot 'agree' with itself.").

<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Id.* at 28.

<sup>83</sup> *Id.* (footnote omitted).

<sup>84</sup> *Id.* at 33–35 (dismissing the issue with outdated information); *id.* at 34 ("Courts have thus rejected the agent's immunity rule in the criminal context: there is no immunity for agents who conspire with their corporate principal or employer."). As previously described, see discussion *supra* Part I.B, the intracorporate conspiracy doctrine has come quite far in being applied in the criminal context since the 1940s and 50s when agent liability was the rule. See, e.g., *United States v. Bach*, 151 F.2d 177, 179 (7th Cir. 1945) ("Corporate agents may be criminally liable individually for acts done by them on behalf of the corporation, even though the corporation may or may not be liable.").

<sup>85</sup> See Nelson, *supra* note 3, at 1002, 1004–13.

intracorporate conspiracy doctrine has warped related doctrines around it.<sup>86</sup>

B. *The Lawyers' Push: Attorneys' Arguments and Responses*

Much of the expansion of the intracorporate conspiracy doctrine into tort and criminal law has come, as may be expected, from businesses pushing to insulate themselves from conspiracy charges.<sup>87</sup>

But a second influential group is behind the expansion of the doctrine as well. Much of the resistance to considering whether wrongful conduct between principal and agent rises to the level of conspiracy comes from attorneys. Attorneys have been sued for civil conspiracy with clients for bringing cases against individuals and companies.<sup>88</sup> As one bar association article explained,

[a] theory that allows an attorney to be sued . . . [because] his or her professional acts were somehow utilized by a client in the commission of a tort, without a required showing of some level of culpability on the part of the attorney, goes against a foundation of public policy that "demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interest of their clients."<sup>89</sup>

The same bar association article, however, goes on to survey the state of the law on an attorney's liability for a client's actions and glosses over the requirement in conspiracy law that "the agreement between two or more individuals to act for the purposes of one common goal is a fundamental requirement."<sup>90</sup> Additionally, for tort liability, the act must include an "unlawful purpose or means."<sup>91</sup> For the attorney to commit an independent civil tort would indeed show "some level of culpability on the part of the attorney."<sup>92</sup>

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<sup>86</sup> See *infra* Part III (discussing warping doctrines).

<sup>87</sup> See, e.g., *Silva v. N.Y. Life Ins. Co.*, No. CV970342973S, 2001 WL 100325, at \*9–11 (Conn. Super. Ct. Jan. 12, 2001) (expanding the intracorporate conspiracy doctrine to hold that the doctrine could be used to bar alleged conspiracy suit between insurance company's office manager and an independent contractor for the company).

<sup>88</sup> See, e.g., *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003); *Heffernan v. Hunter*, 189 F.3d 405, 413 (3d Cir. 1999).

<sup>89</sup> Ryan D. Bolick & Meagan I. Kiser, *Lawyers' Vicarious Liability for Clients' Torts*, FOR THE DEFENSE, Jan. 2011, at 42, [www.cshlaw.com/documents/FTD-1101-BolickKiser.pdf](http://www.cshlaw.com/documents/FTD-1101-BolickKiser.pdf) (quoting *Art Capital Grp., LLC v. Neuhaus*, 70 A.D.3d 605, 606, 896 N.Y.S.2d 35, 37 (2010)).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 43.

<sup>92</sup> *Id.* at 42.



The American Bar Association's Rules of Professional Conduct already prohibit attorney misconduct far short of committing independent torts.<sup>93</sup> Model Rule of Professional Conduct 1.2, for example, bars lawyers from counseling or assisting clients in "conduct that the lawyer knows is criminal or fraudulent."<sup>94</sup>

Attorneys who violate the rules of professional conduct face disbarment. It is not unreasonable for liability for actual commission of a tort to follow, especially because the threshold for tort liability is so high and because attorneys are presumed to be knowledgeable about the boundaries of the law.<sup>95</sup>

Moreover, the Restatement (Second) of Torts makes clear that an attorney should be punished for abuse of the legal system just as any other tortfeasor would be. Thus, if an attorney files suit for an improper purpose, "he is subject to the same liability as any other person."<sup>96</sup> Similarly, under the Restatement (Third) of the Law Governing Lawyers, "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances."<sup>97</sup>

In addition, a lawyer in an outside firm should not benefit from the single-legal-entity rationale of a client's business enterprise to argue that the attorney and client cannot conspire. The attorney often serves many enterprises, and it would be inappropriate for him to operate solely as the agent of the business enterprise that is his current client.<sup>98</sup> An

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<sup>93</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

<sup>94</sup> *Id.*

<sup>95</sup> See also Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers be "Privileged" to Assist Their Clients' Wrongdoing?*, 29 PACE L. REV. 75, 138 (2008) ("[A]t the end of the day, there is no readily apparent principled basis on which courts can grant lawyers a 'privilege' to aid and abet their clients' breaches of fiduciary duty without creating serious inconsistencies between those cases and the well-established lines of cases recognizing that such liability exists in the other two situations in which lawyers are most often sued for aiding and abetting—fraud and breach of trust.").

<sup>96</sup> RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (AM. LAW INST. 1977); accord *United States v. McClatchey*, 217 F.3d 823, 836 (10th Cir. 2000) (reversing the lower court's award of new trial following the jury conviction of an attorney for conspiring with a client to commit fraud against Medicare and Medicaid); *United States v. Cintolo*, 818 F.2d 980, 1004–05 (1st Cir. 1987) (affirming the conviction of an attorney for a conspiracy to obstruct justice with a client under 18 U.S.C. § 371 and § 1503); see also *Nineteen N.Y. Props. L.P. v. Kim*, 674 N.Y.S.2d 642, 642 (App. Div. 1998) (holding that an attorney may be liable for the damage he causes from maliciously pursuing a baseless lawsuit).

<sup>97</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 (AM. LAW INST. 2000).

<sup>98</sup> See, e.g., Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Implement Sarbanes-Oxley Act Provisions Concerning Standards of Professional Conduct for Attorneys (Nov. 6, 2002) ("The standards must include a rule requiring an attorney to report 'evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the company or any agent thereof' to the chief legal counsel (CLO) or the CLO and the chief executive officer of the company (or the equivalent); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors.").

outside attorney's independence should, in the best possible circumstances, serve as a benefit to the business enterprise to provide another perspective on the case.<sup>99</sup> Moreover, in discussing corporate crime, there always exists the danger of overly protecting "house counsel," such as the Gambino crime family's lawyer, as well as "captive" law firms whose "key feature is . . . almost total dependence on a limited number of clients."<sup>100</sup>

Most importantly, just as many victims of conspiracies have harms that cannot be addressed through other types of suits, there are harms unique to conspiracy claims against attorneys that cannot be remedied through other suits. An article describes such a problem in the civil rights context:

Imagine that A is involved in a suit against B, and B and his attorney threaten suit in another court against C, one of A's witnesses, to keep C from testifying. A may not have a cause of action against B—only C would. But A, not C, is the primary victim of the conspiracy, because it is A's suit that suffers if C is too intimidated to testify.<sup>101</sup>

If it is not proper for a client to intentionally injure or intimidate other parties, it should not be proper for the attorney to have the same purpose. This principle should hold whether the agent is an attorney, a doctor, an accountant, or any other professional capable of conspiring to commit harm through misuse of the tools of his profession. Indeed, a key legislative purpose of the Sarbanes-Oxley Act<sup>102</sup> was to make professionals accountable for rendering their appropriate professional judgment whether they work inside or outside of a named enterprise.<sup>103</sup>

Finally, appropriate safeguards for attorneys already exist for liability from conspiracy.<sup>104</sup>

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<sup>99</sup> Cf., e.g., Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 194 (2005) (discussing the policy problems inherent in the capture of counsel by enterprises).

<sup>100</sup> See *id.* at 193 (quoting John Gotti on the subject of the Gambino crime family's lawyer and Texas Supreme Court Justice Raul A. Gonzales on "captive" law firms); *id.* at 194–96 (elaborating on the concept of "house counsel"); *id.* at 219–23 (elaborating on the concept of "captive" law firms).

<sup>101</sup> Kedem, *supra* note 20, at 1824 (footnote omitted); see also *id.* at 1824 n.25 ("While this court has inherent authority to sanction misbehavior by litigants in matters before it, no one has ever suggested that this inherent authority extends to misbehavior before another district court." (quoting *Healy v. Labgold*, 271 F. Supp. 2d 303, 305 (D.D.C. 2003))).

<sup>102</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

<sup>103</sup> See, e.g., Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 98.

<sup>104</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (AM. LAW INST. 1977) (articulating the rule that, when an attorney files a frivolous suit for an improper purpose "he is subject to the same liability as any other person"); see also Kedem, *supra* note 20, at 1822 ("No reason exists to believe that an attorney's accountability for intimidating or intentionally injuring parties or witnesses to federal suits poses any greater risk to his client's rights than conspiracy liability in other contexts. Zealous advocacy ceases to merit protection when

First, the ABA/BNA Lawyers' Manual on Professional Conduct explains that good faith lawyering is generally immune from liability.<sup>105</sup> "Courts have been reluctant to impose any professional liability where the lawyer deals at arm's length with a client's antagonist within minimum bounds of decency and orderly judicial process."<sup>106</sup> According to the Restatement (Second) of Torts, an attorney who "acts primarily for the purpose of aiding his client"<sup>107</sup> rather than to harass or to intimidate the opposing party will not face liability even if that attorney knows that the claim is unlikely to succeed.<sup>108</sup>

Second, even the most alarmist commentators describe the law of civil conspiracy against attorneys as "underdeveloped," noting that "application [of this law] in the context of attorney professional liability is even more limited."<sup>109</sup> Part of this under-development is due to an explicit "litigation privilege" extended to attorneys that acts as a bar to civil conspiracy suits.<sup>110</sup> The privilege is cited in courts as diverse as Tennessee, Illinois, Minnesota, Missouri, New York, Oregon, Hawaii, and West Virginia.<sup>111</sup>

Third, garden-variety business claims, of the type that attorneys and small enterprises are most likely to be involved in, are subject to heightened pleading standards in both federal and state courts.

In federal courts, Federal Rule of Civil Procedure 9(b) establishes the heightened pleading requirement that: "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."<sup>112</sup> One of the key purposes of Rule 9(b)'s standard is to "protect[] defendants from harm to their goodwill and

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attorneys use their legal skills for improper purposes such as interfering with the administration of justice.").

<sup>105</sup> ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 301:602 (2003).

<sup>106</sup> *Id.*

<sup>107</sup> RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (AM. LAW INST. 1977).

<sup>108</sup> See RESTATEMENT (SECOND) OF AGENCY § 320 cmt. a (AM. LAW INST. 1958); see also *Richard Bertram, Inc. v. Sterling Bank & Tr.*, 820 So. 2d 963, 965 (Fla. Dist. Ct. App. 2002) (relying upon this part of the Restatement in an attorney-as-broker-dealer case to absolve the attorney of any liability for tortious interference with a business relationship).

<sup>109</sup> Bolick & Kiser, *supra* note 89.

<sup>110</sup> *Id.* at 44 (citing RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (AM. LAW INST. 1977)).

<sup>111</sup> See *id.* (describing the application of the privilege in state courts across the United States).

<sup>112</sup> FED. R. CIV. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); see also 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1297, at 590 (perm. ed., rev. vol. 2015) (explaining that the "circumstances" required to be pled with particularity under Rule 9(b) are "the time, place, and contents of the false representations or omissions, as well as the identity of the person making the misrepresentation or failing to make a complete disclosure and what [he] obtained thereby").

reputation.”<sup>113</sup> As explained by the U.S. Court of Appeals for the Fourth Circuit, “lack of compliance with Rule 9(b)’s pleading requirements is treated as a failure to state a claim under Rule 12(b)(6).”<sup>114</sup> This standard is routinely applied to conspiracy as a form of fraud.<sup>115</sup> In evaluating conspiracy claims, Rule 9(b) thus prevents “every business dispute over unfair competition [from] becoming a business conspiracy claim” in the federal courts.<sup>116</sup>

States have implemented their own pleading requirements to prevent garden-variety business claims from being elevated to conspiracy cases. Virginia’s courts, for example, have adopted a standard that requires that “[t]here should be some details of time and place and the alleged effect of the conspiracy.”<sup>117</sup>

Fourth, in practical terms, it is very difficult to prove conspiracy between an attorney and his client because the attorney-client privilege shields most of these communications from standard discovery.<sup>118</sup>

The U.S. Supreme Court case of *United States v. Zolin*<sup>119</sup> prescribes the procedure for *in camera* review of otherwise-privileged material to determine if the attorney-client privilege is being abused to commit a fraud or crime. Any opponent of the privilege must produce “evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception’s applicability.”<sup>120</sup> Once an opponent has overcome that hurdle, the court alone determines whether the materials constitute “communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.”<sup>121</sup>

<sup>113</sup> *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1055, 1056–57 (S.D. Ga. 1990)).

<sup>114</sup> *Id.* at 783 n.5 (citing *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997)); *accord* *Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 661–62 (E.D. Va. 2010) (articulating pleading requirement under Rule 9(b)).

<sup>115</sup> *Gov’t Emps. Ins. Co. (GEICO) v. Google, Inc.*, 330 F. Supp. 2d 700, 706 (E.D. Va. 2004); *accord* David N. Anthony & Timothy J. St. George, *Common Law and Statutory Business Conspiracy—What They Are and Aren’t*, TROUTMAN SANDERS LLP (2011), <http://www.troutmansanders.com/files/Uploads/Documents/Conspiracy%20CLE%20Final%20-%20Anthony.pdf> (summarizing developments in the law as of January 2011).

<sup>116</sup> *GEICO*, 330 F. Supp. 2d at 706.

<sup>117</sup> *Kayes v. Keyser*, 72 Va. Cir. 549, 551–52 (Cir. Ct. 2007) (quoting *Johnson v. Kaugers*, 14 Va. Cir. 172, 176 (Cir. Ct. 1988)); *see also id.* (denying defendants’ formulation of a heightened pleading requirement but acknowledging that the plaintiff must plead that the “alleged co-conspirators did, in fact, agree to do something the statute forbids” (quoting *Johnson*, 14 Va. Cir. at 177)).

<sup>118</sup> *See United States v. Zolin*, 491 U.S. 554, 563 (1989); *Kedem*, *supra* note 20, at 1819.

<sup>119</sup> 491 U.S. at 554.

<sup>120</sup> *Id.* at 574–75 (providing for an *in camera* review of an attorney-client communication only once the party opposing the privilege has presented this evidence).

<sup>121</sup> *Id.* at 563 (quoting *O’Rourke v. Darbishire* [1920] AC 581, 604).

Ultimately, the attorney-client privilege also operates only in the interest of the attorney accused of conspiracy. The lawyer may waive the attorney-client privilege to defend against a conspiracy claim when reasonably necessary. According to the Restatement (Third) of the Law Governing Lawyers, “[t]he attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding . . . to defend the lawyer . . . against a charge by any person that the lawyer . . . acted wrongfully during the course of representing a client.”<sup>122</sup>

### C. Caseload Pressures

In further explaining the exponential growth of the intracorporate conspiracy doctrine since 1984 when the U.S. Supreme Court decided *Copperweld*, the practical pressure of increasing caseloads coincides with and may help explain the courts’ less-than-critical embrace of the doctrine’s bar to conspiracy suits. In the same year that *Copperweld* was decided, Chief Justice Burger wrote in his year-end report on the judiciary that “Supreme Court Justices must now work beyond any sound maximum limits.”<sup>123</sup> Large caseloads left judges without “the precious time for reflection so necessary to a court that decides cases with far-reaching consequences has been reduced to, and possibly below, an absolute minimum.”<sup>124</sup> Chief Justice Burger noted that judges in lower courts were similarly suffering from “inflation,” with district court “caseloads up by 7.4 percent [from the previous] year and those of the appeals courts up by 6.2 percent.”<sup>125</sup>

In 1992, the earliest date for which statistics are available on the U.S. Courts website, there were 265,612 cases filed in the federal district courts.<sup>126</sup> By 2012, that number had increased fifty percent to 397,223.<sup>127</sup> In 2013, witnesses before a U.S. Senate hearing warned that “continued

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<sup>122</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 (AM. LAW INST. 2000).

<sup>123</sup> Linda Greenhouse, *Burger Urges Congress to Help Cut Court Load*, N.Y. TIMES (Dec. 31, 1984), <http://www.nytimes.com/1984/12/31/us/burger-urges-congress-to-help-cut-court-load.html>.

<sup>124</sup> *Id.* (quoting Supreme Court Chief Justice Warren E. Burger).

<sup>125</sup> *Id.*

<sup>126</sup> See U.S. COURTS, U.S. DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE 167 (1997), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/1997/09/30-0>.

<sup>127</sup> See U.S. COURTS, U.S. DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE 1 (2012), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2012/03/31-3>.

budget cuts would devastate the nation's system of justice—threatening public safety, constitutional rights and economic well-being.”<sup>128</sup>

It is understandable why courts would be interested in finding a quick way to dismiss conspiracy claims that would otherwise take time, jury attention, and legal analysis.<sup>129</sup> But merely because the intracorporate conspiracy doctrine is a simple way of reducing caseloads for courts does not mean that courts should overexpand this common law doctrine. Not only would courts be shirking their responsibility to provide a forum in which legitimate claims to redress wrongdoings are heard, but the doctrine's overexpansion is also not properly rooted outside antitrust law as courts have assumed.<sup>130</sup>

Finally, the overexpansion of the intracorporate conspiracy doctrine puts pressure for equitable relief against intracorporate conspiracies onto alternative doctrines. This pressure on alternative doctrines further warps the law on corporate and individual responsibility for wrongdoing.

### III. HOW OVEREXPANSION OF THE INTRACORPORATE CONSPIRACY DOCTRINE HAS WARPED RELATED DOCTRINES IN THE LAW

The overexpansion of the intracorporate conspiracy doctrine from antitrust and sovereign immunity cases into criminal and tort law has created distortions in other doctrines to reach equitable, but often ill-fitting, results.

When a conspiracy is not tried as a conspiracy, these other doctrines are ill-suited to reach the behavior that conspiracy law is designed to prevent. Doctrines such as piercing the corporate veil, responsible corporate officer doctrine, and additional approaches, including rejecting the retroactive imposition of the corporate veil and the recent growth of “reverse” piercing cases, all demonstrate how

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<sup>128</sup> *Senate Hearing Is Warned of Lasting Damage to Courts*, U.S. COURTS (July 25, 2013), <http://news.uscourts.gov/senate-hearing-warned-lasting-damage-courts>.

<sup>129</sup> Consider also the related problem of decreasing pay relative to inflation over time for federal judges. In 1984, Chief Justice Burger first raised the issue of low pay for federal judges to Congress as “unseemly” and “unjust.” Blake Denton, *The Federal Judicial Salary Crisis*, 2 DREXEL L. REV. 152, 153 (2009). By 2002, inadequate compensation for federal judges had been “raised in thirteen of the last twenty year-end reports” *Id.* In 2006, Chief Justice Roberts announced that judicial pay has “been ignored far too long and has now reached the level of a constitutional crisis.” *Id.* at 154 (quoting JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2007), reprinted in STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2008), <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf>).

<sup>130</sup> See Nelson, *supra* note 3.

warped the law has become in imposing liability on corporations and their agents for coordinated wrongdoing.

A. *Conflating the Liability of Officers with Their Liability as Shareholders: Piercing the Corporate Veil*

It is not controversial that courts have turned to piercing the corporate veil as an equitable remedy when other means of imposing liability on corporate wrongdoings fail.<sup>131</sup> But equally as uncontroversially, “[v]eil piercing jurisprudence is unpredictable, inconsistent, and largely unprincipled.”<sup>132</sup>

To articulate what can be said about this alternative doctrine, Black’s Law Dictionary defines “piercing the corporate veil” as “[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation’s wrongful acts.”<sup>133</sup> As one commentator explains, however, “despite the enormous volume of litigation in this area,” the net result is that “the case law fails to articulate any sensible rationale or policy that explains when corporate existence should be disregarded.”<sup>134</sup> Courts in veil-piercing cases “are remarkably prone to rely on labels or characterizations of relationships (such as ‘alter ego,’ ‘instrumentality,’ or ‘sham’) and the decisions offer little in the way of predictability or rational explanation of why enumerated factors should be decisive.”<sup>135</sup>

Some of these contradictions may stem from competing justifications for why the corporate form should be entitled to protection from piercing. As is often explained,

[t]here are essentially two major views of the nature of a corporation. A corporation may be regarded as a privilege granted by the state and treated as an “artificial entity” to be operated by its members. According to this view, it is viewed as a privilege that carries with it the responsibility to operate in accordance with the public interest. Thus, the corporate veil should be pierced if there is an abuse of the corporate form.

Alternatively, a corporation may be viewed as a mere contractual arrangement between individuals. As such, the state should not

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<sup>131</sup> See, e.g., Timothy P. Glynn, *Beyond “Unlimiting” Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 333 (2004) (“[A]lthough courts have utilized various ‘veil piercing’ theories to extend liability to shareholders, such theories cannot serve as a vehicle for meaningful reform.”).

<sup>132</sup> *Id.*

<sup>133</sup> *Piercing the Corporate Veil*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>134</sup> BARRY R. FURROW ET AL., HEALTH LAW § 5-4(a), at 182 (2d ed. 2000).

<sup>135</sup> *Id.*

interfere with the corporate form any more than it would a private contract. Accordingly, the corporate veil should be pierced only when it appears that something in the original “contract” has gone amiss.<sup>136</sup>

The most common method for piercing a corporate veil is use of the alter ego theory, also variously described as the existence of an “instrumentality” or a “sham” corporation. The alter ego theory posits that when an individual<sup>137</sup> has abused the corporate form for his own benefit, he has forfeited the legal protection that the corporate form affords.<sup>138</sup> According to the most authoritative treatise in this area, “[u]nder the alter ego doctrine, when a corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded.”<sup>139</sup> To implement equitable remedies, courts “disregard the corporate entity and hold the individuals responsible for their acts knowingly and intentionally done in the name of the corporation.”<sup>140</sup>

Courts typically consider three pieces of piercing the corporate veil arguments. According to the Law of Corporations treatise:

[w]hile the factors that will justify piercing the corporate veil vary from jurisdiction to jurisdiction, a number of courts will disregard the existence of a corporate entity when the plaintiff shows: (1) control, not merely majority or complete stock control, but complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control was used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or to commit a dishonest and unjust act in contravention of the plaintiff's legal rights; and (3) that the aforesaid control and breach of duty proximately caused the injury or unjust loss.<sup>141</sup>

In an interesting parallel with the intracorporate conspiracy doctrine, veil-piercing doctrine originated in the context of piercing one

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<sup>136</sup> 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41 (perm. ed., rev. vol. 2015) (footnotes omitted).

<sup>137</sup> The additional use of the doctrine as a method of piercing the veil of one corporation to reach another corporation will be described below. See discussion *infra* Part II.A.

<sup>138</sup> See FLETCHER ET AL., *supra* note 136, § 41.10.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* § 41 (footnote omitted); accord 18 AM. JUR. 2D *Corporations* § 54 (perm. ed., rev. May 2015) [hereinafter *Corporations*] (“The courts have found consistently that the key requirements to sustain a veil-piercing are that the owner exercised complete domination over the corporation with respect to the transaction at issue and that such domination was used to commit a fraud or wrong that resulted in the plaintiff's injury.”).



corporation's veil to reach another corporation.<sup>142</sup> The doctrine was only later adapted to its primary use and identification with piercing a corporate veil to reach an individual. Further, this development parallels the recent—and very rapid—evolution of the intracorporate conspiracy doctrine from its roots in antitrust parent-subsidary litigation to litigation against employers and individual employees.<sup>143</sup> In addition, piercing a wholly owned subsidiary to reach its parent corporation remains a particularly “ripe” situation for courts to apply the doctrine.<sup>144</sup>

On the surface, however, the intracorporate conspiracy doctrine and piercing the corporate veil should remain very different doctrines, utilizing precisely opposite approaches.

First, in theory, it is an agent's lack of independent will from the principal that protects the agent of a corporation from conspiracy suit under the intracorporate conspiracy doctrine, while it is the existence of independent will on the part of the agent that protects the principal from liability under piercing the corporate veil. The concept of whether there is a second “mind” present, however, is the same: if an entity is a “sham” or “alter ego” under piercing the corporate veil doctrine, the entity has “no separate mind, will or existence of its own.”<sup>145</sup> The difference between the two doctrines is that, under the intracorporate conspiracy doctrine, the existence of a single “mind” immunizes the agent and principal from liability, whereas, under veil-piercing doctrine, the existence of the single “mind” justifies a court's imposition of liability on the principal as well as the agent.

Second, in stark contrast with what the theory of “mind” results should suggest, the practical breadth of license that an agent has to exercise independent judgment while still being protected under the intracorporate conspiracy doctrine is much greater than his license to exercise independent judgment in most cases in which courts will pierce a corporate veil. Under the intracorporate conspiracy doctrine, the U.S. Court of Appeals for the Third Circuit, for example, has held that no conspiracy between a corporation and its agent may exist as long as the agent's actions are not taken purely “for [his] sole personal benefit.”<sup>146</sup> Note how much room for independent thought and action on the part

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<sup>142</sup> See, e.g., FLETCHER ET AL., *supra* note 136, § 41.10 (“[T]he instrumentality doctrine [behind the alter ego theory] has its origins in the context of parent-subsidary relationships.”). The further significance of this distinction between parent-subsidary and corporate-individual liability standards will be the subject of a next article.

<sup>143</sup> See, e.g., Nelson, *supra* note 3, at 985–86 (describing the intracorporate conspiracy doctrine's leap from parent-subsidary corporate forms in antitrust to its current application in employer-employee litigation).

<sup>144</sup> FLETCHER ET AL., *supra* note 136, § 41.10; see also Nelson, *supra* note 3, at 984.

<sup>145</sup> FLETCHER ET AL., *supra* note 136.

<sup>146</sup> Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003) (quoting Heffernan v. Hunter, 189 F.3d 405, 412 (3d Cir. 1999)).

of the agent is preserved under this standard for granting immunity from liability. By contrast, under veil-piercing doctrine, even when all corporate formalities have been observed, courts may still pierce the corporate veil when they find a corporate form to be a “dummy” entity that fails to exercise independent functions such as management or control of assets.<sup>147</sup> When a principal is liable under piercing the veil doctrine, a “dummy” entity has little room for independent thought and action.

Third, a major distinction between the way that the intracorporate conspiracy and veil-piercing doctrines should in theory be applied has been veil-piercing’s particular emphasis on the observance of corporate formalities to insulate principals from liability.

An explicit rationale for piercing the corporate veil is to punish entities that neglect corporate formalities.<sup>148</sup> Typical cases emphasize “whether the corporate form has been adhered to, whether corporate assets are treated as such or as personal assets, and whether there has been an attempt to deceive third parties.”<sup>149</sup> Accordingly, courts have often fused a threshold disregard for corporate formalities with the existence of wrongdoing on the part of the entity controlling the corporation’s behavior.<sup>150</sup>

By contrast, in 1984, the U.S. Supreme Court specifically interpreted the intracorporate conspiracy doctrine to provide protection from suit in opposition to what corporate formalities should dictate. In *Copperweld Corp. v. Independence Tube Corp.*, the Court held that the intracorporate conspiracy doctrine shielded a parent company from being able to conspire with its wholly owned subsidiary for purposes of Section 1 of the Sherman Act.<sup>151</sup> The Court reasoned that despite both entities’ observance of corporate formalities, the companies should not have been considered separate economic entities.<sup>152</sup> Moreover, since the *Copperweld* decision, attorneys have been further pushing the boundaries of the intracorporate conspiracy doctrine in an attempt to blur the legal distinctions between clients and their outside attorneys as separate entities.<sup>153</sup>

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<sup>147</sup> See *Edward Finch Co. v. Robie*, 12 F.2d 360, 363 (8th Cir. 1926) (establishing a traditional rationale behind the equitable doctrine of piercing the corporate veil).

<sup>148</sup> See, e.g., *FLETCHER ET AL.*, *supra* note 136, § 41.10.

<sup>149</sup> *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1232 (Ind. 1994).

<sup>150</sup> See *Corporations*, *supra* note 141 (“The failure to observe corporate formalities will not lead to a disregard of the corporate entity if the informality neither prejudices nor misleads the plaintiff or where there is no showing that the separate legal identity of the corporation was used as a subterfuge or to justify a wrong.” (footnote omitted)).

<sup>151</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

<sup>152</sup> See *id.* at 777.

<sup>153</sup> See, e.g., discussion *supra* Part II.B.

Fourth, returning to the two underlying justifications for protection of the corporate form, both justifications should result in greater protection from piercing of the corporate veil than against prosecution for intracorporate conspiracy. In the absence of the intracorporate conspiracy doctrine's immunity from suit, both the corporation and its agent would be liable for their parts in an intracorporate conspiracy. This default would comport with basic principles of agency law, tort law, and criminal law.<sup>154</sup> In addition, a corporation's liability in tort or criminal law does not pierce the corporate veil itself to reach shareholders or other entities behind its form. Thus, in evaluating the two justifications for protection of the corporate form, repeal of the intracorporate conspiracy doctrine's immunity neither harms the state's privilege of the corporation as an "artificial entity"<sup>155</sup> nor interferes with the "contract" among individuals who formed the firm.<sup>156</sup> Piercing the corporate veil, by contrast, specifically vitiates the state's privilege for the corporation as an "artificial entity" *and* interferes with the "contract" among individuals who formed the firm.<sup>157</sup>

These four basic distinctions aside, the case law itself demonstrates that litigants and courts are *de facto* turning to piercing the corporate veil to permit claims that should have been litigated as conspiracies if not for what has become the absolute bar of the intracorporate conspiracy doctrine.<sup>158</sup> This substitution of one doctrine for another

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<sup>154</sup> See Nelson, *supra* note 3, at 1002–07, 1010–13, 1007–09 (describing the basis of responsibility for collective action in agency, tort, and criminal law, respectively, and how the intracorporate conspiracy doctrine violates those principles).

<sup>155</sup> In fact, there is an argument that holding a corporation liable for its own wrongdoing more properly comports with the corporation's form as a legal "person" who is responsible for its actions in the same manner as all other legal persons.

<sup>156</sup> For two justifications for protection of the corporate form, see *supra* Part III.A and note 136.

<sup>157</sup> See *supra* Part III.A and note 136.

<sup>158</sup> The U.S. Court of Appeals for the Fifth Circuit highlighted this exact behavior by a litigant in *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th Cir. 1992). As the court wrote in dismissing the litigant's argument:

*Bancec* is inapposite to this case. First, the concept of piercing the corporate veil, or alter ego liability, that underlies *Bancec* involves the disregard of corporate status to reach the assets of the owners or of related corporate entities. No such facts are pleaded here. Arriba wants the federal court to disregard the Commission's separate status by lumping it with an entirely distinct entity: the Union's employer, Pemex. There is neither common ownership nor any similar legal relationship between these entities. One cannot pierce a non-existent corporate veil. What Arriba seeks is more properly characterized as joint and several liability for conspiracy or tort, respondeat superior, or agency liability.

*Id.* at 535 (footnotes and citation omitted) (distinguishing *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983)).

sows confusion and randomness in at least the four dimensions that should distinguish the doctrines.

The most blunt statement of a court's willingness to find an equitable remedy under piercing the corporate veil when such a remedy would be blocked by the intracorporate conspiracy doctrine has come from the federal courts. In the 2011 case of *Morelia Consultants, LLC v. RCMP Enterprises, LLC*,<sup>159</sup> the Middle District of Pennsylvania flatly asserted that "plaintiffs have raised allegations sufficient to pierce the corporate veil. As such, the intra-corporate conspiracy doctrine [(i.e., an entity cannot conspire with one who acts as its agent)] does not apply to the case."<sup>160</sup> Despite overwhelming obstacles, the court was determined to allow the plaintiffs' case to proceed. Because the intracorporate conspiracy doctrine would be an outright bar to liability, the court considered exactly the same facts under the more flexible, but volatile, piercing the corporate veil doctrine.

Interestingly, *Morelia* was a civil RICO case.<sup>161</sup> As noted previously, RICO claims are a last type of claim in which the federal courts across the country have applied the intracorporate conspiracy doctrine.<sup>162</sup> Although the U.S. Court of Appeals for the Third Circuit, under which the *Morelia* court functioned, has not taken a position on whether the intracorporate conspiracy doctrine would bar a civil RICO claim under § 1962(d), its discussion of RICO's § 1962(c) would suggest so,<sup>163</sup> and two of its other district courts<sup>164</sup> have already found that such a claim would be barred by the doctrine.<sup>165</sup>

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<sup>159</sup> No. 3:10cv432, 2011 WL 4021070 (M.D. Pa. Sept. 9, 2011).

<sup>160</sup> *Id.* at \*11 (citing *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003)).

<sup>161</sup> See *id.* at \*11-12 (stating that the case was brought under the RICO Act, 18 U.S.C. § 1961).

<sup>162</sup> See *supra* Part I.B (discussing RICO claims in federal courts).

<sup>163</sup> See *Petro-Tech, Inc. v. W. Co. of N. Am.*, 824 F.2d 1349, 1358 (3d Cir. 1987) ("In particular, this and most other courts have held that for purposes of § 1962(c) an enterprise may not be held liable under RICO." (citing *Hirsch v. Enright Ref. Co.*, 751 F.2d 628 (3d Cir. 1984); *Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi.*, 747 F.2d 384, 401-02 (7th Cir. 1984))); see also *Petro-Tech*, 824 F.2d at 1358 ("The contrary rule has been adopted only by the Eleventh Circuit, in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982).").

<sup>164</sup> See *Pioneer Contracting, Inc. v. E. Exterior Wall Sys., Inc.*, No. Civ.A. 04CV01437, 2005 WL 747221, at \*1 (E.D. Pa. Mar. 29, 2005) (holding that a "conspiracy cannot lie against the corporation for the actions of its employees who violate RICO on its behalf. Moreover, employees of a corporation, while acting in the course and scope of their employment, cannot conspire with each other"); accord *Greenberg v. Tomlin*, 816 F. Supp. 1039, 1050 (E.D. Pa. 1993).

<sup>165</sup> See also *Walters v. McMahan*, 795 F. Supp. 2d 350 (D. Md. 2011) (holding that the intracorporate conspiracy doctrine barred RICO § 1962(d) conspiracy claim that a company illegally conspired to depress employees' wages through a scheme of hiring and falsely attesting to the work authorization of illegal immigrants, where officers and managers were all employees of the company acting within scope of their employment and had no interest in the object of the conspiracy independent of their relationship with the company).

Hence, rather than applying the intracorporate conspiracy doctrine itself, the *Morelia* court, obviously outraged by the defendants' behavior in the case, merely dodged the doctrine's application in favor of piercing the corporate veil. In a creative twist invented from whole cloth to link the two doctrines, the *Morelia* court rejected its magistrate judge's recommendation to announce:

Since the court has determined that plaintiffs have properly alleged that the corporate veil should be pierced, the individual defendants may be liable for corporate actions and any distinction created by the intra-corporate doctrine does not exist. Moreover, plaintiffs have alleged that the defendants engaged in fraudulent and negligent misrepresentation, as well as a number of violations of the RICO act, and that the individual defendants acted in combination and as part of a scheme to commit these violations. Plaintiffs have therefore stated a claim for civil conspiracy.<sup>166</sup>

Regarding its test for piercing the corporate veil, the *Morelia* court further rejected its magistrate's recommendation by focusing on the plaintiffs' arguments regarding undercapitalization, and its decision included only a single footnote about the disregard of corporate formalities.<sup>167</sup>

The *Morelia* court, however, is not alone in its frustration with the intracorporate conspiracy doctrine and in its attempt to link analysis under the intracorporate conspiracy doctrine with the stronger equitable tenets of piercing the corporate veil. More subtly, courts across the country have started to entangle the two doctrines' contradictory requirements as the intracorporate conspiracy doctrine has become stronger and courts have increasingly had to rely on piercing the corporate veil as an ill-fitting alternative to permit conspiracy claims to proceed.

The case law demonstrates this blurring of intracorporate conspiracy and veil-piercing doctrines along the four dimensions that should distinguish them.

First, analysis of the degree of independence for an agent to perform the details of torts and crimes before a principal becomes liable under the intracorporate conspiracy doctrine has merged into language about merely declining to inquire or supervise an agent's behavior in the manner of piercing the corporate veil.

The Supreme Court of Nebraska's decision in *Renner v. Wurdeman* illustrates this trend.<sup>168</sup> In *Renner*, the court reversed a lower court's grant of summary judgment to Wurdeman, the president and sole

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<sup>166</sup> *Morelia Consultants*, 2011 WL 4021070, at \*11.

<sup>167</sup> *Id.* at \*24–28, \*27 n.4.

<sup>168</sup> See *Renner v. Wurdeman*, 434 N.W.2d 536 (Neb. 1989).

owner of a real estate company who had promised to award stock to his only employee as compensation for services rendered, but who then fired the employee when the employee attempted to exercise the promised stock option.<sup>169</sup> The employee alleged tortious interference with a business relationship on the basis of a conspiracy between the president of the company, and the same man, Wurdeman, as the individual owner of the company, with the company's promise of stock options to the employee.<sup>170</sup>

The lower court had dismissed the employee's tortious interference claim as duplicative of his claim that the owner and the company had breached their stock agreements.<sup>171</sup> But the Nebraska Supreme Court found the employee's tortious interference claim more complicated. The court concluded that "[s]ince it cannot be said as a matter of law that the company had the right to terminate Renner's employment for any cause or no cause at all, summary judgment" could not be granted to Wurdeman and the company under the intracorporate conspiracy doctrine.<sup>172</sup> But why should the company's adherence to proper form and procedures under the contract determine liability under the intracorporate conspiracy doctrine when the issue is how much the principal controls its agent's actions?

The court's argument here sounds more like a test for piercing the corporate veil: the court has started to confuse the lack of company oversight with the existence of wrongdoing on the part of the agent. Could not the corporation itself have failed to obey the formalities of the contract? Why should the failure to observe those formalities focus the court's inquiry on Wurdeman himself behind the corporate veil? To allow Renner to win his case, the Nebraska Supreme Court substituted a piercing the corporate veil rationale for his argument, which was blocked by the intracorporate conspiracy doctrine.<sup>173</sup> And the result is to find, in the manner of veil-piercing rather than under the intracorporate conspiracy doctrine, that Wurdeman, as the owner rather than as the president of the company, could be personally liable.<sup>174</sup>

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<sup>169</sup> See *id.* at 538–39.

<sup>170</sup> The court explained,

Renner seems to be arguing that Wurdeman the individual did not want to honor the stock option agreement and, therefore, caused himself, as the president of the company, to have the company terminate Renner's employment so that Renner could not satisfy the condition precedent to his right to exercise the option.

*Id.* at 542.

<sup>171</sup> See *id.*

<sup>172</sup> *Id.*

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

Second, courts are granting more license to combine personal and official capacities before reaching judgment under the intracorporate conspiracy doctrine. This trend can be seen in the misuse of veil-piercing's "dummy" corporation analysis in the guise of applying the intracorporate conspiracy doctrine. For example, continuing to follow the reasoning of the Nebraska Supreme Court in the *Renner* case, if "Wurdeman and the company acted improperly in terminating Renner's employment to prevent the exercise of Renner's rights under the stock option agreement, then Renner does have a basis for claiming that Wurdeman may have acted in his individual capacity and tortiously interfered with Renner's business relationship with the company."<sup>175</sup>

Why should it be the act of "improperly" terminating Renner's employment that somehow separates Wurdeman's actions in his "individual capacity" from his official capacity as president of the company? The court's analysis *sub silencio* assumes that Wurdeman's action in terminating Renner was overruling the appropriate "will" of the corporation. Certainly, the court recorded in its recitation of the facts how well Renner had performed for the company while Wurdeman had been unexpectedly incapacitated.<sup>176</sup> The company had compensated Renner for that performance through the promise of stock—but then so had Renner been compensated by Wurdeman as the sole owner of the company who had made this decision also possibly as an act of personal gratitude for Renner's services.

The court effectively considered the company to be a "dummy" corporation in conflating the corporation's and Wurdeman's actions. The concept of a "dummy" corporation, however, is unique to veil-piercing analysis. The misuse of the "individual" capacity language from the intracorporate conspiracy doctrine in the court's piercing-the-corporate-veil analysis reveals the court's desire to reach an equitable remedy when the intracorporate conspiracy doctrine would not provide one.

Third, courts are importing veil-piercing's emphasis on the existence of formal corporate structures into the intracorporate conspiracy doctrine's inquiry regarding the purpose and direction of agents by a principal. The Missouri Court of Appeals made exactly this leap in the often-cited case of *Mika v. Central Bank of Kansas City*.<sup>177</sup> In facts similar to *Black's* California bank fraud,<sup>178</sup> the appellants in *Mika* alleged that a bank, its board members, another company named

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 538.

<sup>177</sup> See *Mika v. Cent. Bank of Kan. City*, 112 S.W.3d 82 (Mo. Ct. App. 2003) (analysis of Missouri fraud statute application superseded by legislation in 2011, but still routinely cited for pre-existing discussion of the intracorporate conspiracy doctrine).

<sup>178</sup> See discussion *supra* Part I.C.

University Health Services (UHS), and various UHS associates conspired to induce the appellants to sell their property to the bank in a false “friendly foreclosure” proceeding.<sup>179</sup> The appellants asserted that the appellees violated their promises and fraudulently conspired to induce the appellants to stop servicing the debt on their notes in order to sell the appellants’ subsequently foreclosed property to UHS.<sup>180</sup>

The appellants argued that the appellee agents could be self-interested under the intracorporate conspiracy doctrine because they were “high ranking officers that would benefit anytime the bank made money,” and because they “wanted to keep their jobs and promote their relationships with the members of the board.”<sup>181</sup>

The *Mika* court’s analysis, however, veered into entirely different territory. Turning to precedents that should long have been superseded by the U.S. Supreme Court’s 1984 *Copperweld* decision, the *Mika* court found it important for the purposes of proving intracorporate conspiracy liability that entities be “separately incorporated.”<sup>182</sup> It quoted with approval a rule that “[w]ithout such an organization legally distinct from the principal defendant, it would be impossible for an employee to have an interest that was truly independent.”<sup>183</sup> Accordingly, the *Mika* court dismissed the charge of intracorporate conspiracy against the bank’s agents.<sup>184</sup>

Where did this strange requirement of formal corporate structure, to the detriment of an inquiry regarding the direction of agents by the principal, come from? Again, the court’s analysis appears to be imported from reliance on corporate formalities in veil-piercing doctrine.<sup>185</sup> Even the Missouri federal court has followed this distorted analysis down the *Mika* court’s rabbit hole, stating in 2009 that agents in another action could not be structurally liable under the intracorporate conspiracy doctrine because they “are co-owners of, and financially invested in” the same corporate entity.<sup>186</sup>

The *Mika* court, however, was responding to a basic frustration with how the current intracorporate conspiracy doctrine operates. When corporate structures are indistinct and attorneys further push the intracorporate conspiracy doctrine’s principal-agent analysis to bleed

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<sup>179</sup> See *Mika*, 112 S.W.3d at 85.

<sup>180</sup> See *id.*

<sup>181</sup> *Id.* at 94.

<sup>182</sup> *Id.* (citing *Metts v. Clark Oil & Refining Corp.*, 618 S.W.2d 698, 702 (Mo. Ct. App. 1981), and its analysis of *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975)).

<sup>183</sup> *Id.* (quoting *Metts*, 618 S.W.2d at 702).

<sup>184</sup> *Id.* at 95.

<sup>185</sup> See, e.g., FLETCHER ET AL., *supra* note 136, § 41.10 (articulating this justification for the doctrine of piercing the corporate veil).

<sup>186</sup> *Rucker v. U.S. Fidelis, Inc.*, No. 4:09CV670 CDP, 2009 WL 2390580, at \*1 (E.D. Mo. July 31, 2009).



across legal forms, courts can be confused and annoyed with the indeterminate reach of the doctrine. As another federal district court wrote in dismissing use of the intracorporate conspiracy doctrine,

[i]n a very broad sense, perhaps, every conspirator could be considered an “agent” of the overarching conspiracy. Defendants’ position would seem to require that any person enlisted into a conspiracy necessarily becomes an “agent,” and therefore he cannot be a conspirator because there is only a single entity, but this cannot be right.<sup>187</sup>

Fourth, by turning to veil-piercing analysis to rectify frustrations with the intracorporate conspiracy doctrine, courts are arbitrarily imposing greater liability, and imposing that liability on shareholders themselves, rather than properly measuring the liability of a corporation for wrongdoing as its own legal entity. That the *Renner* court used an intracorporate conspiracy doctrine case to reach Wurdeman personally under a piercing the corporate veil analysis documents this tendency.<sup>188</sup>

Furthermore, conversely examining cases originally litigated as piercing the corporate veil cases, courts have often found shareholders liable for conspiracies where there should merely have been limited liability on the part of the company and its officers if the cases could have been brought under a conspiracy argument. An empirical study, for example, found that one of the most predictive factors in a court’s decision to pierce the corporate veil is deception by corporate insiders.<sup>189</sup> Piercing was approved in an astonishing ninety-four percent of those cases.<sup>190</sup> The magnification of liability through piercing the corporate veil can be attractive because, as another commentator has explained, “[t]he veil-piercing notion of ‘looking through’ the agency relationship to reach the facts becomes common sense when one recognizes that a claim of civil conspiracy ‘is essentially a tort action.’”<sup>191</sup>

In 1996, the U.S. Supreme Court unsuccessfully attempted to rein in this over-reliance on piercing the corporate veil in *Peacock v. Thomas*.<sup>192</sup> Respondent Thomas filed suit under the Employee Retirement Income Security Act of 1974 (ERISA)<sup>193</sup> against his

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<sup>187</sup> Allison v. Chesapeake Energy Corp., No. 12-0900, 2013 WL 787257, at \*10 (W.D. Pa. Jan. 29, 2013).

<sup>188</sup> Renner v. Wurdeman, 434 N.W.2d 536, 542 (Neb. 1989); see also discussion *supra* Part III.A.

<sup>189</sup> See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1063 (1991).

<sup>190</sup> See *id.*

<sup>191</sup> See Horwitz, *supra* note 8, at 199 (citing Cty. Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 174 (3d Cir. 2006)).

<sup>192</sup> 516 U.S. 349 (1996).

<sup>193</sup> 29 U.S.C. § 1001 (2012).

employer, Tru-Tech, and Peacock, an officer and shareholder of Tru-Tech.<sup>194</sup> The Supreme Court's opinion specifically documented that Peacock was a shareholder of the corporation.<sup>195</sup> Thomas's first suit alleged breach of fiduciary duties in administering the employer's pension benefits plan.<sup>196</sup>

Note that, although Thomas's suit was brought under ERISA, the facts of this case resemble a classic intracorporate conspiracy claim. The message is brought into even sharper relief by the subsequent history of the dispute between Thomas and Peacock.

In Thomas's first suit, the district court entered judgment against Tru-Tech alone. The district court reasoned that only the employer was a fiduciary for the benefits plan under ERISA.<sup>197</sup> But, when Thomas could not collect judgment against Tru-Tech, he initiated a second suit against Peacock as shareholder of the corporation.<sup>198</sup>

In his second suit, Thomas sought to pierce the corporate veil to collect against Peacock.<sup>199</sup> Peacock had allegedly conspired to siphon off Tru-Tech's assets in order to prevent Thomas from satisfying the original judgment.<sup>200</sup> Further, Thomas alleged that Peacock had fraudulently conveyed Tru-Tech's assets in violation of South Carolina and Pennsylvania law.<sup>201</sup> The district court agreed. It pierced the corporate veil to award Thomas judgment against Peacock in the amount that Tru-Tech had owed, plus interest and fees.<sup>202</sup> On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's judgment against Peacock.<sup>203</sup>

The U.S. Supreme Court reversed.<sup>204</sup> Although the Court's language focused on federal jurisdiction and the statutory details of ERISA, its decision sent a sharp warning that, if Thomas could not have won his original suit against Peacock as an officer of the corporation, the federal district court should not have pierced the corporate veil to reach Peacock as a shareholder. As the Court wrote:

Thomas' veil-piercing claim does not state a cause of action under ERISA and cannot independently support federal jurisdiction. Even

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<sup>194</sup> *Peacock*, 516 U.S. at 351.

<sup>195</sup> *See id.*

<sup>196</sup> *See Thomas ex rel. Tru-Tech, Inc. v. Tru-Tech, Inc.*, CIV. A. No. 87-2243-3, 1988 WL 212511, at \*1 (D.S.C. Nov. 28, 1988), *aff'd*, 900 F.2d 256 (4th Cir. 1990).

<sup>197</sup> *See Peacock*, 516 U.S. at 351 (characterizing the original suit).

<sup>198</sup> *See Thomas ex rel. Tru-Tech, Inc. v. Peacock*, No. C/A 7-91-3843-21, 0094 WL 16013214, at \*1 (D.S.C. Oct. 28, 1992), *aff'd in relevant part*, 39 F.3d 493 (4th Cir. 1994).

<sup>199</sup> *See Peacock*, 516 U.S. at 352 (characterizing the original suit).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Thomas v. Peacock*, 39 F.3d 493 (4th Cir. 1994), *rev'd*, 516 U.S. 349 (1996).

<sup>204</sup> *See Peacock*, 516 U.S. at 352.

if ERISA permits a plaintiff to pierce the corporate veil to reach a defendant not otherwise subject to suit under ERISA, Thomas could invoke the jurisdiction of the federal courts only by independently alleging a violation of an ERISA provision or term of the plan. Piercing the corporate veil is not itself an independent ERISA cause of action, “but rather is a means of imposing liability on an underlying cause of action.”<sup>205</sup>

The message of the Court’s decision is to caution federal courts not to exceed their jurisdictional boundaries by magnifying the liability that a corporate officer might otherwise expect to incur. Peacock was both a corporate officer and a shareholder of the corporation. As typical of most fact patterns, Peacock’s liability would have been more limited as a corporate officer than if the court had pierced the corporate veil to reach him as a shareholder. One method of analysis is not a substitute for the other, just as liability under piercing the corporate veil doctrine is not an appropriate substitute to satisfy equities thwarted by the intracorporate conspiracy doctrine.

B. *Individual Officer Liability to Third Parties: Growth of Responsible Corporate Officer Doctrine*

A natural response to the Supreme Court requiring an underlying cause of action for liability not barred by the intracorporate conspiracy doctrine is to find new duties on the part of the corporate officer as an individual to the third parties that the officer harms in furtherance of a corporate conspiracy. These new duties, which are currently being established both by statute and by common law, will become the subject of an additional article.

Yet one dramatic example of the explosion of personal liability for officers in apparent response to the strength of the intracorporate conspiracy doctrine has been the development of “responsible corporate officer” doctrine. This doctrine, in its various forms, imposes personal liability for corporate actions on directors, officers, and individuals acting within corporations when:

- (1) the individual is in a position of responsibility which allows the individual to influence corporate policies or activities; (2) there is a nexus between the individual’s position and the violation in question such that the individual could have influenced the corporate actions

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<sup>205</sup> *Id.* at 353–54 (footnote omitted) (quoting 1 C. KEATING & G. O’GRADNEY, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (perm. ed. 1990)).

which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.<sup>206</sup>

Courts have been most likely to impose responsible corporate officer liability on individuals in cases of statutory violations when they "would normally not be liable under traditional corporate, tort, or agency law principles."<sup>207</sup>

In 1975, the U.S. Supreme Court first approved application of responsible corporate officer doctrine liability under the Federal Food, Drug, and Cosmetic Act.<sup>208</sup> In *United States v. Park*,<sup>209</sup> the Court found that:

knowledge or intent were not required to be proved in prosecutions under its criminal provisions, and that responsible corporate agents could be subjected to the liability thereby imposed. Moreover, the principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime. The principle had been applied whether or not the crime required 'consciousness of wrongdoing,' and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.

In the latter class of cases, the liability of managerial officers did not depend on their knowledge of, or personal participation in, the act made criminal by the statute. Rather, where the statute under which they were prosecuted dispensed with 'consciousness of wrongdoing,' an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability. It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of.<sup>210</sup>

Other versions of this doctrine include the increasingly popular "control person" theory of liability<sup>211</sup> under section 20 of the Securities

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<sup>206</sup> Martin Petrin, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AM. U. L. REV. 1661, 1675 (2010) (citing *In re Dougherty*, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992)).

<sup>207</sup> *Id.* at 1674 (citing Glynn, *supra* note 131, at 357).

<sup>208</sup> See 21 U.S.C. § 331(k) (2012).

<sup>209</sup> 421 U.S. 658 (1975).

<sup>210</sup> *Id.* at 670–71 (citations omitted) (reviewing cases for interpretation of the mens rea required for imposition of liability).

<sup>211</sup> See, e.g., Kevin LaCroix, *New Exposure for Corporate Officials: Control Person Liability for FCPA Violations*, D&O DIARY (Aug. 24, 2009), <http://www.dandodiary.com/2009/08/articles/foreign-corrupt-practices-act/new-exposure-for-corporate-officials-control-person-liability-for-fcpa-violations>.

Exchange Act of 1934<sup>212</sup> and the Foreign Corrupt Practices Act of 1977 (FCPA).<sup>213</sup>

Since 1975, however, not much development occurred in the doctrine until a recent explosion of cases starting in 2009, after prosecutions for conspiracy in the financial crisis were blocked by growth of the intracorporate conspiracy doctrine. In fact, in 2003, before the financial crisis, personal responsibility for corporate officers under a theory of vicarious liability took a step backwards when the U.S. Supreme Court refused to extend personal liability to a corporate officer in the civil rights context for alleged racial discrimination under the Fair Housing Act.<sup>214</sup>

But, in 2009, in its search for new tools to prosecute corporate conspiracy in the wake of the financial crisis, the U.S. Securities and Exchange Commission (SEC) settled with Nature's Sunshine Products (NSP) for violations of the FCPA over NSP's payment of bribes to prevent enforcement of Brazilian regulations on medicine imports.<sup>215</sup> This NSP case is assumed to be "the first time the SEC has held public company officials responsible for an FCPA-related books and records violation based solely upon their status as 'control persons.'"<sup>216</sup> Under the terms of the settlement, NSP's CEO and former CFO each paid a \$25,000 civil penalty under the theory of "control person" liability for not preventing the behavior.<sup>217</sup>

Importantly, under "control person" liability, the SEC made no attempt to tie the liability of the corporate officers to their knowledge or complicity in the violations. Regarding the import duties,

[t]he CEO and CFO of NSP were not accused of having booked the inaccurate entries themselves. In fact, they were not accused of even knowing about the inaccurate entries. Rather, without having any specific knowledge of the entries in question, they were held accountable for the violations simply because of their operational

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<sup>212</sup> 15 U.S.C. § 78t (2012).

<sup>213</sup> 15 U.S.C. §§ 78dd-1 to -3 (2012).

<sup>214</sup> See *Meyer ex rel. Triad, Inc. v. Holley*, 537 U.S. 280 (2003); Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012).

<sup>215</sup> See *Nature's Sunshine Products, Inc.*, Litigation Release No. 21162, 2009 WL 6481881 (July 31, 2009).

<sup>216</sup> Paul R. Berger et al., *Control Person Liability and the FCPA: What Are the Limits and How Should Companies Respond?*, DEBEVOISE & PLIMPTON: FCPA UPDATE, Sept. 2009, at 1, 1, <http://www.debevoise.com/~media/files/insights/publications/2009/09/fcpa%20update/files/view%20the%20update/fileattachment/fcpaupdate%20number2.pdf>.

<sup>217</sup> See *Nature's Sunshine Products*, *supra* note 215 ("Faggioli and Huff violated Sections 13(b)(2)(A) and 13(b)(2)(B) as control persons pursuant to Section 20(a) of the Exchange Act."); *id.* (concluding that, for this violation, "Faggioli and Huff [are] to each pay a civil penalty of \$25,000").

positions within the company and their responsibility for maintaining accurate books and records.<sup>218</sup>

The next year, as a further response to perceived corporate wrongdoing during the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>219</sup> which reinforced the SEC's approach by codifying the agency's authority to assert this form of control person liability.<sup>220</sup>

Commentators have noted the subsequent change in regulatory agencies' enforcement tactics. In 2012, an article concluded that the NSP case was simply the first of many such actions that regulators would take under "control person" liability.<sup>221</sup> With Congressional validation of the SEC's technique, "[e]xpanded use of such claims by the SEC in FCPA cases likely will lead to an increased number of enforcement actions against individuals and larger settlements."<sup>222</sup> In late June 2013, the Commodity Futures Trading Commission (CFTC) brought its first suit under a similar theory of control person liability.<sup>223</sup>

The fundamental problem with substituting responsible corporate officer doctrine and control person liability for reforming the intracorporate conspiracy doctrine is that these alternative doctrines represent exactly what Professor Martin<sup>224</sup> objected to: actual imposition of blind "respondeat superior" liability.<sup>225</sup> For example, under these doctrines, "in most federal courts, it is not necessary to show that the corporate official being charged had a culpable state of mind."<sup>226</sup> Instead, the issue before the court is merely whether the officer had control and responsibility for the alleged actions. Accordingly, it is not a

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<sup>218</sup> Berger et al., *supra* note 216, at 4.

<sup>219</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>220</sup> See *id.* § 929P(c) (codified at 15 U.S.C. § 78u-2 (2012)).

<sup>221</sup> Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 438 (2012) ("The government's focus on FCPA enforcement actions against individuals may intensify with the expanded use of control person liability."); see also generally Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283 (2012).

<sup>222</sup> Mark, *supra* note 221, at 439.

<sup>223</sup> The recent civil case brought by the CFTC against Jon Corzine for financial mismanagement at MF Global was under "control person liability, a legal provision that allows for the punishment of executives for the bad acts of lower-level employees." Ben Protess, *Suit Accuses Corzine of a Failure at the Helm*, N.Y. TIMES, June 28, 2013, at B1. There was no conspiracy element to the charge and it only affected Corzine and one other employee—an assistant treasurer for the company who performed wire transfers. See *id.*

<sup>224</sup> See Martin, *supra* note 74; see also discussion *supra* Part II.A.

<sup>225</sup> See, e.g., Berger, *supra* note 216, at 4 ("Section 20(a) is similar to the concept of 'respondeat superior' in other tort contexts—holding the superior official accountable for the (mis)conduct of more junior employees.").

<sup>226</sup> *Id.*; accord *id.* at 1 n.2 (surveying case law).

defense to control person liability that the officer did not “knowingly participate in or independently commit a violation of the Act.”<sup>227</sup>

But simply penalizing the officer who is in the wrong place at the wrong time does little to define and encourage best practices. Moreover, unlike conspiracy doctrine, responsible corporate officer doctrine and its correlates fail to reward the party who changes course to mitigate damages or to abandon further destructive behavior.<sup>228</sup> Under the Model Penal Code on renunciation of conspiracy, “[i]t is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”<sup>229</sup>

By contrast, under corporate officer doctrine, although the size of the damages may be smaller with a lesser harm if the officer renounces the corporation’s destructive course, the officer’s personal career and reputation may still be destroyed by entry of a judgment. Under the responsible corporate officer doctrine, officers are thus either incentivized to not get caught, or to perpetrate a crime large enough that the monetary value of the wrongdoing outweighs the potential damage to the officer’s career. Litigating responsible corporate officer doctrine has become a new volatile high-wire strategy.

In addition, because as many as ninety-nine percent of public U.S. companies carry director’s and officer’s liability insurance (D&O insurance), the individual charged with personal liability under responsible corporate officer doctrine for actions that he has renounced has an incentive to litigate in such a way that D&O insurance will cover the claim.<sup>230</sup> This often means refusing to accept any degree of responsibility for damages. Delaware law, for example, requires that for corporate indemnification, the individual has been “successful on the merits or otherwise in defense of any action, suit or proceeding.”<sup>231</sup>

Moreover, with these and other explosive hazards for corporate service, it should be no surprise that top executives are demanding and receiving ever-increasing compensation for often short-term

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<sup>227</sup> *Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 724 (11th Cir. 2008).

<sup>228</sup> *Cf.* MODEL PENAL CODE § 5.03(6) (AM. LAW INST., Proposed Official Draft 1962) (“Renunciation of Criminal Purpose.”).

<sup>229</sup> *Id.*

<sup>230</sup> See Josephine Sandler Nelson & Richard O. Parry, *Protecting Employee Rights and Prosecuting Corporate Crime: A Proposal for Criminal Cumis Counsel*, 10 BERKELEY BUS. L.J. 115, 115–17 (2013) (providing citations for D&O insurance estimates); *id.* at 170 (“Because the employees’ right to indemnification may hinge in part or entirely on whether the employees are found guilty of the crime or not, employees have an enormous incentive to fight charges to the end instead of pleading to a lesser count . . .” (footnote omitted)).

<sup>231</sup> DEL. CODE ANN. tit. 8, § 145(c) (2015); see also Nelson & Parry, *supra* note 230, at 175 (discussing the impact of D&O insurance incentives on the length and quality of employee careers).

positions.<sup>232</sup> In 2013, the CEO of J.C. Penney Co., for example, was exposed for making 1,795 times what the average U.S. department store employee made.<sup>233</sup> Since 2009, the year that the NSP case establishing “control person” liability was settled, the discrepancy in pay between top management and the average worker has been growing dramatically.<sup>234</sup> From 2009 to 2013, as measured across Standard & Poor’s 500 Index (S&P 500) of companies, “the average multiple of CEO compensation to that of rank-and-file workers” has risen to 204, an increase of twenty percent.<sup>235</sup>

It is true that the financial crisis did reduce executive compensation packages before 2009, and that there has been a historical trend towards the growth of executives’ salaries as a multiple of average workers’ salaries. For example, “[e]stimates by academics and trade-union groups put the number at 20-to-1 in the 1950s, rising to 42-to-1 in 1980 and 120-to-1 by 2000.”<sup>236</sup> But the jump in executives’ salaries from 2009 has been extraordinary. The new emphasis on vicarious liability for individuals under the responsible corporate officer doctrine since that date must be considered part of executives’ demands for such high compensation in exchange for their risky positions.<sup>237</sup>

The average duration of a CEO’s time in office has diminished as well. In 2000, the average tenure of a departing S&P 500 CEO in the United States was ten years.<sup>238</sup> By 2010, it was down to eight years.<sup>239</sup> In 2011, merely a year later, the average tenure of a Fortune 500 CEO was barely 4.6 years.<sup>240</sup> In 2013, that former CEO of J.C. Penney Co. served for less than eighteen months.<sup>241</sup> With less than an eighteen-month tenure, it might be difficult for a chief executive even to discover what wrongdoing his company is committing, much less to design and institute good preventative measures to guide his subordinates to avoid that harm.

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<sup>232</sup> Cf., e.g., Glynn, *supra* note 131, at 334 (arguing instead for additional personal liability on corporate officers given the “recent emergence of a powerful, highly compensated, and highly mobile top managerial class”).

<sup>233</sup> Elliot Blair Smith & Phil Kuntz, *CEO Pay 1,795-to-1 Multiple of Wages Skirts U.S. Law*, BLOOMBERG (Apr. 30, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-04-30/ceo-pay-1-795-to-1-multiple-of-workers-skirts-law-as-sec-delays.html>.

<sup>234</sup> See *id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> See *id.*

<sup>238</sup> See David Weidner, *Why Your CEO Could Be in Trouble*, WALL ST. J.: DEAL JOURNAL (Sept. 15, 2011, 11:25 AM), <http://blogs.wsj.com/deals/2011/09/15/why-your-ceo-could-be-in-trouble>.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See Smith & Kuntz, *supra* note 233.



Finally, in yet another expression of frustration with not being able to prosecute intracorporate conspiracies as conspiracies, responsible corporate officer doctrine may have begun to merge with elements of piercing the corporate veil. In late fall of 2013, the federal Consumer Product Safety Commission (CPSC) relied on the responsible corporate officer doctrine to add the former chief executive and owner of a dissolved corporation to a recall action, potentially making him “personally responsible for the estimated recall costs of \$57 million.”<sup>242</sup>

Although now the responsible corporate officer doctrine is being used frequently against executives in criminal cases, the doctrine’s use in a purely administrative action in which no laws are alleged to have been broken, is, as the agency confirmed to the news media,<sup>243</sup> a first. Aware of the potential impact of the CPSC’s new approach, the National Association of Manufacturers, the National Retail Federation, and the Retail Industry Leaders Associations filed a brief to urge the administrative law judge to drop the case against the former CEO.<sup>244</sup> To date, the judge has refused.<sup>245</sup>

The fact that the company at fault in the CPSC case is no longer in existence, and that the agency is seeking to reach through its corporate form to hold an owner of the company personally responsible for damages, strongly resembles piercing the corporate veil. The charges have the equitable characteristics of veil-piercing cases as well: the CPSC’s recall was based on serious dangers to children from Buckyballs, the small, strong magnets that the company sold, and the agency’s apparent frustration with the company’s resistance to the recall.<sup>246</sup> As the agency explained about filing suit against the former owner, “[t]he core issue for [the CPSC] is [that] we did not see progress on safety to children . . . . The labels were not effective . . . . Children were getting access to this product.”<sup>247</sup> The agency documented up to 1,700 emergency room visits by children who had ingested similar products, including cases of ripped intestines and other damage.<sup>248</sup>

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<sup>242</sup> Hilary Stout, *Buckyball Recall Stirs a Wider Legal Campaign*, N.Y. TIMES (Oct. 31, 2013), <http://www.nytimes.com/2013/11/01/business/buckyball-recall-stirs-a-wider-legal-campaign.html>; see Maxfield & Oberton Holdings, LLC, CPSC Docket Nos. 12-1, 12-2, 13-2 (Consumer Prod. Safety Comm’n 2015), <http://www.cpsc.gov/en/Recalls/Recall-Lawsuits/Adjudicative-Proceedings>.

<sup>243</sup> See Stout, *supra* note 242.

<sup>244</sup> See *id.*; see also Nancy Nord, Opinion, *The Irrational Federal War on Buckyballs: The Consumer Product Safety Commission is Skirting the Law and Making Consumers Less Safe*, WALL ST. J. (Nov. 12, 2013, 6:45 PM), <http://online.wsj.com/news/articles/SB10001424052702303914304579191764269660456> (warning against the Buckyball case precedent).

<sup>245</sup> See Stout, *supra* note 242.

<sup>246</sup> See *id.*

<sup>247</sup> *Id.*

<sup>248</sup> See *id.*

As in other piercing of the corporate veil cases, the former CEO in this case is both a person who “controlled” the company’s activities and one of its original founders and shareholders.<sup>249</sup> *Peacock*,<sup>250</sup> *Renner*,<sup>251</sup> and many other examples show that there is a unique intersection for the courts when the key officer is also a major shareholder of the corporation.

This set of similarities to veil-piercing cases, however, highlights another problem in relying on the responsible corporate officer doctrine to replace prosecuting intracorporate conspiracies as conspiracies. Importing elements of piercing the corporate veil begins to limit corporate liability by the sophistication of the corporation. According to a famous empirical study, no court has ever pierced the veil of a public corporation.<sup>252</sup> There are simply too many layers of authority and principal-agent control for alter-ego-based piercing arguments to be successful.<sup>253</sup> Out of approximately 1,400 cases, the study found that only nine cases even attempted to pierce the veil of a public corporation: this number represents less than 0.63 percent of the total, with a 0.0 percent success rate.<sup>254</sup>

Although it could be argued that the disclosures required of public corporations should limit widespread wrongdoing, private surveys of officers of public corporations dispute this claim.<sup>255</sup> Ultimately, public corporations appear to perform the largest acts of coordinated wrongdoing, in part because they are significantly bigger institutions and have superior mechanisms of employee control and coordination than smaller-scale private corporations.<sup>256</sup> The prosecution of corporate conspiracies as conspiracies would focus on these mechanisms of principal-agent control in a way that currently escapes both piercing the corporate veil and responsible corporate officer doctrines.

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<sup>249</sup> See *id.* The other founder was not named in the CPSC case. *Id.*

<sup>250</sup> *Peacock v. Thomas*, 516 U.S. 349, 351 (1996); see also discussion *supra* Part III.A.

<sup>251</sup> *Renner v. Wurdeman*, 434 N.W.2d 536, 542 (Neb. 1989); see also discussion *supra* Part III.A.

<sup>252</sup> See Thompson, *supra* note 189, at 1039.

<sup>253</sup> See *id.* at 1047–48.

<sup>254</sup> See *id.* at 1055.

<sup>255</sup> Cf., e.g., LARCKER & TAYAN, *supra* note 18, at 11 (noting that, in the United States, “[a]pproximately 8 percent of publicly traded companies each year have to restate their financial results due to previous manipulation or error”); Norris, *supra* note 54 (presenting data from a survey on corporate corruption).

<sup>256</sup> The Dodd-Frank Act awards whistleblowers a ten to thirty percent bounty when the SEC wins an enforcement action worth over \$1 million, which contemplates a very large set of damages. Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C. § 26(b)(1) (2012); see also *id.* Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (2010) (codified as amended at 18 U.S.C. § 1514A(a) (2012)) (expanding whistleblower protection provided under the Sarbanes-Oxley Act of 2002 to include employees of public companies).

C. *Fracturing the Principal: Reactions to Retroactive Imposition of the Corporate Veil and the Spread of “Reverse” Piercing of the Corporate Veil*

This discussion suggests another way of imposing liability on individuals within groups for illegal behavior even within sophisticated corporations: if the principal can be fractured, then its constituent parts—now multiple principals—may conspire together and lose the protection of the single corporate form. Interesting evidence suggests that courts are utilizing this fracturing approach to evade application of the intracorporate conspiracy doctrine.

Fracturing the principal can be seen in two different lines of cases that essentially accomplish the same type of accountability. The first line of cases pushes back against retroactive imposition of the corporate veil under the entity doctrine. Courts have been willing to pierce the single entity of corporate clients to recognize that an attorney’s true clients may be the constituent parts of a larger corporate client and that covering the constituents under the umbrella of a single entity misunderstands the true interests and incentives of the parties involved.<sup>257</sup>

The second line of cases highlights the recent growth of reverse piercing of the corporate veil doctrine, which holds a corporation liable for the debts and misbehavior of its shareholders or subsidiaries.<sup>258</sup> This approach essentially changes the meaning of imposing a larger corporate veil by holding that, if shareholders and subsidiaries act improperly, then the corporation becomes additionally liable for their actions.<sup>259</sup> The language of reverse piercing, however, does not describe its approach as extending a corporate veil over the shareholders and subsidiaries.<sup>260</sup> Instead, reverse piercing employs the concepts of direct piercing of the corporate veil explored earlier to obtain equitable results.<sup>261</sup> Like direct piercing, reverse piercing of the corporate veil reaches assets to repair damages caused to third parties due to improper coordination among corporate forms or between a shareholder and a corporation designed to defeat the satisfaction of judgments.<sup>262</sup>

The results of cases under both of these movements in the law are the opposite of results under the intracorporate conspiracy doctrine. Under these approaches, the outcome of what would otherwise be

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<sup>257</sup> See *Opdyke v. Kent Liquor Mart, Inc.*, 181 A.2d 579, 583 (Del. 1962).

<sup>258</sup> See Kurtis A. Kemper, Annotation, *Acceptance and Application of Reverse Veil-Piercing—Third-Party Claimant*, 2 A.L.R. 6th 195, § 2 (2005).

<sup>259</sup> See *id.*

<sup>260</sup> See *id.*

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

conspiracy cases is not to find immunity from prosecution but to impose liability on *both* a principal and its agent.<sup>263</sup> As in the warping of other doctrines to reach conspiracy claims, many problems emerge when courts use these alternate approaches to achieve equitable outcomes in lieu of charging intracorporate conspiracies as conspiracies.<sup>264</sup> Nevertheless, courts are actively stretching these rules to impute liability within and across intracorporate entities and legal forms rather than permitting the agency relationship among the parties to become the basis of escaping liability.<sup>265</sup>

The question of when a corporate entity should be fractured to impose liability on its components underlies all three doctrines. One answer for when a principal should be fractured is rooted in agency theory. The agent loses the protection based in agency law when an agent conspires with other agents for his own purposes that are his own and not in the interest of the principal.<sup>266</sup> But the protection of agents in following the interests of the principal under the intracorporate conspiracy doctrine is often overly broad: personal motivations such as job protection and increased salary compensation do not cross the line into completely personal motivations for some courts.<sup>267</sup> The limits of the intracorporate conspiracy doctrine in traditional agency theory were recently explored in a companion piece to this Article.<sup>268</sup>

A second answer to the question of when a corporate entity should be fractured derives from unusual permutations of veil-piercing doctrine such as denying the retroactive imposition of the corporate veil and adopting reverse piercing of the corporate veil. These permutations based in equity and the functional analysis of relationships have been used to impose liability in circumstances in which the intracorporate

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<sup>263</sup> See *id.*

<sup>264</sup> See *id.*

<sup>265</sup> See *supra* Part III.A–B.

<sup>266</sup> See *Harp v. King*, 835 A.2d 953, 974 (Conn. 2003) (holding that employee's conduct must be "unrelated or extraneous" to the corporation's interest); *Findell v. Koos*, No. CV010510859S, 2002 WL 532409, at \*2 (Conn. Super. Ct. March. 11, 2002) (holding that, to be excepted from the intracorporate conspiracy doctrine, the agent of a corporation must have "an independent personal stake" in achieving the illegal objective); *Richard Bertram, Inc. v. Sterling Bank & Tr.*, 820 So. 2d 963, 966 (Fla. Dist. Ct. App. 2002) (holding that agent must have a "personal stake in the activities" separate from the principal's interest in the same activities); *Mika v. Cent. Bank of Kan. City*, 112 S.W.3d 82, 94 (Mo. Ct. App. 2003); *Roberts v. Parker*, Chancery No. 125512, 1992 WL 885025, at \*2 (Va. Cir. Ct. Nov. 19, 1992) (holding that the employee must have a "direct personal benefit . . . wholly separable from the more general and indirect corporate benefit" in the illegal objective (alteration in original) (quoting *Selman v. Am. Sports Underwriters, Inc.*, 697 F. Supp. 225, 239 (W.D. Va. 1988))).

<sup>267</sup> See, e.g., *8000 Md., LLC v. Huntleigh Fin. Servs., Inc.*, 292 S.W.3d 439, 452 (Mo. Ct. App. 2009).

<sup>268</sup> See *Nelson*, *supra* note 3, at 1002–07 (discussing the limits of agency theory in application of the intracorporate conspiracy doctrine).

conspiracy doctrine would bar such claims.<sup>269</sup> Even more pertinent to the recent history of the intracorporate conspiracy doctrine as documented in this Article, almost all of these cases have been generated by the role of attorneys in the representation of clients.<sup>270</sup>

### 1. Doors Open to Fracturing the Principal

There are doors open in the jurisprudence of courts to the approach of fracturing the principal to impose liability on its subcomponents. California and Virginia courts, for example, have suggested that they may be willing to import these equitable ideas for breaking apart the principal for the purposes of imposing liability.

In 1989, the California Supreme Court pushed traditional notions of agency theory by suggesting that corporate directors and officers who directly order, authorize, or participate in tortious corporate conduct may not be protected by the intracorporate conspiracy doctrine solely as part of the principal.<sup>271</sup>

In *Doctors' Company v. Superior Court of Los Angeles County*, the real party in interest was Jose Antonio Valencia, who challenged the ruling of the Superior Court dismissing his claim of unfair practice against a medical malpractice insurer, the insurer's attorneys, and a doctor who testified for the insurer at trial.<sup>272</sup> Valencia had been injured at birth by a doctor's negligence.<sup>273</sup> The doctor had been insured by the Doctors' Company insurance company.<sup>274</sup>

In order to evade appropriate settlement in what eventually became a \$2 million jury verdict for Valencia, the insurer allegedly conspired with its attorneys "to locate [another] local doctor who would agree to only partially review the facts and records and subsequent depositions surrounding the birth of [plaintiff]." <sup>275</sup> That doctor, Russell, agreed to "give a false medical opinion which provided [the insurer] and [its attorneys] a plausible sounding excuse to deny [the plaintiff's] request

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<sup>269</sup> See Kemper, *supra* note 258, § 3.

<sup>270</sup> See *id.* (discussing the equitable nature of piercing the corporate veil).

<sup>271</sup> See *Doctors' Co. v. Superior Court*, 775 P.2d 508, 513 (Cal. 1989) (in bank); see also Miller, *supra* note 1, § 9 (citing the holding in *Doctors' Co.* that "corporate directors and officers who directly order, authorize or participate in the corporation's tortious conduct" are not protected by the intracorporate conspiracy doctrine for the view that corporate officers and directors can conspire through direct participation); see also *id.* (citing *Wyatt v. Union Mortg. Co.*, 598 P.2d 45 (Cal. 1979) (in bank), and *PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663 (Ct. App. 2000), for employing the same reasoning).

<sup>272</sup> *Doctors' Co.*, 775 P.2d at 509–10.

<sup>273</sup> See *id.* at 509.

<sup>274</sup> See *id.*

<sup>275</sup> *Id.* at 510 (second alteration in original) (quoting the complaint).

for a prompt, fair and equitable settlement of his claims.”<sup>276</sup> Dr. Russell, in turn, allegedly conspired with the insurer and its attorneys by agreeing with them not to review the medical records of Valencia’s birth properly before giving his opinion under oath for the insurer.<sup>277</sup>

California law permitted plaintiffs who obtained a tort judgment against a defendant to sue the defendant’s insurer “for violating section 790.03(h)(5), which specifies failure to attempt settlements of claims as an unfair practice in the business of insurance.”<sup>278</sup> But the attorneys and Dr. Russell were not in the business of insurance.<sup>279</sup> The case thus posed the issue of “whether the insurer, the attorneys and Dr. Russell can be held liable for a conspiracy to violate a duty peculiar to the insurer.”<sup>280</sup>

Relying on the intracorporate conspiracy doctrine,<sup>281</sup> the court included the attorneys and Dr. Russell as agents of the insurance company.<sup>282</sup> Ultimately the court held that Valencia’s claim for unfair practices failed because the insurance company’s agents “did not personally share the statutory duty alleged to have been violated.”<sup>283</sup>

But the court’s decision also included a long analysis of the responsibility of attorneys, and it was explicit that attorneys could still be liable for conspiracy with clients under certain circumstances.<sup>284</sup> Not only did the court mention the traditional exception to the intracorporate conspiracy doctrine when agents engage in “conduct which the agents carry out ‘as individuals for their individual advantage’ and not solely on behalf of the principal,”<sup>285</sup> but it suggested the finding of independent tort liability through the fracturing of a unitary principal when facts describe “corporate directors and officers who directly order, authorize or participate in the corporation’s tortious conduct.”<sup>286</sup>

This holding reaffirmed the same court’s 1979 statement in *Wyatt v. Union Mortgage Company* that “[d]irectors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct.”<sup>287</sup>

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<sup>276</sup> *Id.*

<sup>277</sup> *See id.*

<sup>278</sup> *Id.*

<sup>279</sup> *See id.*

<sup>280</sup> *Id.*

<sup>281</sup> *See id.* at 511 (“We then invoked the rule that ‘[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.’” (alteration in original) (quoting *Wise v. S. Pac. Co.*, 35 Cal. Rptr. 652, 665 (Ct. App. 1963))).

<sup>282</sup> *See id.*

<sup>283</sup> *Id.* at 514.

<sup>284</sup> *See id.* at 512.

<sup>285</sup> *Id.* at 513 (quoting *Wise*, 35 Cal. Rptr. at 665).

<sup>286</sup> *Id.*

<sup>287</sup> *Wyatt v. Union Mortg. Co.*, 598 P.2d 45, 52 (Cal. 1979) (in bank).

As recently as 2000, a California appellate court quoted both *Doctors' Co.* and *Wyatt* to affirm that “[p]ersonal liability, if otherwise justified, may rest upon a ‘conspiracy’ among the officers and directors to injure third parties through the corporation.”<sup>288</sup>

In a related line of cases, the Virginia state courts are using the language of acting outside the “scope of the alleged agency relationship” effectively to fracture the principal of corporations in conspiracy suits.<sup>289</sup>

In 2005, the Virginia Circuit Court held that because the defendants, “acting in their individual capacities, joined to form [the corporation] with the purpose of willfully and maliciously injuring” the plaintiff, the intracorporate conspiracy doctrine did not apply to the corporation to shield the defendants’ actions.<sup>290</sup> In addition, the court applied an extra procedural protection to intracorporate conspiracy claims, holding that “[a]ny intra-corporate/agency immunity defense requires a factual determination as to whether the acts complained of were within the scope of the alleged agency relationship’ and cannot be resolved on demurrer.”<sup>291</sup> The court cited precedents as recent as 2000 for its special scrutiny of when the intracorporate conspiracy doctrine could bar claims.

Similarly, the Virginia Circuit Court held in *Singer v. Dungan* that a conspiracy claim could be supported when two of a company’s three stockholders acted in concert to issue additional stock in order to take control of the corporation.<sup>292</sup> The court found that the two stockholders, by virtue of issuing the additional stock in their effort to take control of the corporation, had acted as individuals so as to bar application of the intracorporate conspiracy doctrine to the unitary principal of their corporation.<sup>293</sup>

## 2. Two Approaches to Fracturing the Principal

Courts have developed arguments regarding fracturing the principal tailored for challenging the intracorporate conspiracy doctrine within each of these two alternative doctrines in equity. Case law from many states reveals this trend.

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<sup>288</sup> *PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663, 666 n.4 (Ct. App. 2000) (quoting *Wyatt*, 598 P.2d at 52).

<sup>289</sup> See *PJS Assocs., L.P. v. Cosby*, No. LF-2420-1, 2000 WL 1618100, at \*4 (Va. Cir. Ct. Oct. 26, 2000).

<sup>290</sup> *VMC Satellite, Inc. v. Stevens & Assocs.*, 68 Va. Cir. 103, 107 (Cir. Ct. 2005).

<sup>291</sup> *Id.* (quoting *PJS Assocs., L.P.*, 2000 WL 1618100, at \*4) (citing *Singer v. Dungan*, At Law No. 107888, 1992 WL 884986 (Va. Cir. Ct. Oct. 28, 1992); *Mike’s Madness v. Mason*, Law No. 11668, 1990 WL 751392 (Va. Cir. Ct. Dec. 18, 1990)).

<sup>292</sup> See *Singer*, 1992 WL 884986, at \*1–3.

<sup>293</sup> See *id.* at \*3–4.

a. Retroactive Imposition of the Corporate Veil

Starting with courts that have pushed back against “retroactive” imposition of the corporate veil, the facts of the *Singer* intracorporate conspiracy case have particular echoes in *Opdyke v. Kent Liquor Mart, Inc.*,<sup>294</sup> in which the Delaware Supreme Court rejected the single-entity interpretation of a corporate veil to describe an attorney’s client. In *Opdyke*, the plaintiffs and their business partner obtained a lawyer, Brown, to incorporate a liquor business with a third individual.<sup>295</sup> After mediating a dispute between the three individuals, Brown bought a majority stake in the business.<sup>296</sup> The court found that Brown was really acting as the “attorney for three joint adventurers,” instead of a single corporation.<sup>297</sup> By buying out the shares of two of the shareholders in opposition to the corporation’s third shareholder, Brown had breached his fiduciary duty to his clients.<sup>298</sup> The machinations of constituencies within the corporate client had split apart the protection of the corporation’s unitary form.<sup>299</sup> Although there was no conspiracy alleged in *Opdyke*, both the *Singer* and *Opdyke* courts utilized the same functional analysis of principal-agent behavior to fracture the corporations into multiple principals.<sup>300</sup>

Retroactive imposition of the corporate veil doctrine started to gain strength, however, in 1992. The Wisconsin Supreme Court in *Jesse ex rel. Reinecke v. Danforth* endorsed the retroactive imposition of the corporate veil to cover individual doctors before they had formed a medical corporation.<sup>301</sup> In this case, a group of doctors, while still individuals, had engaged a law firm to help them incorporate.<sup>302</sup> Later, separate plaintiffs hired the law firm to pursue medical malpractice claims against two of the doctors within the medical corporation.<sup>303</sup> The corporation itself was not named in the plaintiffs’ suit.<sup>304</sup> The question before the court was whether the doctors had been clients of the law firm so that the firm had a conflict of interest in representing the plaintiffs in the medical malpractice action against the doctors.<sup>305</sup>

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<sup>294</sup> 181 A.2d 579 (Del. 1962).

<sup>295</sup> See *id.* at 580.

<sup>296</sup> See *id.* at 582.

<sup>297</sup> *Id.* at 583.

<sup>298</sup> *Id.* at 584.

<sup>299</sup> See *id.*

<sup>300</sup> See *id.* at 583–84; *Singer v. Dungan*, At Law No. 107888, 1992 WL 884986, at \*3 (Va. Cir. Ct. Oct. 28, 1992).

<sup>301</sup> *Jesse ex rel. Reinecke v. Danforth*, 485 N.W.2d 63 (Wis. 1992).

<sup>302</sup> See *id.* at 67.

<sup>303</sup> See *id.*

<sup>304</sup> See *id.*

<sup>305</sup> See *id.* at 66.



The court reasoned that, when the doctors first approached the law firm, the firm must have been representing the doctors personally because no corporation had yet been created.<sup>306</sup> But the firm's representation had been limited to the creation of the corporation.<sup>307</sup> The court thus invented a retroactive single-entity rule to hold that the firm never actually represented the doctors as individuals.<sup>308</sup> As the court promulgated its rule:

[W]here (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.<sup>309</sup>

The court explained that the purpose of its rule was to "enhance the corporate lawyer's ability to represent the best interests of the corporation without automatically having the additional and potentially conflicting burden of representing the corporation's constituents."<sup>310</sup> In other words, the rule permits attorneys to retain what is typically their most lucrative client, the corporation, without having to defend or advise its agents.

By 2000, the American Bar Association had adopted retroactive imposition of the corporate veil, or the so-called "entity" approach, for clients composed of multiple individuals. The annotations to the Model Rule of Professional Conduct 1.13, as amended, cite *Jesse* and hold that an attorney "employed or retained by an organization represents the organization."<sup>311</sup>

Similar to attorneys' attempts to expand the corporate form by pushing the growth of the intracorporate conspiracy doctrine, adopting the retroactive imposition of the corporate veil has created strange incentives and intraclient dilemmas. Professor Simon describes the entity rule in words that are equally applicable to the intracorporate conspiracy doctrine:

The law tends to characterize . . . organizations as unitary "entities" or "legal persons" and to suggest that lawyers' duties to such clients are analogous to their duties to individual clients. In fact, however, these organizations consist of multiple individuals with potentially

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<sup>306</sup> See *id.* at 65, 67–68.

<sup>307</sup> See *id.* at 68.

<sup>308</sup> See *id.* at 67.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 1993).

differing interests, and hence they are prone to internal conflicts that do not arise in individual representation.<sup>312</sup>

The fundamental problem, as Professor Simon identifies, is that, even for attorneys, “[a]s a general approach to corporate disqualification issues, the retroactive approach seems either superfluous or unsatisfactory. It is superfluous where the conflict arises between a constituent and a third party. . . . It is unsatisfactory where . . . the dispute is between constituents.”<sup>313</sup> In a dispute between constituents, “[a]pplying the retroactive entity approach . . . yields an immediate, clear answer only if we conflate corporate interests with those of the current control group.”<sup>314</sup> It is improper, however, to conflate corporate interests with only the interests of the current control group.<sup>315</sup>

Serious attorney intraclient dilemmas exist under this expansive corporate form approach in corporate takeovers<sup>316</sup> and when advising closely held corporations.<sup>317</sup> As Professor Ibrahim notes in the context of close corporations, attorneys “have faced potential civil liability and disciplinary actions for failing to appreciate the entity-owner distinction, and clients are usually even more confused.”<sup>318</sup>

In addition, Professor Simon has identified a line of cases that counteracts the retroactive imposition of the corporate veil by “[p]iercing the [v]eil for [p]rofessional [r]esponsibility [p]urposes.”<sup>319</sup> All of these cases take into account a functional analysis of the attorney-client relationship and reject the overreach of a corporate umbrella. Most importantly, courts in these cases have been willing to fracture the unitary entity protection of a corporate client to find that the attorney actually represents each of its principals.

For example, when an attorney represented a closely held corporation owned by a husband and wife, the attorney could not represent the husband in a divorce proceeding against his wife.<sup>320</sup> The California Court of Appeals explained that “in representing an ongoing family corporation, [counsel] in a very real sense *continues* to represent [the] wife.”<sup>321</sup> In another California Court of Appeals case involving a

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<sup>312</sup> William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 59 (2003).

<sup>313</sup> *Id.* at 74.

<sup>314</sup> *Id.*

<sup>315</sup> *See id.* at 73–74.

<sup>316</sup> *See, e.g., id.* at 77–78.

<sup>317</sup> *See, e.g.,* Darian M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 ALA. L. REV. 181, 181–83 (2004) (describing these fundamental problems).

<sup>318</sup> *Id.* at 183 (footnote omitted); *id.* at 183 n.8 (citing cases and examples of such liability).

<sup>319</sup> Simon, *supra* note 312, at 67–69.

<sup>320</sup> *See Woods v. Superior Court*, 197 Cal. Rptr. 185, 188 (Ct. App. 1983).

<sup>321</sup> *Id.*

business dispute between a husband and wife within a partnership, the court wrote that the attorney-client privilege was inapplicable as between the two individuals.<sup>322</sup> When representing a partnership, “the attorney for the partnership represents all the partners as to matters of partnership business. . . . [T]he attorney-client privilege will not bar disclosure of matters related to a partnership business simply because such business was conducted through a law firm.”<sup>323</sup>

In a dispute between two closely held corporations, the Oregon Supreme Court held:

Where a small, closely held corporation is involved, and in the absence of a clear understanding with the corporate owners that the attorney represents solely the corporation and not their individual interests, it is improper for the attorney thereafter to represent a third party whose interests are adverse to those of the stockholders and which arise out of a transaction which the attorney handled for the corporation.<sup>324</sup>

In another case, the Oregon Supreme Court emphasized that closely held corporations involve very different client expectations, and that these expectations should control the behavior of attorneys.<sup>325</sup> The court explained that “where the operator of the corporation either owns or controls the stock . . . it is reasonable to assume that *[t]here is no real reason for him to differentiate in his mind between his own and corporate interests.*”<sup>326</sup>

The Southern District of New York agreed with this functional approach to fracturing the principal when it found that corporate counsel could not represent one of the two shareholders in a closely held corporation against the other because “it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney.”<sup>327</sup>

Importantly, not all of these cases involve closely held corporations. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, the U.S. Court of Appeals for the Seventh Circuit found that counsel for a trade association could not represent one of the association’s members against the interest of its other members.<sup>328</sup> Counsel for the trade

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<sup>322</sup> See *Hecht v. Superior Court*, 237 Cal. Rptr. 528, 532 (Ct. App. 1987).

<sup>323</sup> *Id.* (alterations in original) (quoting *Wortham & Van Liew v. Superior Court*, 233 Cal. Rptr. 725, 728 (Ct. App. 1987)). Partnerships are a form of business association with their own rules, but the functional approach that the court took toward the enterprise in general is instructive.

<sup>324</sup> *In re Brownstein*, 602 P.2d 655, 657 (Or. 1979).

<sup>325</sup> See *In re Banks*, 584 P.2d 284, 292 (Or. 1978) (en banc).

<sup>326</sup> *Id.* (emphasis added).

<sup>327</sup> *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987).

<sup>328</sup> *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

association sought to represent Westinghouse in an antitrust action alleging illegal conspiracy in restraint of trade in the uranium industry. At the same time, that counsel, representing the trade association, had just completed a confidential survey and report to the group's members on their uranium holdings and profits.<sup>329</sup>

The parties in *Westinghouse* were not unsophisticated entities: the American Petroleum Institute trade association included as plaintiffs the Gulf Oil Corporation, the Kerr-McGee Corporation, and the Getty Oil Company; and the attorneys involved were from the firm of Kirkland, Ellis & Rowe. The uranium litigation had already involved the efforts of eight to fourteen of the firm's attorneys and generated some \$2.5 million in legal fees.<sup>330</sup> Six more of the firm's attorneys represented the trade association.<sup>331</sup>

In its decision, the Seventh Circuit found that not even the firm's internal "Chinese wall" between legal teams could overcome its conflict of interest in the case.<sup>332</sup> The court instead broadly defined an attorney's client as: "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."<sup>333</sup> Using a functional approach based on the actual relationships of the intraclient entities involved, the court held that the "professional relationship for purposes of the privilege for attorney-client communications 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'"<sup>334</sup>

In fracturing principals to examine the roles of intracorporate parties, these courts' functional approach to relationships is the same analysis as under conspiracy cases. The same issues of control and real interest emerge in the courts' push-back against the retroactive imposition of the corporate veil as in the principal and agent questions underlying an intracorporate conspiracy charge. The important inquiry is not how the paperwork for a corporate form has been filed, but what

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<sup>329</sup> The survey for the report had promised that

Kirkland, Ellis & Rowe is acting as an independent special counsel for [the trade association], and will hold any company information in strict confidence, [n]ot to be disclosed to any other company, or even to [the trade association], except in aggregated or such other form as will preclude identifying the source company with its data.

*Id.* at 1314 (emphasis added).

<sup>330</sup> *Id.* at 1313.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 1321.

<sup>333</sup> *Id.* at 1320.

<sup>334</sup> *Id.* at 1319 (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 88 (Edward W. Cleary Ed., 2d ed. 1972)).

members of an intracorporate group are doing to orchestrate and further organizational wrongdoing.

There is a public policy argument that courts do not want to patrol behavior inside corporations because they do not want to be pulled into disputes among a corporation's constituents, which may resemble intra-family arguments more than criminal and tort wrongdoing. But the power of applying traditional conspiracy doctrine is that the doctrine has been vetted for its application against all types of individuals and constituents in small groups, from the street, to—as the law used to be understood—corporate agents and subsidiaries.

#### b. Reverse Piercing of the Corporate Veil

Finally, another method of using functional analysis to fracture otherwise unified interests behind the corporate veil is so-called “reverse” piercing of the corporate veil.<sup>335</sup> In reverse veil-piercing, a corporation can be held liable for the conduct of its shareholder or subsidiary.<sup>336</sup>

Intriguingly, like direct piercing of the corporate veil and the intracorporate conspiracy doctrine itself, reverse piercing of the corporate veil was originally developed in the context of reaching through the parent-subsidary relationship.<sup>337</sup> Only later did it become known for reaching from individuals through to corporations.<sup>338</sup> Unlike its cousins, however, reverse piercing of the corporate veil in many jurisdictions has kept more of its original focus on corporate-to-corporate forms. For example, Tennessee courts recognize reverse veil-piercing solely in the context of the parent-subsidary corporate relationship.<sup>339</sup> Furthermore, reverse piercing of the corporate veil still cannot, in almost any jurisdiction, be used against sole proprietorships.<sup>340</sup>

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<sup>335</sup> See Kemper, *supra* note 258.

<sup>336</sup> See, e.g., *id.* § 1.

<sup>337</sup> See *id.* § 3.

<sup>338</sup> See, e.g., *id.* (“In perhaps the earliest case involving reverse piercing of the corporate veil, *Kingston Dry Dock Co. v. Lake Champlain Transp[ortation] Co.*, 31 F.2d 265 (. . . 2d Cir. 1929), it was recognized that a subsidiary might be held liable for the actions of its parent corporation.”). The further significance of changes between parent-subsidary and corporate-individual liability standards will be the subject of a future article.

<sup>339</sup> *Nippert v. Jackson*, 860 F. Supp. 2d 554 (M.D. Tenn. 2012).

<sup>340</sup> Kemper, *supra* note 258, § 7 (“It has been recognized that the concept of reverse piercing of the corporate veil—a means by which a third-party outsider may assert a claim against, or reach assets of, a corporation or other entity based on the action or liability of an individual with a legal or equitable ownership interest in the target entity—is inapplicable in the context of certain noncorporate entities such as sole proprietorships.”); see also *id.* § 2 (“Reverse veil-piercing has been expressly found applicable to some noncorporate entities such as partnerships and trusts, but not to sole proprietorships.” (citation omitted)).

Much of the growth of reverse piercing of the corporate veil has taken place very recently, in direct parallel with the limitation on conspiracy cases under the intracorporate conspiracy doctrine. In 2008, the Southern District of New York, interpreting New York law, ruled that a corporation could not use reverse veil-piercing offensively to pierce a corporate veil that the corporation had created for its own benefit and treat damages suffered by another entity as its own.<sup>341</sup> In 2013, Tennessee courts were actively deciding a major case interpreting reverse veil-piercing.<sup>342</sup>

Also recently, reverse veil-piercing has ostensibly started to take on more characteristics of direct piercing by importing language from the alter ego theory of liability against corporations. In 2012, for example, a federal bankruptcy court applied the alter ego doctrine under Wisconsin law in a reverse piercing case to reach assets transferred between the Archdiocese of Milwaukee and its parishes to evade collection by the victims of sexual assaults by priests.<sup>343</sup> According to the court, “[i]t is appropriate to apply [alter ego] doctrine in reverse ‘when the controlling party uses the controlled entity to hide assets or secretly to conduct business to avoid the pre-existing liability of the controlling party.’”<sup>344</sup> Echoing the factors of direct piercing, the court applied the following test to determine if the Archdiocese’s parishes were a sham: “failure to observe corporate formalities, non-payment of dividends, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, and the absence of corporate records.”<sup>345</sup> Astonishingly, even after reciting these factors, the court still approved the piercing of a very large and sophisticated set of corporate organizations.

Another current formulation of reverse veil-piercing merges the language of the alter ego theory of liability with a much stronger emphasis on the performance of justice and equitable results. The Supreme Court of Colorado, for example, has written that courts may

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<sup>341</sup> See *24/7 Records, Inc. v. Sony Music Entm’t, Inc.*, 566 F. Supp. 2d 305 (S.D.N.Y. 2008) (applying New York law).

<sup>342</sup> See *Nippert*, 860 F. Supp. 2d 554, *appeal dismissed*, No. 12-5440 (6th Cir. May 16, 2013).

<sup>343</sup> *In re Archdiocese of Milwaukee*, 483 B.R. 693 (Bankr. E.D. Wis. Dec. 7, 2012) (applying Wisconsin law). Consider whether the theory of this case might apply to any of the church’s actions in New York as well. Cf., e.g., Laurie Goodstein, *Dolan Sought to Protect Church Assets, Files Show*, N.Y. TIMES (Jul. 1, 2013), <http://www.nytimes.com/2013/07/02/us/dolan-sought-vatican-permission-to-shield-assets.html> (“Files released by the Roman Catholic Archdiocese of Milwaukee on Monday reveal that in 2007, Cardinal Timothy F. Dolan, then the archbishop there [and now of New York], requested permission from the Vatican to move nearly \$57 million into a cemetery trust fund to protect the assets from victims of clergy sexual abuse who were demanding compensation.”).

<sup>344</sup> *In re Archdiocese*, 483 B.R. at 698 (quoting *Olen v. Phelps*, 546 N.W.2d 176, 181 (Wis. Ct. App. 1996)).

<sup>345</sup> *Id.* at 698–99 (quoting *Olen*, 546 N.W.2d at 180–81).

use reverse piercing of the corporate veil to satisfy the obligations of a shareholder or “other corporate insider” when “(1) the controlling insider and the corporation are alter egos of each other, (2) justice requires recognizing the substance of the relationship over the form because the corporate fiction is utilized to perpetuate a fraud or defeat a rightful claim, and (3) an equitable result is achieved by piercing.”<sup>346</sup>

Finally, reverse veil-piercing cases come in two varieties, so-called “inside” claims and “outside” claims.<sup>347</sup> Inside claims are brought by a controlling insider against a corporation to satisfy a debt that the insider alleges is due to him, or to protect assets from satisfying obligations to third parties.<sup>348</sup> Outside claims are brought by third parties against a corporation to satisfy harms perpetrated by a shareholder, or, specifically in Colorado, “other corporate insider,” when already pursuing the same claim against the insider.<sup>349</sup> Outside claims sound like cases that might otherwise be barred by the intracorporate conspiracy doctrine. Yet recently, court after court has approved the pursuit of such outside claims without mentioning that these results circumvent the intracorporate conspiracy doctrine.<sup>350</sup>

As when courts directly pierce the corporate veil in cases in which it would be more appropriate to charge conspiracy, applying reverse veil-piercing to reach results barred by the intracorporate conspiracy doctrine harms the coherence and predictability of reverse veil-piercing as a general tool.

For example, it certainly strains conventional alter ego analysis to find that the parishes of the Archdiocese of Milwaukee are shams.<sup>351</sup> But that court’s conclusion must also be read as an attempt to rectify serious injustices that have resulted from applying the intracorporate conspiracy doctrine to bar the conspiracy claims of victims of sexual assault by priests, such as against the Diocese of Bridgeport.<sup>352</sup> In 2012,

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<sup>346</sup> *In re Phillips*, 139 P.3d 639, 646 (Colo. 2006) (en banc) (citations omitted).

<sup>347</sup> *See id.* at 644–45.

<sup>348</sup> Insurance coverage is a good example. *See, e.g., id.*

<sup>349</sup> *Cf., id.* 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.’” (alteration in original) (quoting Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 55 (1990))).

<sup>350</sup> *See, e.g., id.* at 646 (holding that “outside reverse piercing is appropriate”); *see also* C.F. Tr., Inc. v. First Flight L.P., 580 S.E.2d 806, 811 (Va. 2003) (permitting outside reverse-piercing).

<sup>351</sup> *See In re Archdiocese of Milwaukee*, 483 B.R. 693, 698–99 (Bankr. E.D. Wis. Dec. 7, 2012).

<sup>352</sup> *See* *See v. Bridgeport Roman Catholic Diocesan Corp.*, No. CV 930302072S, 1997 WL 466498 (Conn. Super. Ct. July 31, 1997) (holding that the intracorporate conspiracy doctrine

the facts of that case were back in the news when, after the U.S. Supreme Court ruled that incendiary details of the Diocese's handling of the priests must be released,<sup>353</sup> retired Cardinal Edward Egan unfathomably described the Diocese's handling of such cases as "incredibly good."<sup>354</sup>

Another major problem with the use of reverse veil-piercing to satisfy the injustices of conspiracy cases otherwise barred by the intracorporate conspiracy doctrine is that reverse veil-piercing, like the responsible corporate officer doctrine, does not properly take into account whether the target entity actually participated in the wrongdoing. At least in conspiracy cases, the actions of each party to the conspiracy must be established. By contrast, as now developing in the courts, reverse veil-piercing relies much more on pure outcomes and the need to compensate third parties. As yet another ill-fitting substitute to reforming the intracorporate conspiracy doctrine, reverse veil-piercing creates significant volatility in the imposition of punishment disconnected from the actions of the corporation in directing and supervising its agents in coordinated wrongdoing.

#### CONCLUSION

Reimposing liability for an intracorporate conspiracy would regulate principal-agent behavior within and across enterprises without distorting alternative doctrines. This simple and tested change would better prevent corporate crime and more consistently mitigate the impact of corporate wrongdoing on victims who are now being injured without predictable recourse.

Ultimately, by arguing for rolling back the intracorporate conspiracy doctrine directly, this Article relieves the need to dance around the intracorporate conspiracy doctrine in efforts to hold individuals and corporations responsible for the negative impacts of corporate conspiracies. In the absence of a direct attack on the intracorporate conspiracy doctrine, objections against application of the intracorporate conspiracy doctrine and its perverse incentives have been taking shape in the growth of doctrines such as piercing the corporate veil, which completely vacates the protection of the corporate form, and responsible corporate officer doctrine, which more strenuously holds

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barred victims' claims). For more discussion of this case and subsequent events, see Nelson, *supra* note 3 (discussing this case in the context of the intracorporate conspiracy doctrine).

<sup>353</sup> See Paul Vitello, *Bridgeport Diocese Loses Bid to Keep Records Sealed*, N.Y. TIMES, Oct. 6, 2009, at A28; see also *Bridgeport Roman Catholic Diocesan Corp. v. N.Y. Times Co.*, 558 U.S. 808 (2009) (denying application for stay).

<sup>354</sup> Andy Newman, *Retired Cardinal Regrets '02 Apology on Abuse Cases*, N.Y. TIMES, Feb. 8, 2012, at A22.



top corporate officers responsible for the actions of their corporations, but imposes a regime of blind respondeat superior liability. Avoidance of the intracorporate conspiracy doctrine is also related to courts pushing back against the retroactive imposition of the corporate veil and has fueled the recent growth of reverse veil-piercing cases. These responses, however, have serious implications for attorney's conflicts of interest and the additional volatility of legal doctrines.

Attorneys, among others, have pushed hard to expand the intracorporate conspiracy doctrine's principal-agent analysis to bleed across legal forms. Not only has this push created confusion and annoyance in the courts,<sup>355</sup> but it has also further reinforced a doctrine that misincentivizes corporations and their agents in ordering and performing coordinated wrongdoing. Ultimately, attorneys' push to protect themselves from liability by extending the intracorporate conspiracy doctrine backfires on the profession. Other legal doctrines and the rules of attorney ethics already harbor behavior within ethical boundaries, and they better help maintain the profession's reputation.

At a time when prosecutors and the public are searching for new tools to combat corporate conspiracies in the wake of the financial crisis, the Roman Catholic Church's sex-abuse scandals, and other recent examples of large-scale corporate wrongdoing, the overextension of the intracorporate conspiracy doctrine stands out as a fundamental problem. Courts are relying on alternative doctrines to defeat intracorporate conspiracy immunity, but these other doctrines are ill-suited for imposing liability on conspiracies and more sophisticated corporate forms. The basic solution is the simplest, most efficient, and best-tested: courts and legislatures should roll back the intracorporate conspiracy doctrine and help repair its warping of related doctrines that distorts the incentives and responsibilities of corporations and their agents for coordinated wrongdoing.

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<sup>355</sup> See, e.g., *Allison v. Chesapeake Energy Corp.*, No. 12-0900, 2013 WL 787257, at \*30 (W.D. Pa. Jan. 29, 2013) ("In a very broad sense, perhaps, every conspirator could be considered an 'agent' of the overarching conspiracy. Defendants' position would seem to require that any person enlisted into a conspiracy necessarily becomes an 'agent,' and therefore he cannot be a conspirator because there is only a single entity, but this cannot be right.").