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Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities, The

Phillip Blumberg
University of Connecticut School of Law

THE INCREASING RECOGNITION OF ENTERPRISE PRINCIPLES IN DETERMINING PARENT AND SUBSIDIARY CORPORATION LIABILITIES

Phillip I. Blumberg[*]

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* A.B. Harvard; J.D. Harvard; LL.D. (hon.) University of Connecticut. Dean and Professor of Law and Business, Emeritus, The University of Connecticut School of Law.

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I. INTRODUCTION

The American legal system is responding to the challenges presented by corporate enterprises of unprecedented size and complexity by increasingly adopting enterprise principles to overcome the inadequacies of traditional jurisprudential concepts fashioned centuries ago. This is a change of profound significance in American law, not only in the federal system, but in the law of the fifty American states as well.

Because of the global nature of the world economy, the application of enterprise principles to foreign subsidiaries of American parent corporations is of great importance to the international community as well. Multinational corporate groups increasingly have become predominant in the world economy.[1] The application of American law to multinational groups, with their many foreign subsidiaries and affiliates, although inevitable in order to fulfill domestic regulatory imperatives, makes for serious international confrontation when national policies conflict. The application of national law and enterprise concepts to world business thus constitutes a major challenge to the international legal order.

In the United States, as in other Western countries, traditional corporation law has had misty medieval roots that reflect principles derived from Roman law. For centuries, English law (which was adopted by the United States after the Revolution) has viewed each corporation as a separate juridical entity with its own rights and responsibilities, separate and distinct from those of its shareholders. This view of the corporation as a separate juridical entity with its own rights and duties distinct from those of its shareholders is entity law. Much more recently, the centuries-old view of the corporation as a separate legal personality was reinforced by the adoption, after major political struggles, of the separate doctrine of limited liability of shareholders for corporate debts. This did not occur decisively in the United States until 1830, when the doctrine was adopted by Massachusetts,[2] (then the leading industrial state) or until 1855 in England.[3]

Until the end of the nineteenth century, a corporation could not hold shares in another corporation except where expressly authorized by statute. Such authorization was rare except in the case of railroads and telegraph companies, and unheard of for manufacturing corporations. Corporate groups and holding companies were unknown.[4]

1. Intra-enterprise transactions of multinational corporations represent approximately 30 to 40 percent of American exports. Transactions with others account for much of the remainder. *See* S. Hipple, *The Changing Role of Multinational Corporations* and M.C. Casson & R.D. Pearce, *Intra-firm Trade and the Developing Countries in U.S. International Trade in* 8 UNITED NATIONS LIBRARY ON TRANSNATIONAL CORPORATIONS (TRANSNATIONAL CORPORATIONS AND INTERNATIONAL TRADE AND PAYMENTS) 99, 114-23, 137, 145 (H. Gray ed. 1995).

2. 1830 Mass. Acts 325, 329, Act of Feb. 23, 1830 ch. 53, § 8.

3. Limited Liability Act, 1855, 18 & 19 Vict., ch. 133 (1855); Joint Stock Companies Act, 1856, 19 & 20 Vict., ch. 47 (1856).

4. Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 605

This all changed with the revolution of state corporation law led by New Jersey in the 1890s. For the first time, the acquisition and formation of subsidiaries was freely permitted. Within a decade, corporate groups began to dominate the American economy.

For almost half a century thereafter, American corporate and regulatory law did not recognize the existence of corporate groups, even though they included the major enterprises in the American economy. Commencing in 1933 with the New Deal Reform Era of the first Franklin D. Roosevelt administration, the American legal system dramatically changed, particularly on the statutory level, as the utilization of enterprise principles replaced traditional entity law.

This change was the result of an effort to deal effectively with the problems presented by corporate groups. Legislative action, administrative implementation, and judicial decision-making have all participated in the increasing acceptance of enterprise concepts. With dozens of statutes and hundreds of judicial opinions, the present author (no doubt an excessively wordy author) has required 15 years, six volumes, and approximately five thousand pages to describe and analyze adequately the attribution by American law of intra-enterprise rights and liabilities among parent, subsidiary, and sister subsidiary companies.[5]

This movement from entity law to enterprise principles has occurred to varying extent and through different techniques in different areas of the American law. Any review of the development of the American law of corporate groups may proceed effectively only by rigorously separating each of these jurisprudential areas from the others.

In the area of statutes of specific application expressly referring to corporate groups, the legislature has adopted enterprise principles, typically building on the concepts of the "controlled" corporation and the holding company.[6] Elsewhere, in the statutes of general application

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(1986). *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 556 (1933) (Brandeis, J., dissenting) ("The holding company was impossible.").

5. *See* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURE (1983) [hereinafter LCG-I], BANKRUPTCY (1985) [LCG-II], SUBSTANTIVE COMMON LAW (1987) [LCG-III], STATUTORY LAW OF GENERAL APPLICATION (1989) [LCG-IV], STATUTORY LAW OF SPECIFIC APPLICATION (1992) [LCG-V], and STATE STATUTORY LAW (1995) [LCG-VI]. *See also* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993); Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986).

6. As discussed below, the concept of "control" underlies much of statutory enterprise law. This is typically defined functionally as the "power [however obtained] to command or direct the command of the management or policies of a corporation." *See* Bank Holding Company Act, 12 U.S.C.A. § 1841. Many statutes focus pervasively on the parent corporation with such

lacking any such express adoption of enterprise law, in the substantive common law of contracts, torts, and property, in judicial procedure, and corporate procedure, the law develops as the judiciary determines.

The great range of jurisprudential concept and outcome in considering the intra-enterprise attribution of rights and obligations among the members of a corporate group in various areas of the law is not only inevitable but appropriate. It flows from the understanding that the enterprise concepts underlying the law of corporate groups rest on essentially pragmatic considerations rather than on any transcendental legal concept. Intra-enterprise attribution of rights or liabilities among the constituent companies of the group does not flow from the legal acceptance of an overriding concept of the group as an economic entity. Nor does such attribution derive from substituting this concept for the traditional jurisprudential concept of each corporation as a separate juridical entity with its own rights and liabilities. As opposed to a doctrine of universal application such as the entity law, which it supersedes on occasion, intra-enterprise attribution occurs only where the statute so provides or where, under the particular facts of the controversy before the court, the court concludes that the application of enterprise, rather than entity, concepts better implements the underlying policies and objectives of the law in the area.

In the statutory law, each regulatory program has its own jurisprudential world framed by the statutory text, the statutory history, the history of the socio-economic problem giving rise to the enactment, the policies and objectives underlying the act, and the administrative gloss. Antitrust is very different from environmental law; banking has different needs than meatpacking. In private controversies at common law, substantive issues present concerns different from procedural questions, and within the substantive law, contract, tort, and property have dramatically different objectives. Similarly, within procedure, such issues as jurisdiction, joinder, res judicata, and the statute of limitations have varying objectives and present their own very special problems.

These underlying differences in subject matter inevitably result in different levels of application of enterprise principles. While the law of corporate groups has pervasive themes of considerable prominence, it varies dramatically in usefulness and acceptance from area to area. Where it does occur in American judge-made law, intra-enterprise attri-

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"control" often called a "holding company" and extend the statutory program to all its controlled corporations. Others utilize the concept selectively and utilize enterprise concepts only in designated areas.

bution of rights and responsibilities among the constituent companies of corporate groups rests on a common foundation, but with significant variations, reflecting the aspect of the legal system involved. It is the product of an uneven and episodic evolution that first and foremost rests on pragmatic responses to specific policies and problems, rather than on transcendental jurisprudential foundations.

This paper seeks to provide a comprehensive overview of those areas of American law in which enterprise principles have superseded traditional entity concepts of corporate law. These are areas in which the legislature or the courts have concluded that enterprise principles, rather than entity law, more effectively carry out the underlying policies and objectives of the law.

II. AMERICAN JURISPRUDENTIAL STANDARDS FOR INTRA-ENTERPRISE ATTRIBUTION

The American law of corporate groups rests on a series of very different statutory and common-law standards:

*the concept of "control" in many statutory areas consisting of a numerical standard buttressed by an alternative functional standard of the power to direct or influence the direction of corporate affairs;

*numerical standards of stock ownership in statutory areas, such as tax, requiring a high degree of clarity and ease of application;

*the standard of "integrated enterprise" in statutes dealing with labor relations, employment, and discrimination;

*the "unitary business" standard in testing the constitutionality of state unitary tax apportionment statutes for taxation of interstate and multinational corporate groups;

*the traditional and modified concepts of "piercing the veil" in judicial decisions in common law areas and in the application of statutes of general application; and, finally,

*those state judicial decisions that uphold the intra-enterprise attribution of rights and responsibilities avowedly in reliance on enterprise principles, such as decisions in Louisiana resting on the "single enterprise" standard.[7]

In the statutory world, the concept of "control" plays a decisive role in determining the applicability of enterprise principles. Judicial invoca-

7. *See infra* notes 143-45.

tion of enterprise rests on a broader foundation. While courts that have superseded entity doctrines with enterprise principles have relied primarily on the concept of "control," they have adopted an enterprise approach only when "control" is accompanied by certain other critical factors. These include the following:

*the economic integration of the enterprise collectively being conducted by the dominant parent and subservient subsidiaries under the parent's "control";

*the financial interdependence of the members of the group with the use of the funds or credit of the parent or one group member for the benefit of other group members;

*the administrative interdependence of the members of the group with the parent or a subsidiary providing common group services to all members, including such services as legal, accounting, engineering, public relations, payroll, personnel, safety, and research and development;

*group utilization of personnel and personnel services with common group pension, medical, insurance, and profit-sharing plans together with personnel moving from one member company to another without loss of group seniority; and

*the conduct of the business of the group by the constituent companies under the common public persona of the group, including the same tradename, trademark, logo, advertising slogans, forms, and color schemes.

With this summary background as a framework for discussion, the paper proceeds to review the evolution of these doctrines in recent years.

A. *The Supreme Court Decisions Employing Enterprise Principles*

Fifty years ago, a badly divided Supreme Court adopted enterprise principles in *Anderson v. Abbott*[8] in the construction of a banking statute that imposed double assessment liability on the shareholders of insolvent national banks. In *Anderson*, the Court imposed the statutory obligation on the shareholders of a bank holding company that held all the shares of the insolvent bank subsidiaries even though the statute did not apply literally since the holding company shareholders were not directly shareholders of the subsidiaries. The Court emphasized that

8. 321 U.S. 349 (1944).

"realities not forms" should govern and that "[t]o allow this holding company device to succeed would be to put the policy of double liability at the mercy of corporate finance."[9]

In the last decade and one half, the Supreme Court has had to resolve, in a series of major cases, controversies presenting a fundamental jurisprudential choice between enterprise law and traditional corporate entity law. Enterprise law would determine the legal rights and obligations of the parties by focusing on the corporate group as a unit and traditional corporate entity law by treating the various constituent corporations as separate juridical entities, each with its separate rights and obligations.

In each of these cases, the Court embraced enterprise principles firmly in order to implement the underlying objectives of the law in the area and rejected application of the traditional corporate doctrines. These landmark decisions are the *Copperweld*[10] decision (1984) in antitrust law; the *Unitary Tax*[11] cases (1980 to 1994) in constitutional law; and the *Cuban Trade Bank*[12] case (1983) involving the application of the set-off of a claim against the Cuban government against a claim being asserted by a controlled Cuban governmental instrumentality. In some of these cases, the Court accompanied its rejection of entity law by pointing out the lack of utility of "piercing the veil jurispru-

9. *Anderson*, 321 U.S. at 363.

10. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

11. Barclays Bank PLC v. Franchise Tax Bd., 114 S. Ct. 2268 (1994); Allied-Signal, Inc. v. Director, Div. of Taxation, 112 S. Ct. 2251 (1992); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, *reh'g denied*, 464 U.S. 909 (1983); ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); F.W. Woolworth Co. v. Taxation & Revenue Dep't, 458 U.S. 354 (1982); Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980).

12. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983).

dence" in contributing a solution to the jurisprudential problems involved.[13]

B. *Statutory Regulatory Law of Specific Application To Corporate Groups*

1. Introduction of Enterprise Principles

American statutes of specific application to corporate groups that use enterprise principles substantially now include the great federal statutes regulating the banking industry, the savings and loan industry, securities, investment companies, employer-sponsored pensions, export controls and foreign trade, among others. Enterprise concepts play an important, although less pervasive, role in the federal labor relations, employment, and anti-discrimination statutes as well.

The acceptance of enterprise law in statutes of specific application includes aspects of state jurisprudence as well. State regulatory statutes governing insurance, casino gambling, and alcoholic beverages in addition to state banking and savings and loan institution law are the most prominent examples of this development in state law.

The high water of American adoption of enterprise principles is found in the many federal and state statutes that apply enterprise principles, resting directly or indirectly on doctrines of "control," to the regulation and taxation of corporate groups and the corporations that comprise them.

This development got underway as one of the major reforms introduced by the New Deal Era of American history during the first administration of President Franklin D. Roosevelt. The legal concepts employed have not only had a profound impact on American jurisprudence, but have served as jurisprudential models for developed nations around the world.

Prior to the Roosevelt era, American law had been wedded exclusively to entity law and its concept of the corporation as an independent juridical entity with its own separate rights and liabilities. Against this legal structure, reinforced by concepts of limited liability and the highly formalistic and conceptual application of law characteristic of the

13. In the *Cuban Trade Bank* case, for example, Justice O'Connor rejected counsel's analysis utilizing such terms as "whether to pierce the corporate veil" or "alter ego" or "instrumentality" and, relying on Justice Cardozo, "warned . . . against permitting worn epithets to substitute for rigorous analysis." First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. at 623.

American judiciary and academy of the time, previous federal industrial regulation (particularly of the railroad industry, its principal target) had been largely an exercise in futility. Corporate counsel readily evaded statutory and administrative objectives by manipulating corporate forms and interposing subsidiaries to insulate the regulated parent company from a proscribed activity. These achievements resulted in widespread evasion of statutory objectives.[14]

a. *The Emergence of "Control" as the Linchpin of Statutory Enterprise Liability*

Such governmental impotence changed dramatically with the enactment, from 1933 to 1935, of a series of major regulatory statutory programs based on enterprise principles: the Securities Act of 1933,[15] the Emergency Railroad Transportation Act of 1933,[16] the Securities Exchange Act of 1934,[17] and the Public Utility Holding Company Act of 1935.[18] In the statutes and in administrative rule-making implementing them, the coverage of the statutes was expanded substantially by including under the regulatory program not only the parties performing the activities in issue, but all other persons linked to them by "control." The statutes imposed liability not only on the parties directly participating in the proscribed or regulated activity, but also on the party or parties that "controlled" them.[19] Parent corporations, however carefully shielded from participation in the regulated activity, became liable along with the subsidiary that actually committed the violation.

This expanded liability was accomplished through a series of alternative standards for "control." Under the reform statutes, this essential element for expansion of the outer boundaries of statutory liability could be established in a number of ways. For example, a specified proportion of voting stock ownership could suffice. Further, effectively preventing evasion by structural manipulation, the statutes or administrative gloss added an alternative functional standard: "control" also

14. *See* United States v. Elgin, J. & E. Ry., 298 U.S. 492 (1936); United States v. Delaware & Hudson Co., 213 U.S. 366 (1909). *See also* Gilbertville Trucking Co. v. United States, 371 U.S. 115, 124 (1962). *See also* BLUMBERG, LCG-IV, *supra* note 6, at ch. 19.

15. 15 U.S.C. §§ 77a *et seq.* (1988).

16. 48 Stat. 211 (1933) (codified as amended in scattered sections of 49 U.S.C.).

17. 15 U.S.C. §§ 78a *et seq.* (1988).

18. 15 U.S.C. §§ 79a *et seq.* (1988).

19. Securities Act of 1933, 15 U.S.C. §§ 77b(3), 77o; Securities Exchange Act of 1934, 15 U.S.C. §§ 78l(b)(1), 78m(b)(1), 78m(e)(2), 78t; Public Utility Holding Company Act of 1935, 15 U.S.C. § 79b(a)(7)-(8) (1988).

could be established by the "possession direct or indirect of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting securities, by contract, or otherwise."[20]

In the Public Utility Holding Company Act and a number of later statutes including the Investment Company Act, the Bank Holding Company Act, and the Savings and Loan Holding Company Act, among others, this functional standard was expanded further. The statutes modified "control" to include a party with a "controlling" influence over the regulated company. In addition, administrative regulations reduced the percentage of stock giving rise to a presumption of control when coupled with certain other indicia of interrelationship.[21]

Application of the concept of "control" as the standard establishing the outer boundaries of the legislative program has, in numerous statutes, expanded even further, reaching beyond parent corporations to include all members of the controlled group, parents, subsidiaries, and sister subsidiaries. This was accomplished by a provision expanding the scope of statutes to include not only the regulated party but all others "that it controls, is controlled by, or is under common control with."[22] This expanded concept of "control" has become a hallmark of most American regulatory law.

Although some regulatory statutes, particularly state statutes, still naively use majority stock ownership as the sole numerical standard for determining "control," the great regulatory statutes utilize much smaller percentages. The Public Utility Holding Company Act, for example, utilizes 10 percent of voting stock ownership, while the Bank Holding Company Act and the Savings and Loan Holding Company Act utilize 25 percent as the standard.[23] The administrative regulations under these statutes go even further, providing that as little as 5 percent (in the case of banks) and 10 percent (in the case of savings and loan institutions)

20. Securities Act of 1933 Rule 405, 17 C.F.R. § 230.405 (1995). This formulation built on the initial statutory attempt in the Emergency Railroad Transportation Act of 1993 that introduced the standard of "control" as "the power to exercise control or management." 48 Stat. 211, 218 (1933).

21. 17 C.F.R. § 230.405 (1994); 15 U.S.C. § 79b(a)(7) (1988). "Controlling influence" also appears in the Bank Holding Company Act, 12 U.S.C.A. § 1841(a)(2)(c) (1995), the Savings and Loan Holding Company Act, 12 U.S.C.A. § 1467a(a)(2) (1995); the Investment Company Act, 15 U.S.C. § 80a-2(a)(9) (1988), among others.

22. *E.g.*, Savings and Loan Holding Company Act, 12 U.S.C.A. § 1467a(a)(1)(H) (Supp. 1995); Investment Company Act, 15 U.S.C. § 80a-2(a)(40) (1988); Securities Act of 1933 Rules 144, 405, 17 C.F.R. §§ 230.144, 230.405 (1994).

23. 15 U.S.C. § 79b(7); 12 U.S.C. § 1841(a)(2); 12 U.S.C. § 1467a(2).

gives rise to a rebuttable presumption of "control" when combined with certain other indicia of interrelatedness.[24] But in almost all instances, numerical standards of stock ownership are strengthened by alternative functional standards focusing on the realities of the power relationship within the corporation. In this manner, the realities, not corporate forms, are decisive.[25]

Reflecting their very different objectives, the tax laws differ from the regulatory statutes in their approach to corporate groups in several respects. While the tax laws also focus on "control," they define the term exclusively in arithmetical terms of the percentage of stock ownership and contain no alternative functional standard. For many purposes, the tax laws specify majority stock ownership, formulated in no less than four different ways in different sections of the Code.[26] However, in certain provisions dealing with groups, including important provisions dealing with corporate reorganizations and consolidated returns, the tax laws define "control" in terms of 80 percent stock ownership. Indeed, there are no less than five different formulations of an 80 percent standard in the tax laws.[27]

"Control" defined in terms of 80 percent stock ownership in a tax revenue-raising statute manifestly is intended to serve a very different purpose than the use of the term "control" in a regulatory statute. Nevertheless, a number of regulatory statutes incorporate the 80 percent tax standard. Thus, the comprehensive federal statute regulating employer liability in funding employer-sponsored pension programs imposes liability on the "controlled corporate group," defined by reference to the consolidated group provisions in the tax laws turning on 80 percent ownership.[28]

24. 12 C.F.R. §§ 225.31(d)(1), 574.4 (1994).

25. Thus, the Supreme Court in the celebrated *Rochester* decision, stated that "control" was to be determined by a regard for "actualities in such intercorporate relationships" and to encompass every type of control in fact. Rochester Tel. Co. v. United States, 307 U.S. 125, 145-46 (1939). The Court later emphasized that it was "reject[ing] artificial tests for 'control.'" Alleghany Corp. v. Breswick & Co., 353 U.S. 151, 163, *reh'g denied*, 353 U.S. 989 (1957).

26. *See* BLUMBERG, LCG-V, *supra* note 6, at ch. 15.

27. *See* BLUMBERG, LCG-V, *supra* note 6, §§ 15.03-15.07.

28. 29 U.S.C. § 1301(b)(1) (1988); 29 C.F.R. § 2612.3 (1994).

b. The "Integrated Enterprise" Standard in Federal Labor, Employment, and Discrimination Law

The labor, employment, and discrimination laws use a very different standard developed by an administrative agency, rather than the courts. The National Labor Relations Board has expanded the scope of these statutes through the introduction of the unique functional standard of the "integrated enterprise" to determine whether related corporations are to be treated as a "single employer" in the administration of the statutory program.[29] This arose as a pragmatic response to problems caused by multiple incorporation and "runaway" shops designed to sidestep union organizing and contracts.

Through reliance on the concept of "control" or the "integrated enterprise" doctrine, numerous federal and state statutes of specific application regulate major industries in the American society by extending the statutory program to include the corporate group as a whole rather than restricting the statutes' scope to the component corporation of the group that actually conducts the regulated activity. Enterprise concepts have prevailed in the regulation of public utilities, banking, savings and loan companies, insurance companies, securities and investment companies, casino gambling, employee retirement benefits, major areas in income taxation—federal and state—and foreign trade and investment. These are briefly reviewed below.

2. Public Utility Holding Companies

The Public Utility Holding Company Act of 1935[30] (PUHCA) was the first major federal statute to adopt enterprise principles as the basis for the pervasive regulation of a major American industry. Utilizing and expanding concepts of "control" introduced by the Emergency Transportation Act of 1933, the Securities Act of 1933, and the Securities Exchange Act of 1934, PUHCA dealt with the widespread abuses and insolvencies of the nation's major utility chains by concentrating its regulatory provisions on the utility holding company system as a whole. It reorganized and simplified the corporate structure of the entire industry by requiring geographical and functional integration of each system, by restricting systems to no more than three tiers of subsidiary companies, and by regulating strictly transactions with other companies in

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29. Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Servs., Inc., 380 U.S. 255 (1965). *See* BLUMBERG, LCG-IV, *supra* note 6, §§ 13.06, 14.03.

30. 15 U.S.C. §§ 79 *et seq.* (1988).

the group, as well as affiliated companies and interests. PUHCA proved to be a widely acknowledged success, and its regulatory techniques have been followed widely in numerous subsequent regulatory statutes of significance.

3. Financial Institutions

a. *Banking and Savings and Loan Institutions*

The American banking industry is governed both by the federal government and the state governments through an overlapping and confusing series of regulatory programs of great complexity. No less than three federal agencies have serious areas of responsibility, and in the case of banks chartered under state law, the state banking departments serve as still another regulatory agency.

Whatever the agency for regulation, American banking law, federal and state, is committed firmly to enterprise law. Building on concepts introduced by the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940,[31] the Bank Holding Company Act of 1956[32] is one of the nation's most comprehensive statutes in its pervasive reliance on the concept of "control." It and its sister statute, the Savings and Loan Holding Company Amendments Act of 1967,[33] have served as a model for much of American regulatory law seeking to regulate holding company systems. While the definition of "control" in the Act provides that 25 percent ownership or control of voting shares gives rise to a rebuttable presumption of "control," administrative regulations, as noted, go further.[34]

The Savings and Loan Holding Company Amendments Act of 1967 is substantially the same.[35] State banking law also focuses on the financial holding company, and in many respects follows federal law and enterprise principles in authorizing regulation of bank and savings and loan holding companies in statutes modeled after the federal bank and savings and loan holding company statutes.[36]

31. 15 U.S.C. §§ 80a *et seq.* (1988).
32. 12 U.S.C. §§ 1841 *et seq.* (1988).
33. Pub.L. 90-255, Feb. 14, 1968, 82 Stat. 5.
34. 12 U.S.C. § 1841(a)(2) (1988); 12 C.F.R. § 225.31(d)(1)-(2) (1995). They provide that as little as 5 percent of voting stock ownership will suffice where it is combined with certain other indicia of corporate interrelationship. *See supra* text accompanying notes 24-26.
35. 12 U.S.C. § 1467a(a)(2) (1988); 12 C.F.R. § 574.4 (1994).
36. *See* BLUMBERG, LCG-VI, *supra* note 6, § 4.03.

The distinctive lines between banks and savings and loan institutions have become blurred. The pressures to permit well capitalized banks to participate in the rehabilitation of savings and loan institutions in distress has accelerated this process. Increasingly, the industry is being dominated by financial holding companies with affiliates in both industries. Pressures in the Congress appear to be on the verge of reversing six decades of American law by adding investment banking to the list of permissible activities for such institutions. While many would also add insurance to the spectrum of services permissible for banks to provide, this movement, which at one point in the current Congress had appeared close to success, appears to have been defeated at least for the time being. These proposals highlight the role of holding company regulatory law in determining the scope of the enterprise.

American banking laws have undergone change in recent years to encourage entry of foreign banks and subsidiaries into the American market, to regulate their conduct of American business, and to establish certain restrictions on the extent of their market share. In a series of statutes, including the International Banking Act of 1978,[37] the Foreign Bank Supervision Enhancement Act of 1991,[38] and the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,[39] American law has responded to the increased participation of foreign banks in American banking markets. Competitive opportunities have been broadened, and the scope of American regulation widened. Pursuant to the 1994 statute, American officials have commenced work on a study to determine whether foreign banks should be required to conduct banking operations in the United States through subsidiaries (subject to more far-reaching American regulation than branches).[40] At the same time, both the federal standards for citizenship and residence of directors of national banks and comparable state requirements for directors of state

37. 12 U.S.C. §§ 3101 *et seq.* (1988).

38. 12 U.S.C.A. § 3101 (1995).

39. Pub. L. No. 103-328, 108 Stat. 2338 (1994), (codified as amended in scattered sections of 12 U.S.C.).

40. International Banking Act of 1978, 12 U.S.C. §§ 3101 *et seq.* (1988); 105 Stat. 2236 (1991), (codified as amended in scattered sections of 15 U.S.C.); Pub. L. No. 103-328, 108 Stat. 2338 (1994). *See* BLUMBERG, LCG-VI, *supra* note 6, §4.14.

banks have been significantly relaxed.[41] All the regulatory statutes in the financial area rest on enterprise principles.

b. *Insurance*

The regulation of the insurance industry presents a unique chapter in American jurisprudence. By reason of a nineteenth century decision of the Supreme Court holding that insurance was not "commerce" within the federal power to regulate interstate commerce,[42] insurance regulation commenced solely on the state level. By the time constitutional thinking had changed, and the Court was prepared to recognize the assertion of federal control over insurance, state regulation was well-entrenched. In the McCarran-Ferguson Act of 1944,[43] the Congress directed that insurance continue to be governed by state regulation. In order to head off pressures for federal regulation two decades later, the industry joined state regulators in supporting the Model Insurance Holding Company System Regulatory Act (1969)[44] that was adopted by virtually all the states. Building on the Federal Banking and Savings and Loan Holding Company Acts, the Model Act focussed on the insurance holding company and on insurance holding company systems and used the familiar standards of "control" developed in the federal statutes and regulations. Notwithstanding extensive regulation of the parent corporation and the holding company system, the Model Act provides, however, that the home states of insurer companies remain their primary regulators.[45]

When well-publicized scandals in the 1980s identified areas of inadequate supervision, pressures for federal intervention again increased. In response, the Model Act was strengthened and revised to diffuse the

41. *E.g.*, 12 U.S.C.A § 72 (1995) (substitutes majority for two-thirds in residency requirements for directors of national banks; Comptroller of Currency authorized to permit minority of directors to be aliens in the case of national banks that are subsidiaries or affiliates of foreign banks). For state banks, see BLUMBERG, LCG-VI, *supra* note 6, § 4.14.2.

42. Paul v. Virginia, 75 U.S. 168, 183 (1868).

43. 15 U.S.C. § 1012(a) (1988).

44. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MODEL REG. SERV. 440-1 *et seq.* (1992). The Model Act defines "control" in terms closely following those of the Savings and Loan Holding Company Act, 12 U.S.C.A. § 1467(a) (1995). Many of the states, however, introduce their own variations, with presumptions of "control" ranging from 5 percent stock ownership in Alabama to 25 percent in Oklahoma. Most follow the regulations under the Savings and Loan Holding Company Act regulations and specify 10 percent. *See* BLUMBERG, LCG-VI, *supra* note 6, § 7.04.

45. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MODEL REG. SERV. 440-1 *et seq.* (1992).

movement for federalization.[46] This procedure for voluntary acceptance of regulation is unique in the American experience.

Insurance has joined banking, savings and loan, public utilities, and casino gambling as the areas in American federal and state law in which the holding company and the corporate group are major subjects of regulatory concern. These statutes regulate the holding company systems conducting the regulated activities and extend the outer boundaries of statutory obligation to all component companies of the system whether or not the company itself is engaged in the regulated activities. Similarly, the statutes extend the regulatory program to apply statutory provisions regarding disclosure and regulation of transactions with "insiders" to all companies in the system and affiliated companies and interests as well.

4. Securities and Investment Companies

Unlike the statutes dealing with banking, savings and loan, and insurance, the federal statutes dealing with the public offering and sale of securities, regulation of broker-dealers, stock exchanges and public companies listed on stock exchanges, and regulation of investment companies (the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940) do not focus on the holding company. Though not pervasive, as in other statutes, enterprise principles play a major role in these areas as well. "Control" serves as the cornerstone of vital provisions in the statutes. It underlies the statutory provisions for imposition on secondary liability of "controlling persons" for all statutory violations, and it widely expands the outer boundaries of a number of other major areas of the regulatory programs.[47]

These three statutes and the administrative regulations thereunder are historic pioneers in attempting to establish "control" as the source of federal authority in this area. Although "control" plays a major role in the 1933 and 1934 Acts, definition was left to administrative formulation and the Securities and Exchange Commission ("SEC") established the wide-ranging contours of statutory application with the

46. MODEL REVISED INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT (1984); NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MODEL REG. SERV. 440-27 *et seq.* (1992).

47. Securities Act of 1933, 15 U.S.C. §§ 77b(3), 77c(a)(2), 77o, 77s(a), 77aa Sched. A(25) (1988); Securities Exchange Act of 1934, 15 U.S.C. §§ 78c(a)(18), 78k, 78*l*(b)(1), 78m(b)(1), 78m(e)(2), 78t (1988); Investment Company Act of 1940, 15 U.S.C. §§ 80a-2(a)(3)(C), 80a-2(a)(19), 80a-3(b)(2) (1988).

definition of "control" previously noted.[48] This definition borrows from and harmonizes with the statutory definition in the Public Utility Holding Company Act of 1935, administered by the same agency.[49]

In the Investment Company Act of 1940, the Congress borrowed from both the administrative gloss on the 1933 and 1934 Acts and the model of the Public Utility Holding Company Act of 1935 for the comprehensive definition of "control" in the statute. It reworked themes that had become familiar rather than introducing still other standards.[50]

5. Casino Gambling

Casino gambling or gaming has become an American industry of considerable magnitude. Often, subsidiaries of publicly held corporate groups of size, listed on the stock exchange, conduct the gambling facilities. In the absence of any federal regulation, state law governs this area, with the states in which the facilities are located assuming the primary regulatory responsibility.

Because of its vulnerability to public exploitation and to control by criminal elements, the leading American states recognizing such activity as lawful, starting with Nevada and now including Mississippi, New Jersey, Illinois, and Louisiana as well, have enacted comprehensive statutes that expansively extend the regulatory program to include all the companies (including their officers, directors, and certain shareholders) comprising the corporate group of which the licensed gambling subsidiary is a part. Modeled after the most far-reaching of the federal statutes, the various state casino gambling regulatory programs uniformly extend their disclosure, divestiture, and license disqualification provisions throughout the group as a whole.[51]

Federal regulation of financial institutions including banks and savings and loan institutions and financial holding companies, the regulation of public utility holding company systems, securities and investment companies and state regulation of insurance holding company systems and of casino gambling represent the areas of greatest triumph of enterprise principles in American law.[52]

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48. *E.g.*, Securities Act Rule 405, 17 C.F.R. § 230.405 (1995).

49. *See supra* notes 19-22.

50. 15 U.S.C. § 80a-2(a)(9) (1988).

51. ILL. ANN. STAT. ch. 220 (Smith-Hurd 1993); LA. REV. STAT. ANN., §§ 4:601-686 (West Supp. 1995); MISS. CODE ANN. §§ 75-76-1 to -313 (1991 & Supp. 1994); NEV. REV. STAT. ANN. §§ 463.010-.720 (1990); N.J. STAT. ANN. §§ 5:12-1 to -208 (West 1988 & Supp. 1995).

52. *See* BLUMBERG, LCG-VI, *supra* note 6, § 13.02.

6. Employer-Sponsored Pension Programs

The Employees Retirement Income Security Act (ERISA), the basic American statute regulating employer-sponsored retirement income or pension programs,[53] is grounded firmly on enterprise principles. These principles determine the scope of employer financial liability under the Act. The Act provides for separate treatment of multi-employer plans and other plans. With respect to multi-employer plans, the Act employs enterprise principles expressly providing that "trades or businesses . . . under common control" constitute a "single employer."[54]

The regulations utilize the concept of the "controlled group of corporations" as the determining standard for businesses "under common control" and define the term by reference to one of the 80 percent stock ownership standards of the Internal Revenue Code. Borrowed from § 1563 of the Code, this refers to "ownership of stock possessing at least 80 percent of the combined voting power of all classes of stock . . . or at least 80 percent of the total value of shares of all classes of stock."[55]

However, ERISA does not depart from entity law principles in determining liability of a single employer, and the courts have refused, in most cases, to impose contribution or withdrawal liability under the statute upon a parent corporation (or other controlling shareholder), except on compliance with the principles of "piercing the veil."[56] However, a number of courts have made it plain that the traditional principles are significantly relaxed in order to achieve the statutory objective.[57]

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53. 29 U.S.C. §§ 1001-1461 (1988).

54. 29 U.S.C.A. § 1301(b)(1) (West 1995).

55. I.R.C. § 1563 (1995); Treas. Reg. § 1.414(c)-2(b)(2)(i)(A) (1994). The Employees Retirement Income Security Act incorporates the regulations of the Internal Revenue Service. 29 U.S.C.A. §§ 1301(b)(1), 1302(b)(3) (West 1995).

56. *See* BLUMBERG, LCG-IV, *supra* note 6, § 16.03.

57. *See, e.g.*, Alman v. Danin, 801 F.2d 1, 3-4 (1st Cir. 1986)

> ([F]ederal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form . . . , an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine . . . . Indeed deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act . . . . Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid obligations to employee benefit plans would seem precisely the type of conduct Congress wanted to prevent.).

See also United Steel Workers of Am. v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988) (statutory violation accepted as the fraudulent or inequitable conduct required for "piercing").

7. Taxation

a. *Federal Income Taxation*

The Federal Internal Revenue Code contains extensive provisions dealing with the relations of American taxpayers with affiliated corporations, including their foreign affiliates. Among these, the most prominent are provisions authorizing reallocation of income and expense pertaining to intragroup transactions including transfer pricing, elaborate provisions for treatment of intragroup payments of interest, dividends, and liquidation distributions involving foreign group components as well as extensive provisions dealing with "controlled foreign subsidiaries."[58]

Commencing with an abortive effort in a World War I excess profits tax regulation, the federal income tax system speedily adopted enterprise principles as an essential feature of an efficient tax collection system. It has done so efficiently through use of various formulations of the concept of "control." However, unlike the regulatory statutes, the federal tax laws define "control" in terms of a specified amount of stock ownership. In some cases, the tax laws require a high proportion of stock ownership, including, in some cases, non-voting shares as well.[59] Here, the term "control" is being used in a sense quite different from its invariable meaning in the regulatory statutes to refer to "the power to direct or command the direction of the policies or management of a corporation."[60]

Many provisions define "control" in terms of majority stock ownership. It is an interesting illustration of the vagaries of legislative drafting that the Code contains no less than four different models in implementing this particular approach.[61] A very different class of provisions, however, use the concept of the "controlled group" turning on 80 percent stock ownership; there are no less than five different models of such provisions in the Code.[62] The 80 percent standard applies to the

58. *E.g.*, I.R.C. §§ 245, 367, 482, 861(b), 862(b), 863, 864, 902, 951-64, 6038, 6038A (1994).

59. *E.g.*, I.R.C. §§ 368(c), 582(b), 1504(a)(2), 1551(b), 1563 (80 per cent stock ownership required); I.R.C. §§ 368(c), 582(b) (non-voting shares included); I.R.C. §§ 246A, 267(f), 382(*l*), 1504(a)(2), 1551(b), 1563 (referring to "total value" of all the stock).

60. Securities Act of 1933 Rule 405, 17 C.F.R. § 230.405 (1995).

61. These range from "at least" 50 percent to "more than" 50 percent. At the same time, the base to which the percentage is applied varies from "voting power of stock" and "total value" to "voting power" or "total value." *See* BLUMBERG, LCG-V, *supra* note 6, §§ 15.09-15.13.

62. These all specify "at least 80 percent." However, the base to which the percentage is applied ranges from "the voting stock," Treas. Reg. § 1.537-3(b), to "each class of stock,"

provisions of the Code facilitating economic combination by making certain corporate combinations and acquisitions tax-free. It also appears in the provisions dealing with the filing of a consolidated return for all qualifying members of a group rather than by each separate affiliated corporation. As a result, the consolidated group does not include all majority-owned subsidiaries.[63]

In order to achieve the clarity and ease of application essential for a tax statute, the tax statutes rely solely on an express numerical standard, eschewing any resort to the functional standards of "control" so prominently employed in the application of enterprise principles in the American regulatory law. The Internal Revenue Code, however, effectively prevents tax evasion through manipulation of the numerical standards by introducing an alternative functional standard. Section 482 authorizes reallocation by the administrative agency of income, deductions, and tax credits or allowances between "organizations, trades, or businesses . . . owned or controlled directly or indirectly by the same interests [in order to] prevent evasion of taxes or clearly to reflect the[ir] income . . . ."[64]

b. *State Income Taxation*

Similarly, state tax law widely relies on comparable concepts of "control" in dealing with the tax problems presented by transactions between taxpayers and their controlling and controlled corporations (and shareholders) and those under common control.[65] In addition, state tax law widely includes broad-reaching provisions dealing with the tax problems presented by corporate groups. Some states require the filing of consolidated or combined returns by all groups, while many more require such filing when directed by the tax authorities or certain other circumstances.[66] Finally, state law widely follows federal law in authorizing reallocation by the state tax authorities of income, deductions, credits, and allowances in the case of treatment of the tax consequences

I.R.C. § 582(b), to "total voting power . . . *and* . . . total value," I.R.C. § 1504(a)(2), to "total combined voting power . . . *and* . . . total number of shares of all other classes [non-voting] of stock," I.R.C. § 368(c), and to "total combined voting power . . . *or* . . . total value of all classes [of stock]," I.R.C. §§ 1551(b), 1563 (emphasis added). *See* BLUMBERG, LCG-V, *supra* note 6, §§ 15.03-15.07.

63. I.R.C. §§ 351-54, 368, 1501-1504.

64. I.R.C. § 482.

65. BLUMBERG, LCG-VI, *supra* note 6, § 8.06.

66. *See* BLUMBERG, LCG-VI, *supra* note 6, §§ 8.07.1-8.07.4.

of transactions between taxpayers, affiliated corporations, and related parties.

In the case of a business taxpayer of significant size, the various states almost inevitably face the difficult problem of allocation of the taxpayer's liability among all the jurisdictions in which the taxpayer (or, in the case of consolidated returns, the taxpayer and its affiliated companies within the corporate group) are conducting business. The Uniform Division of Principal and Income for Tax Purposes Act,[67] adopted by most states, deals with this problem through the concept of unitary tax apportionment.

Unitary tax apportionment determines tax liability by providing for the filing of a consolidated or combined return for the affiliated corporations of the group, on which a total tax is first computed. The appropriate fraction of the total tax attributable to the jurisdiction in question is then apportioned by determining the proportion that the in-state business activities bear to the total activities of the group. This typically is accomplished by use of a three-factor formula, such as the in-state proportionate share of the total assets, revenues, or income of the group.[68]

The constitutionality of measurement of the tax liability of a local subsidiary through such unitary tax apportionment has been litigated extensively. This has been most severe where the statute has had worldwide application, including foreign-based as well as United States-based multinational corporate groups. Such expansive assertion of tax jurisdiction has stirred a storm of international controversy.[69]

In a series of celebrated decisions resting on enterprise principles, the Supreme Court has reaffirmed that unitary tax apportionment is constitutional so long as the taxing authorities can establish that the taxpayer is a part of a group conducting a "unitary business." The "unitary business" standard considers the "underlying economic realities" to determine the "unity or diversity of [the] business enterprise" involved. The Court defines "unitary business" as a "functionally inte-

67. 7A U.L.A. 336 (1985 & Supp. 1995).

68. *Id. See* BLUMBERG, LCG-VI, *supra* note 6, § 8.05.

69. Although the controversy involves the manner of *apportionment* of tax due from the affiliate within the jurisdiction, not the imposition of tax liability on units beyond the jurisdiction, the impact is severe. It is contended that the application of the method to foreign affiliates of a multinational group imposes excessive accounting costs, threatens multiple taxation, and because of the relatively higher profitability of foreign business, results in a higher tax liability in the aggregate than if tax liability were computed on a separate taxpayer basis in the ordinary course. *See* Barclays Bank Int'l Ltd. v. Franchise Tax Bd., 114 S. Ct. 2268 (1994); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, *reh'g denied*, 464 U.S. 909 (1983).

grated enterprise" with "centralization of management and economies of scale" or as a "highly integrated business which benefits from an umbrella of centralized management and controlled interaction."[70]

The use of this method of taxation on a multinational basis has provoked a high level of criticism from foreign powers. Although the Congress did not respond to the criticism, the American executive branch was able to persuade the states utilizing world-wide unitary tax apportionment to restrict use of the method to the American components of a group; these are the so-called water's edge statutes.

However, tidying up the determination of tax upon foreign corporate groups for the years prior to the amendment of the statutes continued to give rise to litigation for a while. Thus, in the recent *Barclays Bank* litigation,[71] which involved tax years prior to repeal of the world-wide scope of the California unitary tax apportionment statute, the Court dealt with an issue that its earlier decisions had left open. In *Container Corporation of America, Inc.*,[72] the Court had held that, insofar as foreign commerce was concerned, the use of this method of taxation for unitary businesses was constitutional where the parent corporation of the group was an American corporation. In *Barclay's Bank*, a case involving a British-based multinational banking group with a California affiliate, the Court upheld the constitutionality of such tax apportionment in the case of groups under "control" of a *foreign* parent corporation as well.

8. Foreign Trade and Investment

a. *Export Controls*

For decades, American law dealing with export controls or related measures in protection of national security interests, implementation of foreign policy objectives, or economic objectives, has employed enterprise principles. In these areas, administrative agencies, rather than the Congress, have delineated the outer boundaries of the regulatory program. In defining its range of application, the statutes expansively refer to "persons subject to the jurisdiction of the United States"[73] while

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70. Exxon Corp v. Wisconsin Dep't of Revenue, 447 U.S. 207, 224 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 438, 440-41 (1980).

71. Barclays Bank PLC v. Franchise Tax Bd., 114 S. Ct. 2268 (1994). *Accord* Colgate-Palmolive Co. v. Franchise Tax Bd., 114 S. Ct. 2268 (1994).

72. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, *reh'g denied*, 464 U.S. 909 (1983).

73. First War Powers Act of 1941, 12 U.S.C. § 95a (1988), 50 U.S.C. app. § 5 (1988);

leaving it to the administering agencies entrusted with the programs to define the jurisdictional sweep more precisely. The intensity of the foreign policy objectives involved, as perceived by the administration involved, has dictated the outcome. Where the pressure has been acute, the statutory phrase has been defined in broad terms to include all controlled corporations, including foreign subsidiaries and, thus, to embrace all constituent companies in the corporate group. In other cases, in order to avoid international confrontation, foreign subsidiaries have been excluded.

Thus, in the imposition of export controls to implement American foreign policy objectives to isolate Communist China after the Korean War and the Soviet Union during subsequent decades, the administrative regulations expanded the sweep of the program to include foreign subsidiaries of American groups.[74] Subsequently, similar controls were imposed on foreign subsidiaries of American groups with respect to transactions with Iran and Iraq.[75]

Where American objectives have differed from the objectives of the host countries, as has occurred in the extraterritorial application of American law in the Chinese and Siberian Pipeline embargoes, profound international controversies erupted in which English, French, and Dutch governments and courts successfully resisted such American efforts.[76] Most recently, the long-standing sanctions directed at Cuba have been expanded to include foreign subsidiaries.[77] In other situations, American economic sanctions directed at Rhodesia, South Africa, Libya, and, as noted, Cuba, did not extend to foreign subsidiaries, usually for competitive reasons to protect American business abroad.[78]

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1988); Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1988); Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841, 842 (expired 1979).

74. 50 U.S.C. §§ 1701-1706 (1988); 50 U.S.C. app. §§ 1-44 (1988); 50 U.S.C. app. §§ 2401-2420 (1988); Foreign Assets Control Regulations, 31 C.F.R. § 500 (1994).

75. Iranian Assets Control Regulations, 31 C.F.R. § 535 (1994); Iraqi Sanctions Regulations, 31 C.F.R. § 575 (1994).

76. *See* BLUMBERG, LCG-V, *supra* note 6, §§ 20.06, 21.05. For instances of European judicial action frustrating United States extraterritorial assertions, see S.A. Societe Fruehauf-France v. Massardy, Judgment of May 22, 1965, Cour d'appel, Paris, [1968] D.S. Jur. 147, [1965] J.C.P. II no. 14274, 5 I.L.M. 476 (1966); Compagnie Europeene des Petroles S.A. v. Sensor Nederland B.V. No.82/716 (Dist. Ct., The Hague, Sept. 17, 1982), 22 I.L.M. 66 (1983).

77. Although the original Cuban regulations literally included foreign subsidiaries of American groups under the ban, this was not enforced in cases "where local law requires, or policy in the third country favors trade with Cuba." Cuban Assets Control Regulations, 31 C.F.R. §§ 515.329, 515.559(a)(3)(b) (1994).

78. Rhodesian Sanction Regulations, 31 C.F.R. § 530 (1976); South African Transactions

This area provides one of the outstanding examples of the challenges to the international legal order arising from the extraterritorial application of enterprise principles to multinational corporations and their foreign subsidiaries. The experience of the United States with respect to the China embargo and Siberian Pipeline embargo should leave no doubt of the inevitability of the confrontation arising from such programs, even with a nation's closest allies. It also should leave little doubt that such extraterritorial application is doomed to failure when firmly opposed by any great power that hosts the foreign subsidiary in question.

b. *Foreign Investment in the United States*

For decades, the United States has restricted foreign investment and membership of foreign nationals on boards of directors in particularly sensitive areas of the economy including aviation, communications, fishing, government procurement, and other areas such as energy, mining, and shipping. Although these restrictions have been somewhat modified in recent years, most remain fully effective.[79] In addition, in 1989, Congress gave the President the authority to prohibit acquisitions of control of United States corporations by foreign interests where a threat to national security was involved. The statute includes any acquisition by a person "directly or indirectly controlled" by a foreign person, including a United States corporation acquired for the purpose of acquiring another American corporation contrary to the statute.[80] This sweeping power has been invoked only once.

Other statutes have focused on disclosure of foreign investment in the United States without regulating the inflow of foreign funds. These statutes and implementing regulations are drafted in a sophisticated manner including comprehensive definitions of "parent," "affiliate," and "foreign parent" that utilize a benchmark of 10 percent equity stock ownership as the level requiring reporting.[81]

Although years ago most of the states made ownership of land by non-citizens and non-residents unlawful, such limitations have long since been repealed or extensively modified. Only a few states have significant restrictions of this nature.[82]

Regulations, 31 C.F.R. § 545 (1994); Libyan Sanctions Regulations, 31 C.F.R. § 550 (1994).

79. *See* BLUMBERG, LCG-V, *supra* note 6, at ch. 27.

80. 50 U.S.C.A. app. §2170 (1995) (Exon-Florio amendment).

81. 7 U.S.C. §§ 3501-3508 (1988); 22 U.S.C. §§ 3101-3108 (1988); I.R.C. §§ 6038A(c)(3), 7701(a)(30) (1988); 7 C.F.R. § 781 (1994); 15 C.F.R. § 806 (1994).

82. For example, the Wisconsin statute is limited to ownership of more than 320 acres of

c. *Foreign Corrupt Practices Act*

This statute regulates American business practices abroad by prohibiting bribes of foreign governmental officials to obtain business and requiring adequate internal accounting control systems for recording such transactions. From a jurisprudential point of view, the statute is particularly interesting because it seeks to achieve its objectives by imposing statutory obligations on American parent companies and does not apply literally to their foreign subsidiaries in any respect. However, the American parent corporation cannot comply with the statute unless it sees to it that the conduct of its foreign subsidiaries complies with the statutory restrictions.[83] This is a unique example in American law of indirectly achieving enterprise regulation of a group while, in form, restricting the regulatory program to the parent company.

d. *Arab Boycott of Israel*

The statute and implementing regulations restricting American participation in the secondary and tertiary Arab boycott of Israel are drawn carefully to focus on efforts by American corporations and American individuals without unduly impeding American trade with the Arab states. The program appears to have expansive breadth, applying to any "United States person" and "any foreign subsidiary or affiliate . . . controlled in fact." "Controlled in fact" is defined as the "authority or ability of a domestic concern to establish general policies or to control day-to-day operations" of the foreign subsidiary or establishment. There is a rebuttable presumption that this standard is satisfied in the event of 50 percent voting stock ownership, or even 25 percent (if no large block is outstanding) or interlocking majority representation on the foreign board.[84]

However, the statute only applies to transactions in the "commerce of the United States." This includes transactions of foreign-controlled companies only when specifically directed, financed, or otherwise supported by a United States person, or involving goods and services procured from the United States. As a result, the statute does not interfere with the general operations of American owned foreign subsidiaries and

agricultural land, and the South Carolina statute to ownership of 500,000 acres or more. *See* BLUMBERG, LCG-VI, *supra* note 6, at ch. 11.

83. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and -2 (1988).

84. Export Administration Act of 1985, 50 U.S.C. app. §§ 2401-2420 (1988); 15 C.F.R. § 769 (1995).

affiliates so long as their United States parent does not directly control their activities and United States-origin goods and services are not involved.[85]

C. *Statutory Regulatory Law of General Application*

In addition to the statutes specifically applying to corporate groups which represent the greatest triumph of enterprise principles in American law, there has been widespread utilization of such principles in the judicial construction and application of statutory regulatory law generally. Even where statutes have not referred to groups at all, numerous courts have introduced concepts of enterprise liability to attribute rights, impose liabilities, and support exclusion of corporations affiliated with the group that is being regulated or that is performing the prohibited activity. The courts generally have done so whenever enterprise treatment was required in order to implement the underlying policies and objectives of the statutory program, prevent their frustration, or to prevent evasion through the organization of a subsidiary corporation to conduct the activity in question.

In some cases, the courts have reached such result simply through analysis of the legislative action. Thus, as a distinguished American judge, Judge Henry Friendly, observed many years ago: "We did not think Congress meant the policies of that act 'to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes.'"[86] Courts have similarly given "remedial" statutes a "broad" or "liberal" construction in order to carry out the legislative policies and objectives.[87]

As noted above in connection with the Employees Retirement Insurance Security Act, still other courts have relied on an avowedly modified version of traditional "piercing the veil" jurisprudence. Because of the need to implement the underlying purpose of the statute in question, courts have applied enterprise principles, notwithstanding a subsidiary's (or controlled corporation's) meticulous observance of corporate forms, because, in statutory application, such forms receive "less respect" than

85. Export Administration Act of 1985, 50 U.S.C. §§ 2401, 2407; 15 C.F.R. § 769.

86. United States v. J.B. Williams Co., 498 F.2d 414, 437 (2d Cir. 1973) (quoting Bowater S.S. Co. v. Patterson, Ltd., 303 F.2d 369, 372 (2d Cir. 1962), *cert. denied*, 371 U.S. 860 (1962)).

87. After 60 years in which this philosophy of statutory construction was supreme, recent decisions of the Court indicate that it may be abandoning this approach. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 313 (1992).

under the "strict common law alter ego doctrine" of "piercing the veil."[88] They have also reached much the same result by weakening further the rigorous standards for application of traditional "piercing the veil jurisprudence." Numerous cases simply have disregarded an inability to establish that the conduct in question was fraudulent or inequitable,[89] an indispensable elemenof the traditional doctrine in common-law controversies.

1. Antitrust Law and Other Conspiracy Statutes

The Sherman Antitrust Act imposes criminal, as well as civil, sanctions on conspiracies to monopolize.[90] Although numerous previous decisions of the Supreme Court had recognized that conspiracies between constituent companies of corporate groups—that is, intra-enterprise conspiracies—might constitute a violation of the Act, the Court in *Copperweld Corp. v. Independence Tube Corp.*[91] flatly held that a parent and *wholly owned* subsidiary could not conspire under these sections. Emphasizing that the statute outlawed concerted activity, the Court held that a parent and wholly owned subsidiary always have a "unity of purpose or a common design" and that "their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."[92] The Court considered any coordinated activity of a parent and its wholly owned subsidiary to be that of a single enterprise. Accordingly, it held that they could not conspire to monopolize. It reserved decision with respect to partly owned subsidiaries.[93]

Numerous cases in the lower federal courts have considered the application of the *Copperweld* doctrine in federal antitrust law cases where the subsidiary had been only partly owned or where sister companies, rather than parent and subsidiary corporations, were involved. In the case of subsidiaries and sister companies overwhelmingly owned by the parent, the enterprise principles of *Copperweld* have been applied

88. *See* Alman v. Danin, 802 F.2d 1, 4 (1st Cir. 1986); Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981); Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974); United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1039 (N.D. Ohio 1981).

89. *See, e.g.*, United Steel Workers of Am. v. Connors Steel Co., 885 F.2d 1499, 1507-08 (11th Cir. 1988) (statutory violation sufficient in and of itself to provide essential element of fraudulent or inequitable conduct).

90. 15 U.S.C. §§ 1, 2 (1988).

91. 467 U.S. 752 (1984).

92. *Id.* at 771-72.

93. *Id.* at 776.

uniformly,[94] but in the case of lesser ownership, albeit majority control or more, the cases are widely divided.[95]

With a notable exception, courts applying state law also have followed the *Copperweld* doctrine widely in cases arising under state antitrust statutes where wholly owned subsidiaries were concerned.[96] In the same manner, the state courts share the confusion in the lower federal courts and have also divided widely over the application of the doctrine to partly owned subsidiaries.[97]

Since *Copperweld*'s sweeping rejection of entity principles and adoption of enterprise law in antitrust conspiracy, many courts have applied the doctrine to parents and their wholly owned subsidiaries in conspiracy cases arising not only under the Sherman Act, but also in cases arising either at common law, the criminal law, or under other statutes, including patent law. Not all have done so, distinguishing the construction of the antitrust statute from conspiracy problems arising under other areas of the law, including the Racketeer Influenced and Corrupt Organizations Act. Other courts have refused to follow the *Copperweld* analysis in areas other than antitrust even where wholly owned subsidiaries were involved.[98]

2. Environmental Law

In its environmental statutes, the United States has embarked on an extensive regulatory program covering the generation, transportation, and disposal of hazardous waste and imposing onerous financial clean-up obligations on the "owner" or "operator" of a vessel or facility or

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94. *E.g.*, Leaco Enterprises, Inc. v. General Elec. Co., 1989 U.S. Dist. LEXIS 18162 (D. Or. 1990) (91.9 percent); Total Benefit Servs., Inc. v. Group Ins. Admin., Inc., 1993 U.S. Dist. LEXIS 49 (E.D. La. 1993) (85 percent).

95. *Compare* Novatel Communications, Inc. v. Cellular Tel. Supply, Inc., 1986-2 Trade Cas. (CCH) ¶67,412 (N.D. Ga. 1986) (51 percent); Magnum Force Distribs. v. Bon Co. of Am., 47 Antitrust & Trade Reg. Rep. (BNA) 1104 (E.D.N.Y. 1984) (60 percent) (incapable of conspiracy) *with* American Vision Centers, Inc. v. Cohen, 711 F. Supp. 721 (E.D.N.Y. 1989) (54 percent); Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482, 1495 n.20 (79 percent of equity and 100 percent of voting stock) (capable of conspiracy), *vacated on other grounds*, 475 U.S. 1105 (1986).

96. *See* BLUMBERG, LCG-IV, *supra* note 6, § 14.03.2.

The Louisiana Supreme Court refused to follow *Copperweld* in dealing with this problem under the Louisiana statute. It approached the problem in conceptualist terms and applied traditional notions of entity law. It rejected the relevance of the enterprise analysis adopted by the Supreme Court of the United States. Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149 (La. 1986).

97. *See* BLUMBERG, LCG-VI, *supra* note 6, § 14.03.4.

98. *See* BLUMBERG, LCG-IV, *supra* note 6, §§ 7.02.1 nn.13b-c, 30.04 n.20 (Supp. 1995).

on the person who "arranged" for disposition of hazardous wastes.[99] Although there are important decisions rejecting enterprise principles,[100] numerous courts have given "broad" or "liberal" construction to the statutory terms to impose liability on parent corporations for acts of their subsidiaries.[101] The cases turn on the degree of involvement of the parent in the management of the affairs of the subsidiary. Courts also have indicated that less involvement will suffice for a violation based on "operator" status than on "owner" status.

As in the case of most authorities utilizing enterprise principles rather than traditional entity law and imposing intra-enterprise liability on component companies of corporate groups, this development rests, in the final analysis, on the determination of the courts to construe the remedial statutes in a manner which most effectively will implement their objectives. However, that determination faces the resistance of more conservative courts which have concluded that principles of limited liability should be respected, even when being applied for the protection of parent corporations (as distinct from their public shareholders), in the absence of a clear demonstration of Congressional intent to impose such liability. This is one of the most vigorously litigated areas in all American statutory law. It is also a subject over which the decisions of the circuit courts of appeal are in conflict.[102]

3. Labor

Years ago, the National Labor Relations Board, through administrative action, adopted the concept of an "integrated enterprise" to determine whether two or more related corporations comprised a "single employer" for purposes of the National Labor Relation Act. With the

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99. 42 U.S.C. §§ 6901 *et seq.* (1988); 42 U.S.C. §§ 9601 *et seq.* (1988); Pub. L. No. 99-499, 100 Stat. 1625 (1986).

100. Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); Jacksonville Elec. Auth. v. Eppinger & Russel Co., 776 F. Supp. 1542 (M.D. Fla. 1991), *aff'd*, 996 F.2d 1107 (11th Cir. 1993).

101. *E.g.*, United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); CPC Int'l, Inc. v. Aerojet-General Corp, 777 F. Supp. 549 (W.D. Mich. 1991); City of New York v. Exxon Corp., 112 B.R. 540 (S.D.N.Y. 1990); United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989); Idaho v. Bunker Hill Co., 647 F. Supp. 1064 (D. Idaho 1986); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

102. *Compare* Lansford-Coaldale Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993); Kayser-Roth, 910 F.2d 24; *Bunker Hill Co.*, 647 F. Supp. 1064 (alternate holding) (extensive exercise of "control" sufficient) *with* United States v. Cordova Chem Co., 59 F.3d 584 (6th Cir. 1995); *Joslyn Mfg. Co.*, 893 F.2d 80 ("piercing the veil" standards determinative).

approval of the Supreme Court, this functional standard, which focuses on the economic reality of the employment relationship rather than on the technical forms of corporate structure, has served as the foundation for the Board's administration of the Labor Relations Act.[103]

For almost 40 years, the standard has been applied uniformly and has been utilized in administering federal statutory programs that deal not only with labor relations, but with other employment programs, including regulation of employee wages and hours and employment discrimination statutes generally. The "integrated enterprise" standard under the labor statutes involves four factors: interrelation of operations; centralized control of labor relations; common management; and common ownership of financial control.[104]

In recent years, the "integrated enterprise" standard, which was originally developed by an administrative agency and adopted by the courts, has received explicit congressional recognition in the Age Discrimination in Employment Act of 1984[105] and the related 1991 amendments under Title VII of the Civil Rights Act of 1964.[106] Although the statutes utilize "control" and "controlled" as the standard, they define such terms according to the "integrated enterprise" standard to determine the applicability of American anti-discrimination law to foreign subsidiaries of American corporate groups. Most recently, the "integrated enterprise" standard has been adopted in the administration of the Worker Adjustment and Retraining Notification Act of 1988.[107]

Under these statutes, courts readily have imposed liability on parent corporations for statutory violations of their subsidiaries by relying on the "integrated enterprise" standard. Attempts to achieve this result in reliance on traditional corporate law doctrines of "piercing the veil" have been markedly less successful.

103. National Labor Relations Act, 29 U.S.C. §§ 151 *et. seq.* (1988). The doctrine does not apply to other areas of the labor relations law in which the Labor Board does not have primary jurisdiction, such as contract actions in the district courts under the Taft-Hartley Act, 29 U.S.C. § 301 (1988). *See, e.g.*, Local Union 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc., 653 F.2d 143, 147 (5th Cir. 1981). The application of two conflicting standards of jurisprudence to companion provisions of the labor relations law is one of the outstanding anomalies in American law. *See* BLUMBERG, LCG-IV, *supra* note 6, § 13.02.

104. 21 NLRB Ann. Rep. 14 (1956), *approved in* Radio & Television Broadcast Technicians Local Union v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255 (1965) (*per curiam*). *See* BLUMBERG, LCG-IV, *supra* note 6, §§ 13.03, 13.06, 14.05.

105. 29 U.S.C.A. § 623(h) (1995).

106. 42 U.S.C.A. §2000e-1(b), (c) (1995).

107. 29 U.S.C. §§ 2101 *et seq.* (1988). This statute requires 60 day notice of plant shutdowns and relocations by employers of 100 or more full-time employees.

4. Bankruptcy Law

American bankruptcy law has made use of enterprise principles in four major areas to provide relief against parent corporations and other related corporations or parties, contrary to the traditional entity law concepts of corporation law. Judicial law-making has introduced enterprise principles in the administration of bankruptcy law in the areas of substantive consolidation, equitable subordination, and treatment of intra-group guaranties under the fraudulent transfer laws. Section 547 of the Bankruptcy Code expressly recognizes enterprise law in its provisions dealing with voidable preferential transfers.

a. *Substantive Consolidation*

Although the Bankruptcy Code is silent, the bankruptcy courts have developed a body of enterprise law called substantive consolidation for use in selected cases. Under this form of relief, where parent and subsidiary corporations are being administered in bankruptcy, the separate proceedings of the related corporations may be consolidated and all their assets and liabilities pooled in the payment of claims. Courts apply the doctrine where such pooling will advance the interests of creditors as a whole, even though the interests of some individual creditors will be prejudiced.[108] They do so in proceedings involving corporate groups (or controlled corporations and their controlling shareholders) presenting such circumstances as the economic integration of the operations of the related companies, the intermingling of assets, records, and accounts, a reduction in the time and expense of the proceedings that consolidation will make possible, or where consolidation will contribute to an increase in the feasibility of reorganization and continuance of the enterprise. Under any of these circumstances, traditional entity concepts are ignored and the proceedings are consolidated notwithstanding the prejudice to individual creditors of one or another of the corporations in question.[109]

108. Application of the doctrine is intended to increase the total pool of assets available for all creditors. While this will benefit creditors of those debtor companies in the proceedings where the ratio of distributable assets to claims is lower than the ratio under such pooling, it obviously will prejudice those creditors with claims against other debtor companies where the ratio of distributable assets to claims on a separate company basis is higher.

109. *See, e.g., In re* Augie/Restivo Baking Co., Ltd., 860 F.2d 515 (2d Cir. 1988). *See also* BLUMBERG, LCG-II, *supra* note 6, at ch. 10.

Outside of the United States, New Zealand similarly has authorized the pooling of assets and liabilities of related corporations in winding-up proceedings.[110]

b. Voidable Preferences

From 1898 to 1978, American bankruptcy law made voidable all transfers by insolvent corporations in payment of an antecedent debt within 120 days of filing the bankruptcy petition where it enabled a creditor to receive more than it otherwise would have received in the bankruptcy proceedings.[111]

Section 547 of the Bankruptcy Code of 1978 dramatically revised the earlier law. For such transfers generally, it reduced the period of vulnerable transfers from four months to 90 days. While reducing the application of the doctrine in this manner, the Code also strengthened it by providing that insolvency was presumed during such period. In a provision of importance with respect to corporate groups, § 547 dramatically expanded the law. It made voidable all transfers of an insolvent debtor within one year prior to the filing of the bankruptcy petition to controlling persons and other "insiders" or "affiliates." For this purpose, "insider" includes the parent corporation (or other person) in control of the debtor as well as any 20 percent shareholder, 20 percent subsidiary, or 20 percent owned sister subsidiary.[112] It should be noted that comparable provisions now appear in the laws of a number of other countries, including Canada and New Zealand.[113]

Until overruled by the Congress, widespread judicial acceptance of enterprise principles significantly expanded the coverage of § 547 to include transfers to banks and other lenders in repayment of obligations of the debtor that were guaranteed by "insiders." Under such circumstances, such transfers were voidable when made within a year of the bankruptcy petition even where the banks or other lenders were not

110. New Zealand Companies Amendment Act §§ 315A, 315B (1980); *In re* Grazing & Export Meat Co., [1984] 1 N.Z. B.C.R. 668.

In British Commonwealth countries, so-called winding-up proceedings in the corporation statutes, rather than a bankruptcy law, deal with the problem of insolvent corporations.

111. 11 U.S.C. §§ 96(a), (b) (1976) (*repealed* 1978). These were sections 60a and 60b of the Bankruptcy Act of 1898.

112. 11 U.S.C.A. §§ 547(b), (f) (1993); 11 U.S.C.A. §§ 101(2), (31)(B) and (31)(E) (1993).

113. R.S.C., ch. B-3 §§ 95-96, 100 (1985) (Can.) (one year); New Zealand Companies Amendment Act, § 311C (1980) (three years).

"insiders" because the repayments reduced the liability of the "insider" guarantors.[114]

c. *Equitable Subordination*

Going back to landmark cases following the accession of Roosevelt appointees to the federal bench,[115] American bankruptcy law has accepted firmly the doctrine of equitable subordination which rests on a combination of enterprise principles and fiduciary concepts. Under the revised doctrine, where a parent corporation or other controlling shareholder has exercised inequitably its control over a bankrupt subsidiary or controlled corporation to the detriment of the corporation or its public security holders, a bankruptcy court has authority to order deferment of the payment of all claims of a parent corporation (or controlling shareholder) or other affiliate against the bankrupt debtor until the claims of all other claimants have been satisfied.[116] This introduction of enterprise doctrines in the formulation of equitable subordination has expanded its use greatly in comparison with prior law in which subordination rested on compliance with the rigorous requirements of "piercing the veil jurisprudence."[117]

d. *Intra-Group Guaranties and Fraudulent Transfers*

In a number of respects, American courts have adopted enterprise principles in applying the fraudulent transfer laws to intra-group guaranties. In the absence of intentional fraud, the fraudulent transfer laws, whether under § 548 of the Bankruptcy Code or under state law, involve a transfer or guaranty by an insolvent without "reasonably equivalent consideration."[118] Most corporate groups employ a high degree

114. *In re* Wesley Indus., Inc., 30 F.3d 1438 (11th Cir. 1994); *In re* Suffola, Inc., 2 F.3d 977 (9th Cir. 1993); Levitt v. Ingersoll Rand Fin. Corp. (*In re* V.N. Deprizio), 874 F.2d 1186 (7th Cir. 1989). These cases were overruled by the Bankruptcy Reform Act of 1994, 11 U.S.C.A. § 550(c) (1995).

115. Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510 (1941); Pepper v. Litton, 308 U.S. 295 (1939); Taylor v. Standard Gas & Electric Co., 306 U.S. 307 (1939).

116. *See* BLUMBERG, LCG-II, *supra* note 6, at chs. 3, 4.

117. Thus, in the famous *Deep Rock* case, the Supreme Court, relying on the revised doctrine, granted relief which the Circuit Court of Appeals had denied because the conditions for "piercing the veil" could not be satisfied. *Compare* Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939) *with* Taylor v. Standard Gas & Elec. Co., 96 F.2d 693 (10th Cir. 1938), *rev'd*, 306 U.S. 307 (1939).

118. This is the standard of § 548(a)(2)(A) of the Bankruptcy Code and § 5(b) of the Uniform Fraudulent Transfer Act. 11 U.S.C. § 548(a)(2)(A) (1988); 7A U.L.A. 657 (1985). Sections

of financial interdependence among the component companies. This frequently includes a guaranty by one component company in a group of the indebtedness of another. Under entity law analysis, looking at such transactions as arm's length transactions between separate interests, the validity of such guaranties is doubtful. However, through increasing use of enterprise analysis, courts have upheld the validity of such guaranties by recognizing that the affiliated parties are part of the same enterprise and that the borrowing strengthens the guarantor as well as the affiliated borrower by strengthening the financial position of the group.[119]

D. *Judicial Decisions Adopting Enterprise Principles*

1. Substantive Common Law

In contrast to American statutory law, particularly the statutes of specific application where enterprise principles have had such widespread acceptance in shaping the evolving law, the courts have been much less ready to apply enterprise concepts in the place of traditional principles of entity law. Although enterprise principles have been frequently accepted in such areas of judge-made law as jurisdiction and torts, the determination of controversies by reference to entity law continues as a vital, if not predominant, force in American law. The only recognized exception to this rule is courts' alternative use of "piercing the veil" jurisprudence.

In a few instances, enterprise principles have been recognized and applied as such.[120] In most decisions, however, the attribution to a parent corporation or other affiliated corporation of legal consequences arising from the acts of its subsidiary or affiliate has rested on a court's

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3 and 4 of the Uniform Fraudulent Conveyance Act, which had previously served as the basis for most state law and the federal Bankruptcy Act, replaced by the Code in 1978, required "fair consideration" and "good faith." 11 U.S.C. § 107d(s)(2) (1976); 7A U.L.A. 448, 474 (1985). However, the change in wording has not led to a significant difference in result.

119. Intra-group guaranties may be made by a parent corporation of the debt of a subsidiary (down-stream guaranty), a guaranty by a subsidiary of the debt of its parent (up-stream guaranty), and a guaranty by one subsidiary of the debt of a sister subsidiary (cross-stream guaranty). While down-stream guaranties present few problems because strengthening the subsidiary improves the net worth of the parent's investment in the subsidiary, the validity of up-stream guaranties and cross-stream guaranties largely rest on enterprise analysis. *See* Phillip I. Blumberg, *Intragroup (Upstream, Cross-Stream and Downstream) Guaranties under the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 685 (1987).

120. An outstanding example is the "single enterprise" doctrine in isolated Louisiana and North Carolina cases. *See* Pine Tree Assocs. v. Doctors' Assocs., Inc., 654 So. 2d 735 (La. Ct. App. 1995); Green v. Champion Ins. Co. 577 So. 2d 249 (La. Ct. App. 1991); Glenn v. Wagner, 313 S.E.2d 832 (N.C. App. 1984), *rev'd on other grounds*, 329 S.E.2d 326 (N.C. 1985).

relaxation of the rigorous requirements for "piercing the corporate veil" under traditional doctrines of entity law.[121] In some cases, "agency" has served as a basis for application of enterprise principles even though the requirements of traditional agency law had not been satisfied.[122]

In all American jurisdictions, private controversies at common law involving the attribution of intra-enterprise tort or contract liability are governed generally by traditional principles of entity law. Only in "rare" or "exceptional" cases[123] do American courts escape from the strict confines of entity law by invoking the doctrine of "piercing the corporate veil." This is a creation of nineteenth century equity jurisprudence under which equity courts disregard corporate forms where required to prevent fraud.

As stated by the Supreme Court of Texas in *Castleberry v. Branscum*, American "piercing the veil" has taken a number of forms:

> We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately when the corporate form has been used as part of a basically unfair devise to achieve an inequitable result . . . . Specifically . . . (1) when the fiction is used as a means of perpetuating fraud; (2) where a business is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetuate monopoly; (5) where the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied on as protection of crime or to justify wrong.[124]

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121. *E.g.*, United Steel Workers of Am. v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988); Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986). Such decisions typically eliminate the traditional requirement that the controlled corporation has been employed in a fraudulent or inequitable manner. Commission of a tort or violation of a statute has been accepted by this minority to satisfy the requirement.

122. For discussion of the use of "quasi-agency" doctrines, see BLUMBERG, LCG-I, *supra* note 6, §§ 1.02.2, 4.02.1, 4.04.1; BLUMBERG, LCG-III, *supra* note 6, §§ 6.06, 14.03.3.

123. *See, e.g.*, Baker v. Raymond Int'l, Inc., 656 F.2d 173, 179 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982).

124. Castleberry v. Branscum, 721 S.W.2d 270, 271-72 (Tex. 1987) (quoting Pacific Am. Gasoline Co. v. Miller, 76 S.W.2d 833, 851 (Tex. Civ. App. 1934)) (footnotes omitted). The following year, the Texas Legislature overruled the decision insofar as contract matters were concerned. TEX. BUS. CORP. ANN., art. 221A (Vernon Supp. 1996).

The court then added inadequate capitalization as still another basis for disregarding a corporate entity.[125]

Although the Texas court also distinguished "piercing the veil" from the "alter ego" doctrine, most courts have refused to do so, treating the "alter ego" concept and the so-called "instrumentality" doctrine. This latter doctrine has been accepted widely as a statement of the principles governing "piercing the veil," making the two essentially interchangeable terms.[126]

Under the "alter ego" variant of "piercing the veil," the corporate entity is disregarded where the separateness of the corporate entity had ceased and restricting liability to the entity would result in injustice.[127] The instrumentality doctrine employs three factors: (1) excessive control of the subsidiary or controlled corporation destroying its separate existence; (2) use of such control to accomplish a fraud or wrong or violate a statutory or legal duty; and (3) proximate cause of injury to the plaintiff.[128]

While the "instrumentality" doctrine and the closely associated "alter ego" doctrine are stated in somewhat different formulations, they rest essentially on the same factors. Both rest on the excessive exercise of "control" by the dominant parent or shareholder over the subservient subsidiary or controlled corporation and the existence of fraud or conduct that is "morally culpable," "fundamentally unjust" or "inequitable." In all jurisdictions, excessive exercise of "control" and "fraud or inequity" lead to disregard of the corporate entity and imposition of the responsibilities of a subsidiary or other controlled corporation on its parent corporation or controlling shareholder. Liability is imposed in particular when "control" and "fraud or inequity" are accompanied by a

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125. *Castleberry*, 721 S.W.2d at 272 n.3.

126. *See* Wm. Passalacqua Builders., Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 138 (2d Cir. 1991); Bendix Home Sys., Inc. v. Hurston Enters., Inc., 566 F.2d 1039, 1041 (5th Cir. 1978) (*per curiam*) (Florida law) ("no material difference").

Connecticut employs a third variation, the so-called "identity" doctrine. Although expressed in somewhat different terms, it utilizes substantially the same factors. *See* Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc., 447 A.2d 406 (Conn. 1982) (Borden, J., dissenting); Zaist v. Olson, 227 A.2d 552, 558 (Conn. 1967).

127. *See* Castleberry v. Branscum, 721 S.W.2d 270 (1987).

128. *See* Lowendahl v. Baltimore & O.R.R., 287 N.Y.S. 62, 76 (1st Dep't), *aff'd*, 6 N.E.2d 56 (1936).

disregard of corporate formalities and failure to maintain corporate separateness.[129]

The dominance of traditional entity law reinforced by the rigorous traditional requirements for "piercing the veil" is particularly notable in such areas as contract law, in which enforcing a party's expectations plays a major role, or in property law, where stability of a long-term relationship is a paramount concern. But, there are other classes of common-law controversies between private parties in which enterprise principles have achieved greater success. While most tort cases follow the older doctrines of entity law, with each related corporation in an integrated group liable only for its own acts, an impressive number of tort cases have imposed intra-enterprise liability on the parent corporation for the subsidiary's torts.[130]

This increasing imposition of intra-enterprise liability in tort cases has been accomplished by courts that have used significantly relaxed versions of "piercing the veil," although in form they have purported to apply traditional doctrines. As noted previously, this very technique has been followed frequently in cases involving the construction of statutes of general application. However, in contrast to the tort decisions, the courts construing such statutes typically have recognized their modification of the traditional doctrine. They have justified their relaxation of traditional requirements because the implementation of governmental policies and objectives were involved, rather than private controversies.[131]

In some tort cases, enterprise concepts have been invoked expressly. This is particularly true in litigation involving catastrophic torts where the courts appeared to be particularly aware of the public pressures for imposing group liability.

Three dramatic American cases involving events of this nature are the Amoco Cadiz Oil Spill in the English Channel,[132] the Bhopal Di-

129. *See* BLUMBERG, LCG-III, *supra* note 6, at ch. 6.

130. In BLUMBERG, LCG-III, *supra* note 6, at ch. 10, the author has collected scores of cases imposing intra-enterprise tort liability. However, even more cases continue to reject such liability.

131. *See* Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981); Capital Tel. Co. v. FCC, 498 F.2d 734, 738-39 (D.C. Cir. 1974); Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965); SEC v. Elmas Trading Corp., 620 F. Supp. 231, 234 (D. Nev. 1985); United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1039 (N.D. Ohio 1981); United Paperworkers Int'l Union v. Penntech Papers, Inc., 439 F. Supp. 610, 620-21 (D. Me. 1977), *aff'd sub nom.*, United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978).

132. *In re* Oil Spill by the "Amoco Cadiz" off the Coast of France on Mar. 16, 1978, 1984

saster in India,[133] and the Exxon Valdez Oil Spill in Prince William Sound.[134] In these much publicized cases, it appeared that both the courts and the parent corporations were ready to impose or accept liability for the acts of the subsidiaries because of the intense public concern over the high human and environmental costs created by the catastrophic disasters.

The *Amoco Cadiz* case involved a tanker discharge of oil in the English Channel that befouled the sea and beaches on French, Belgian, and Dutch coasts. Though the trial found the parent company directly liable for its own negligence, the district court, in an alternative holding, imposed liability on the parent of the group in reliance on enterprise principles. It held: "As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard [the parent] is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities [directly involved in the oil spill]."[135]

In the *Bhopal* case, the Government of India's complaint based one of its six causes of action on enterprise principles.[136] The American decisions in this litigation turned on procedure and *forum non conveniens* and never reached the substantive issue. However, in referring the case to the Indian courts, the court conditioned the referral on an agreement by the American parent corporation to accept the decision of the Indian courts with respect to its own liability.[137] The Indian courts

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A.M.C. 2123 (N.D. Ill. 1984) (finding No. 43), *aff'd*, 954 F.2d 1279 (7th Cir. 1992).

133. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir. 1987).

134. *In re* the Exxon Valdez, 1995 A.M.C. 1429 (D. Alaska 1994).

135. *Amoco Cadiz*, 1984 A.M.C. 2123 (finding No. 43). The judgment was ultimately upheld on appeal. 954 F.2d 1279 (7th Cir. 1992).

136. Count I, entitled "Multinational Enterprise Liability," alleged, among other things:

> The complex corporate structure of the multinational with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals. In reality, there is but one entity, the monolithic multinational . . . . A multinational corporation has a primary, absolute and non-delegable duty to the persons and country in which it has in any manner caused to be undertaken any ultrahazardous or inherently dangerous activity.

Plaintiff's Complaint, Union of India v. Union Carbide Corp., No. 85 Civ. 2696 (S.D.N.Y. 1985), *subsequently decided sub. nom. Bhopal*, 634 F. Supp. 842, *aff'd and modified*, 809 F.2d 195.

137. *Bhopal*, 634 F. Supp. 842, *aff'd and modified*, 809 F.2d 195.

found the parent liable, and in the settlement of the litigation,[138] the American parent paid the overwhelming part of the damages.

The Exxon Valdez environmental disaster resulted from the negligence of a tanker subsidiary of an integrated international oil company. With public indignation at a very high level, Exxon, the parent corporation, was concerned with the impact of the catastrophe on consumer attitudes. Accordingly, the parent corporation did not choose to contest its liability for the negligence of its subsidiary.

Enterprise principles also have been used widely in tort cases arising in the taxicab industry. Where a corporate group in the taxicab industry operates taxicabs owned by a number of subsidiaries or sister corporations as an integrated fleet with a common public persona, typically involving common logos, trade names, and color schemes, supported by common garage, maintenance, dispatching and other facilities, the parent or sister corporations have been held liable for the tort liability arising from any one of the taxicabs.[139]

Finally, enterprise principles also were employed to widen the range of liability in the early days of product liability. Before the full flowering of the product liability doctrine, the presence of related corporations, such as parent and subsidiary, in different stages of the product development-production-distribution-retail sale chain of commerce, was used by courts to justify the imposition of liability upon an affiliate that otherwise would have escaped liability under then-accepted doctrines requiring direct participation in the tort.[140] With the final triumph of enterprise liability generally in product liability law and the imposition of liability on all parties involved at any stage in commerce involving

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138. Charan Lal Sahu v. Union Carbide, [1989] 1 S.C.C. 674; 2 S.C.C. 540; 3 S.C.C. 38; Union Carbide Corp. v. Union of India, AIR, [1990] 1 S.C.C.273.

139. Mull v. Colt Co., 31 F.R.D. 154 (S.D.N.Y. 1962) (New York law); Robinson v. Chase Maintenance Corp., 190 N.Y.S.2d 773 (N.Y. Sup. Ct. 1959); Mangan v. Terminal Transp. Sys., Inc., 284 N.Y.S. 183 (N.Y. Sup. Ct. 1935), *aff'd per curiam*, 286 N.Y.S. 666 (N.Y. App. Div. 1936). *See* Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966). The latter case has received much attention for its refusal on the pleadings before it to apply "piercing the veil jurisprudence" and hold the individual controlling shareholder liable for the tort liability of the controlled corporation operating the taxicab. However, in so doing, the court pointedly made it clear that the sister corporations would be liable:

> [I]t is one thing to assert that a corporation is a fragment of a larger corporate combine which actually conducts the business. It is quite another to claim that the corporation is a "dummy" for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends.

Walkovszky, 223 N.E.2d at 8. *See* BLUMBERG, LCG-III, *supra* note 6, § 12.02.

140. *E.g.*, Bathory v. Procter & Gamble Distrib. Co., 306 F.2d 22 (6th Cir. 1962) (Michigan law).

dangerously defective products,[141] the ready availability of liability under the newer tort law doctrine made further reliance on corporate enterprise principles unnecessary.

2. State doctrines

In some states such as Louisiana and North Carolina, courts have developed their own unique doctrines of enterprise law without reference to traditional "piercing the veil" jurisprudence. For instance, in litigation involving the scope of the administrative powers of its Insurance Commissioner in the rehabilitation of an insurance component of a corporate group, the Louisiana court upheld administrative authority over the entire group and utilization of the assets of non-insurance company affiliates as assets of the insurance affiliate.[142] The court relied on the fact that a "single business enterprise" was involved. The court found that the group constituted a "single economic entity despite internal compartmentalization" and that "excessive fragmentation of a single enterprise into different corporations" had occurred.[143]

The "single business enterprise" doctrine has not been confined to construction of the insurance statute. It has been applied in Louisiana cases involving common law controversies as well.[144] Similarly, in isolated tort decisions, the North Carolina courts have used a "single business enterprise" doctrine as the basis for the imposition of intra-enter-

141. RESTATEMENT (SECOND) OF TORTS § 402A (1965); RESTATEMENT (THIRD) OF TORTS ch. 1 (Tentative Draft No. 2, 1995).

142. Green v. Champion Ins. Co., 577 So. 2d 249 (La. Ct. App. 1991) (The companies constituted a "single business enterprise" and a "single economic entity despite the internal compartmentalization" or "fragmentation" by separate incorporation.).

143. *Green*, 577 So. 2d at 259.

144. Pine Tree Assocs. v. Doctors' Assocs., Inc., 654 So. 2d 735 (La. Ct. App. 1995) (contract); Brown v. Automotive Casualty Ins. Co., 644 So. 2d 723 (La. Ct. App. 1994) (insurance rehabilitation). In *Pine Tree Assocs.*, the court, quoting *Green v. Champion Ins. Co.* among others, stated:

> Where two or more corporations operate a single business, the courts have been unwilling to allow affiliated corporations that are not directly involved to escape liability simply because of the business fragmentation. In addition to using a *"piercing the veil"* theory to disregard a corporate identity, the "single business enterprise" or "instrumentality" theory has been used to extend liability beyond a separate entity.

654 So. 2d at 738 (quoting *Green*, 577 So. 2d at 257) (emphasis added) (citations omitted).

prise liability.[145] Whether these decisions, however, mean a permanent change in Louisiana and North Carolina tort law is far from clear.

3. Judicial Procedure

In some areas of American procedural law, enterprise principles have made marked inroads. These include such areas as jurisdiction, claim preclusion (res judicata) and issue preclusion (collateral estoppel), pre-trial discovery, and some aspects of the application of statutes of limitation. In these areas involving procedural matters rather than issues of substantive liability, the sharply reduced role of limited liability contributes to a more ready abandonment of established concepts of the separate juridical existence of each affiliated corporation.

a. *Jurisdiction*

In recent decades, American constitutional standards for the assertion of judicial *in personam* jurisdiction have moved from older concepts of "presence" and "doing business" to an evaluation of the existence of "minimum contacts" according to the standards of the *International Shoe* decision and its progeny.[146] Under the influence of this change, the courts have divided increasingly on the circumstances under which jurisdiction may be asserted over a foreign affiliate in reliance on the activities of a local affiliate with which it is conducting a common business under common control. While many American courts still adhere to the older view in which the forms of separate corporate existence are decisive,[147] a significant number of courts have relied on enterprise principles to uphold the assertion of jurisdiction over foreign parents (and subsidiaries) of domestic subsidiary (or parent) corpora-

145. Glenn v. Wagner, 313 S.E.2d 832, 843 (N.C. Ct. App. 1984), *rev'd on other grounds*, 329 S.E.2d 326 (N.C. 1985). The intermediate appellate court stated: "The extension of liability for a corporation's obligations beyond the confines of its own separate corporate entity is appropriate in those cases where an essentially single business or economic enterprise is nevertheless conducted through several separate corporations . . . ." The court described this as the "'single enterprise' theory of inter-corporate liability."

146. International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945). Subsequent decisions have engrafted additional requirements such as the party's "purposeful[] avail[ment]" and "substantial connection" with the benefits of the forum, its reasonable anticipation of being hailed into litigation in the courts of the forum and whether the assertion offends concepts of "fair play and substantial justice." *E.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 297 (1980); Hanson v. Denckla, 357 U.S. 235, 252-53 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957).

147. *E.g.*, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925).

tions.[148] A powerful force strengthening this development has been the development of the "stream of commerce" doctrine[149] in which jurisdictional concepts have been expanded, particularly where foreign-based multinationals are involved. This doctrinal expansion matches the expanded "enterprise liability" content of modern product liability law. While this movement originated in product liability litigation, courts have extended it to other matters, including patent infringement and contracts.[150]

b. *Claim and Issue Preclusion*

Enterprise principles prevail in both claim preclusion (res judicata)[151] and in issue preclusion (collateral estoppel).[152] American courts have extended claim preclusion to bind affiliated corporations of a party as well as the party itself. Thus, a parent (or a subsidiary) is bound by a prior adverse judgment on the same claim involving the same defense in a prior action brought by its subsidiary (or parent). Similarly, a parent (or subsidiary) is protected by a prior favorable judgment for its subsidiary (or parent) in a prior action on the same claim involving the same defense brought by the same plaintiff.

In the same manner, the doctrine of issue preclusion has been applied to the members of corporate groups. Where an issue has been litigated and determined in a prior action involving its parent (or subsidiary) corporation the subsidiary (or parent) corporation is bound by the finding of the issue in the prior action.[153]

The courts have applied the doctrines of claim preclusion and issue preclusion to members of corporate groups in keeping with the broader doctrine that applies such doctrines of preclusion to all non-parties whose interests in and relationship to the litigation are so closely relat-

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148. *See* BLUMBERG, LCG-I, *supra* note 6, at chs. 3-5.

149. Under the "stream of commerce" doctrine, courts have asserted jurisdiction over foreign parent corporations of American subsidiaries or distributors where a substantial volume of the parent's products were distributed to the jurisdiction and the parent could have reasonably anticipated that claims would ensure. *See* BLUMBERG, LCG-I, *supra* note 6, § 5.12a (Supp. 1995).

150. *See* BLUMBERG, LCG-I, *supra* note 6, § 3.08 and §§ 5.12a-5.12b (Supp. 1995).

151. A final judgment on the merits by a court with jurisdiction binds the parties with respect to the cause of action or any defense thereto; this is res judicata or claim preclusion.

152. Issue preclusion (or collateral estoppel) applies when an issue of law or fact has been litigated and determined in an action between the parties and the determination was essential to the final judgment. In such event, the parties are bound by the determination in subsequent litigation of any kind.

153. *See* BLUMBERG, LCG-I, *supra* note 6, §§ 11.02-11.03.

ed to a party as to make it appropriate to extend the finality of the judgment to them. This is intended to serve judicial efficiency as well as fairness because under these circumstances, one may conclude fairly that the corporate affiliates functioning under common control and the other closely related parties have already had their "day in court."[154]

c. *Pre-Trial Discovery*

Under the Federal Rules of Civil Procedure, parties may achieve pre-trial discovery through interrogatories of "such information as is available"[155] and the production of documents in the "possession, custody, or control" of another party.[156] These provisions have been construed expansively to authorize discovery on a group-wide basis, including not only parties to the litigation but all corporations in the corporate group of which the party is a member. "[P]ossession, custody, or control" of a subsidiary has been construed to include documents of its parent and sister corporations as well.[157]

In multinational enterprises, this construction has led to extraterritorial assertion of American judicial power over foreign corporations, leading to serious international confrontation. In consequence, no less than 15 countries adopted so-called blocking statutes restricting the release of documents pursuant to an order from a court or agency in another country and forbidding compliance with American judicial discovery orders.[158]

The United States has joined with the European powers to eliminate or reduce such disputes. With respect to litigation generally, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters[159] and in the antitrust area in particular, agreements with the European Union, Australia, Canada, and Germany have sharply reduced the areas of controversy.[160]

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154. *See* 18 CHARLES A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4460 (1981).

155. FED. R. CIV. P. 33(a).

156. FED. R. CIV. P. 34(a)(1).

157. FED. R. CIV. P. 33(a), 34(a)(1). Canadian law is much the same. Canadian Rules of Civil Procedure, Rule 30.02.4. Can. O. Reg. 560/84.

158. *E.g.*, British Protection of Trading Interests Act, 1980, 1980 Stats. 8(5), at 313, §§ 2, 4; French Law of July 16, 1980, Law No. 80-538, 1980 J.O. 1799; Canadian Combined Investigation Act, Rev. Stat. Can. ch. C-23, § 31.5. *See* BLUMBERG, LCG-I, *supra* note 6, § 10.10.

159. Convention for the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241, (text reprinted at 28 U.S.C.A. § 1781 (Supp. 1995)).

160. Agreement Regarding the Application of Competition Laws, Sept. 23, 1991, U.S.-E.C., 30

d. *Statutes of Limitation*

Where a plaintiff mistakenly has begun an action against a parent (or subsidiary) corporation of a corporate group within the statutory period for filing such actions and then, after the expiration of the period, seeks to add or substitute the subsidiary (or parent or sister subsidiary), the courts have construed Federal Rule 15(c) to permit such an action. This is possible only where the other party had received notice of the action during the statutory period and knew or should have known that but for a mistake concerning the identity of the party, the action would have been brought against it.[161] The courts support this application of enterprise law by emphasizing that the affiliated parties have identical interests, their close interrelationship, and the reasonable assurance that notice to one constituent company would be brought to the attention of the other.[162]

4. Corporate Procedure

In three procedural areas pertaining to corporations—multiple derivative actions, inspection of books and records of subsidiaries, and voting of parent stock held by subsidiaries—American courts have departed from entity law to apply enterprise principles.

a. *Multiple Derivative Actions*

The American derivative action authorizes a shareholder of a corporation, upon notice and demand to the corporation, to institute an action in the name of, on behalf of, and for the benefit of the corporation, either against a third party or against corporate officers or directors.[163] Under the multiple derivative action doctrine, the derivative remedy has

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I.L.M. 1487 (1991). After the European Court held that the agreement negotiated by the European Commission was beyond its power, France v. European Commission (Case C-327/91 1994), the European Union approved it. Common Mkt. Rep. (CCH), EC Update No. 58, Apr. 27, 1995, at 1. *See also* Agreement Relating to Cooperation in Anti-Trust Matters, June 29, 1982, U.S.-Austrl., 34 U.S.T. 389, 21 I.L.M. 702 (1982); Memorandum With Respect to the Application of National Anti-Trust Laws, March 9, 1984, U.S.-Can., 23 I.L.M. 275 (1984); Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, 1039 U.N.T.S. 345 (1976).

161. FED. R. CIV. P. 15(c). *See* BLUMBERG, LCG-I, *supra* note 6, at ch. 12.

162. *See, e.g.*, Lockett v. General Fin. Loan Co., 623 F.2d 1128, 1131 (5th Cir. 1980); Horwitt v. Longines Wittnauer Watch Co., Inc., 388 F. Supp. 1257, 1258-59 (S.D.N.Y. 1975).

163. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.01 (1994); 13 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5977 (rev. perm. ed. 1991).

been broadened to authorize a derivative action by a shareholder of a parent corporation in the name and on behalf of a subsidiary corporation (or even a second-tier subsidiary corporation), although the shareholder of the parent corporation does not hold directly any shares in the subsidiary.[164] This includes majority-owned and sister subsidiaries as well as wholly owned subsidiaries.[165] Apparently, no American court has considered this question with respect to minority-owned controlled subsidiaries of a corporate group, although the result should be the same. This is particularly true in the case of an action against the parent or its officers or directors for alleged breach of fiduciary duty where the parent board of directors may not be expected to act.

b. *Inspection of Books and Records*

Under American common law and statutory law, a shareholder has the right to inspect the stock ledger book and other books and records of a corporation in which it holds shares provided that it is doing so for a "proper purpose."[166] Although there is surprisingly little authority on the matter, the cases considering this issue have divided over whether a shareholder's right of inspection includes the books and records of subsidiary corporations as well.[167] Since access to the information concerning subsidiaries is directly related to the rationale for recognition of

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164. *E.g.*, Marcus v. Otis, 168 F.2d 649, *aff'd on reh'g*, 169 F.2d 148 (2d Cir. 1948); Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir. 1944), *cert. denied*, 323 U.S. 737 (1944); United States Lines, Inc. v. United States Lines Co., 96 F.2d 148 (2d Cir. 1938); Kaufman v. Wolfson, 151 N.Y.S.2d 530, 532 (N.Y. Sup. Ct. 1956). *See* BLUMBERG, LCG-I, *supra* note 6, at ch. 16; AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 165, § 7.02, cmt. f.

165. *United States Lines*, 96 F.2d 148; *Kaufman*, 151 N.Y.S.2d at 532.

166. *See* 5A WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 2213-2215 (rev. perm. ed. 1995); 4 MODEL BUS. CORP. ACT ANN. § 16.02 (Supp. 1995). A "proper purpose" is the existence of a reasonable relationship to one's interest as a shareholder.

167. Some courts have recognized the right of inspection in the intragroup context. *E.g.*, Sack v. Cadence Indus., C.A. No. 4747 (Del. Ch. Apr. 9, 1975), 4 Del. J. Corp. L. 223 (1978); Leeds v. G. Fried & Sons, 117 N.Y.S.2d 400 (N.Y. Sup. Ct. 1952), *rev'd on other grounds*, 119 N.Y.S.2d 265 (N.Y. App. Div. 1953). Most examine the problem by reference to "piercing the veil jurisprudence." *See* BLUMBERG, LCG-I, *supra* note 6, §§ 18.02-18.03.

While providing that every director of the parent corporation has the right to inspect the books of subsidiary corporations, the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* does not discuss whether the shareholders of the parent have a right to do so. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 165, § 3.03(a) and Reporter's Note 5. The Model Business Corporation Act similarly does not address the problem. 4 MODEL BUS. CORP. ACT ANN., § 16.02 (Supp. 1995).

the basic right of inspection, the better view would uphold inspection. A California statute so provides.[168]

c. *Voting of Parent Stock Held By Subsidiaries*

In cases where a subsidiary corporation owns shares of its parent corporation, American statutes and judicial decisions have held uniformly that the subsidiary is barred from voting such shares in the election of directors of the parent corporation.[169] This sound policy rests on the undesirability of permitting the members of the board of directors of the parent, who have the power to command the manner of voting of such shares by a subsidiary, from using such votes for their own re-election or the election of their designees.

This doctrine has been applied in cases involving shares held by subsidiaries that were at least majority-owned. It should also apply to shares held by any controlled corporation, even where minority-owned. Notwithstanding the reduced stock interest of the parent corporation, where it has "control" of the subsidiary, it retains the power to direct the voting of the shares. The evil giving rise to the doctrine is equally prevalent in minority-owed subsidiaries as it is in majority-owned subsidiaries. "Control," however achieved, and the existence of the underlying evil, should be recognized as the crucial factors that bring the underlying policy into play.[170]

III. INTERNATIONAL ACCOMMODATION OF CONFLICTING NATIONAL LAW USING EXTRATERRITORIAL ENTERPRISE PRINCIPLES

This is an era of national law and world business. Multinational enterprises, consisting of parent and subsidiary corporations incorporated under and governed by the national laws of numerous nation-states,

168. *E.g.*, CAL. CORP. CODE § 1601(a) (West 1977). *See* BLUMBERG, LCG-I, *supra* note 6, § 18.06.

169. 2 MODEL BUS. CORP. ACT ANN. § 7.21(b) (Supp. 1995). *See* BLUMBERG, LCG-I, *supra* note 6, at ch. 19. Although the American jurisdictions are substantially divided over the issue of voting parent shares held by a subsidiary in a fiduciary capacity, the Model Act provides such shares may be voted. 2 MODEL BUS. CORP. ACT ANN. § 7.21(c) (Supp. 1995).

170. While the provision in the Model Act is limited to majority-owned subsidiaries, the Official Comment recognizes that the purpose of "[t]he prohibition to prevent management from using corporate investment to perpetuate itself in power[]" is also present when the parent owns a "large but not majority interest," that is, controls the subsidiary. 2 MODEL BUS. CORP. ACT ANN. § 7.21 cmt. 3 (Supp. 1995).

dominate the world economy. Thus, the use of enterprise principles to bring a multinational group, with its many foreign constituent companies, under the national regulatory program of the parent corporation, inevitably sets the stage for international confrontation and controversy. As the national legal systems of the great industrial powers increasingly use enterprise principles to deal with the problems presented by corporate groups in order to achieve more effective implementation of their domestic regulatory programs, the pressure has increased severely for international efforts to deal with the resulting conflict. This is the international dimension of the law of corporate groups.

Recognizing this problem, the United States and a number of European nation-states, as well as the European Union itself, have joined on a number of occasions to achieve improved international accommodation of the overlapping national regulatory programs. There have been a number of encouraging developments of this nature. These include the proliferation of bilateral tax treaties and of international efforts for harmonization of national tax laws,[171] international agreements on coordination and cooperation of the enforcement of antitrust laws between the United States and England, Germany, and now the European Union,[172] and the growing application of the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.[173] The statutory exclusions in the American employment discrimination laws to avoid conflict with foreign law represent a further unilateral step in the same direction.[174]

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171. For tax treaties, see Fed. Tax. Rep. (CCH) ¶¶ 2690 (France, 1968, amended 1979, 1983, 1988); 2695 (Germany, 1990); 2725 (Italy, 1985); 2850 (United Kingdom, 1980). *See also* Stephen G. Utz, *Tax Harmonization and Coordination in Europe and America*, 9 CONN. J. INT'L L. 767 (1994).

172. Agreement on the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1487 (1991). After the European Court held that the agreement negotiated by the European Commission was beyond its power, France v. EC Commission (Case C-327/91 (1994)), the European Union Parliament and Council approved it. Common Mkt. Rep. (CCH), EC Update No. 58, Apr. 27, 1995, at 1. *See also* 23 I.L.M. 275 (Can., 1984); 21 I.L.M. 702 (Austl., 1982); 15 I.L.M. 1282 (F.R.G., 1976).

173. Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241, (text reprinted at 28 U.S.C.A. § 1781 (1995)). In Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 546 (1987), the Supreme Court held that use of the Hague Convention by United States courts was not mandatory. However, the courts should use "special vigilance" to prevent foreign litigants from abuse and to demonstrate due respect for any sovereign interest expressed by another nation. Four concurring judges contended that "there should be a general presumption favoring use of the Convention" rather than the Federal Rules unless the Convention proved futile or unhelpful. *Id.* at 568 (Blackmun, J., concurring and dissenting in part).

174. Age Discrimination in Employment Act, 29 U.S.C.A. § 623 (1995); Title VII of the

The application of national law to problems of world business inevitably results in international controversy and confrontation. As statutory programs are extended to the extraterritorial operations of American corporate groups, including their foreign subsidiaries, these problems become more and more serious. The task of finding accommodation for the clash of national regulatory programs is a fundamental problem for the international order.[175]

IV. ENTERPRISE PRINCIPLES AS A FORM OF RELATIONAL LAW

Any discussion of American corporate groups would not be complete without recognizing that the application of enterprise principles for the attribution of rights and liabilities between parent and subsidiary corporations is only a sub-set of the larger legal problem of attributing rights and liabilities among the participants in collective commercial undertakings generally. Similarly, it is not recognized that these developments represent what Dean Roscoe Pound a century ago termed "relational law," the determination of legal rights and responsibilities by reference to status, not contract.[176]

The application of enterprise doctrines to commercial undertakings occurs in response to the presence of three fundamental factors: economic integration, "control," and interdependence of the participating interests. Whether or not linked by stock or by contract, when parties join in the collective conduct of an integrated economic activity, much the same pressures for application of enterprise principles are present. These pressures are strengthened when the contract establishes a relationship of dominance and subservience and when the subservient party is one of a number under the control of the dominant party conducting different fragments of a common business. Where the contract requires

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Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et. seq.* (1995). These provisions exclude compliance with the acts if it would "violate the laws of the country in which [the] workplace is located." "[L]aws of the country" has been construed to include collective bargaining agreements. Mahoney v. RFE/RL Inc., 47 F.3d 447 (D.C. Cir. 1995).

175. *See* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993); Phillip I. Blumberg, *National Law and Transnational Groups and Transactions: Survey of the American Experience*, 5 AUSTL. J. CORP. L. 295 (1995) (presented in December 1994 in Brisbane, Australia at the First Annual Asia-Pacific Economic Law Forum).

176. 1 ROSCOE POUND, JURISPRUDENCE 210-21 (1959); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 12-29 (1921).

the subservient party's conduct of the collective business under the trade name, logo, and other indicia of the public persona of the dominant party, the parallel to the corporate group linked by stock is even more apparent.

Franchisors and franchisees which today represent a major segment of the American economy[177] most strongly raise the issue of the application of enterprise principles to collective undertakings resting on contract. Other examples include licensors and licensees, and contractors and subcontractors or others in an integrated contractual chain.

These examples of the application of enterprise principles to commercial undertakings do not stand alone. There are numerous developments in American law that involve comparable application of enterprise principles and the growing expansion of relational law - or law flowing from status (or relationship) rather than contract - in modern commercial affairs. In addition to corporate groups linked by stock ownership and those linked by contract, American law includes such dynamically developing areas of enterprise law as lender liability and successor liability in corporation law, enterprise liability in product liability law, and comparable developments emerging in American health law.

This acceptance of relational principles in major areas of the modern economy has close parallels in earlier common law developments in related areas that often did not involve large-scale business operations. An outstanding example is the venerable doctrine of *respondeat superior* in the attribution of tort liability from servant to master.[178] Another example has been the acceptance of the doctrine of inherent agency.[179] This phenomenon, almost entirely ignored in the literature,[180] cannot be discussed adequately here due to the restricted

177. In 1991 542,500 American franchised operations generated annual sales of about $750 billion. Auto and truck dealers and gasoline service centers accounted for about 25 percent of these franchised establishments and represented as much as 66 percent of aggregate sales. The others largely consisted of restaurants, hotels, food retailers, and service companies of various kinds. Stat. Abstr. of the U.S. tab. 1314 (1993).

178. *See* 5 FOWLER HARPER ET AL., LAW OF TORTS ch. 26 (2d ed. 1986).

179. RESTATEMENT (SECOND) OF AGENCY § 8A (1958). *See* WARREN A. SEAVEY, HANDBOOK OF AGENCY § 8F (1964).

180. For exceptions, see Hugh Collins, *The Transformation Thesis and the Ascription of Contractual Responsibility*, *in* PERSPECTIVES OF CRITICAL CONTRACT LAW 293-310 (T. Wilhelmsson ed., 1993); Gunther Teubner, *Piercing the Contractual Veil? The Social Responsibility of Contractual Networks*, *in* PERSPECTIVES OF CRITICAL CONTRACT LAW 211-40 (T. Wilhelmsson ed., 1993); Gunther Teubner, *Beyond Contract and Organization? The External Liability of Franchising Systems in German Law*, *in* FRANCHISING AND THE LAW: THEORETICAL AND COMPARA-

scope of this paper. It will, however, be the subject of the seventh and concluding volume of the author's series entitled *The Law of Corporate Groups.*

V. CONCLUSION

In the last half century, the acceptance of enterprise principles in American law, primarily on the statutory and administrative level, but also in judicial decisions, has become a more prominent feature of the law governing commercial and financial activity. American law in this area cannot be understood properly without a clear recognition of this development.

American law presents a paradox. Of all the countries in the world, it has experienced the most prominent growth of the application of enterprise law to corporate groups. This is particularly true in the statutory area as evidenced by the existence of pervasive regulatory programs dealing with banking, savings and loan, insurance, and public utility holding companies as well as statutes more selectively applying enterprise principles to securities, labor, anti-discrimination, employee pensions statutes, and foreign trade and investment. Moreover, this growth also has occurred in numerous areas of judicial lawmaking involving private controversies at common law, particularly torts, as well as in judicial procedure and corporate procedure.

At the same time, the jurisprudential significance of this major development in the American legal system has still not been recognized widely. The American bench and American commentators still most often approach the problem as primarily one of corporate law to be determined by traditional entity law and "piercing the veil" jurisprudence.[181] In contrast, European and Australian legal literature on the legal problems of corporate groups is voluminous.[182]

TIVE APPROACHES IN EUROPE AND THE UNITED STATES 105-32 (C. Joerges ed., 1991); Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Interaction*, 53 MOD. L. REV. 731 (1990).

181. The author's treatise, THE LAW OF CORPORATE GROUPS, *supra* note 6, and his MULTINATIONAL CHALLENGE TO CORPORATION LAW, *supra* note 174, virtually constitute the only extensive consideration of the development.

182. *See, e.g.*, J. Antunes, *Liability of Corporate Groups, in* 10 STUDIES IN TRANSNATIONAL ECONOMIC LAW (N. Horn & R. Buxbaum eds., 1994); KONZERNRECHT IM AUSLAND (M. Lutter ed., 1994); THE LAW RELATING TO CORPORATE GROUPS (M. Gillooly ed. 1993) (Australia); 2 LEGAL AND ECONOMIC ANALYSES ON MULTINATIONAL ENTERPRISES (Klaus J. Hopt ed., 1982); REGULATING CORPORATE GROUPS IN EUROPE (D. Sugarman & G. Teubner eds., 1990); FRANK WOOLDRIDGE, GROUPS OF COMPANIES: THE LAW AND PRACTICE IN BRITAIN, FRANCE AND GER-

Nor has the true jurisprudential nature of the development been adequately recognized. Enterprise law is relational law. The attribution of legal rights and responsibilities from one related party to another with whom it is collectively conducting a common business under common control rests on status not contract. This is a development of historic proportions. Sir Henry Maine's dictum that the history of the English law is best understood as the movement from status to contract[183] is part of the educational inheritance of every American and English lawyer. However, in commercial areas, the reality is quite different. The movement of American law is from contract to status.

Multinational corporations and other corporate groups present major problems for all nation-states in which they conduct business. As discussed above, these underlying problems have given rise to extensive application of enterprise principles in the national systems of regulatory law involving major industries, tax law, and the adjudication of controversies in the national courts.

In this century, large corporations have become even larger, have burst their national boundaries, and in all countries, conduct themselves as multinational corporations doing business the world over. Multinationals increasingly dominate in the new global economy. The application of national law to world business resting on the extraterritorial imposition of enterprise principles to foreign subsidiaries of multinational parent corporations leads to inevitable confrontation with foreign nations that are pursuing differing policies and objectives. In the world global market, enterprise principles have made national legal systems inadequate. Nor do contemporary concepts of international law provide a solution. The need to fashion an international legal order that can respond adequately to the problems so presented is becoming more urgent.

MANY (1981).

183. HENRY MAINE, ANCIENT LAW 164 (2d ed. 1874).