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## Liability of a Parent Corporation for the Obligations of an Insolvent Subsidiary under American Case Law and Argentine Law


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### I. Introduction [3]

Modern authors have stressed the increasing unacceptability of the concept of *entity law* and the emergence of the doctrine of *enterprise law* with respect to many aspects of the legal relationships of parent and subsidiary corporations. This change is very significant because it reflects a growing unwillingness on the part of the courts and legislatures to continue accepting the traditional view of corporate law when it no longer corresponds to the reality of the modern business enterprise in a complex industrialized international society.

The increase in the scale of business operations reflects a number of factors. First, the economic basis of all the industrialized nations has greatly expanded. The national product has multiplied throughout the industrialized world. Further, most important businesses of a certain size tend to outgrow their original national limitations. The large corporation is now typically a multinational enterprise doing business in many countries throughout the world. Finally, aggregate concentration (the share of the nation's corporate assets, sales, and income represented by large corporations) has increased. [4]

To conduct economic undertakings of such magnitude, the large enterprise is inevitably driven to abandon the simple twentieth century form of corporate organization and must develop a complex corporate structure. For tax, accounting, political or administrative convenience, or to avoid qualification under foreign corporation statutes, the large corporation today almost universally conducts its business through many subsidiary corporations. The parent and the subsidiaries constitute a corporate group, which collectively conducts the business of the enterprise throughout the world. [5] In some cases, the subsidiaries conduct truly separate businesses and most often the subsidiary is only a part or fragment of the larger business of its parent, which is collectively conducted by the various affiliates under common direction.

This change in the structure and conduct of the large business corporation is inevitably producing a decisive change in the way that the law deals with the individual constituent companies of the corporate group. Older legal concepts derived from a world of much smaller and more simply organized businesses have become hopelessly inadequate.

The older view, that for almost all purposes each corporation is a separate legal entity with its own legal responsibilities, is in the process of collapsing, particularly in situations where the corporation in question is a constituent part of a corporate group conducting an integrated enterprise. In many areas, a new concept, termed by Philip I. Blumberg as "*enterprise law,"* is winning increasing acceptance as the preferred method of analysis of the legal problems of parent and subsidiary corporations.

The new doctrine, suggested by Blumberg, seeks to trace the decline of *entity law* and the emergence of *enterprise law* as the standard for application to corporate groups and their constituent corporations. *Entity law*, the view that each corporation is a separate legal personality, originally arose from philosophical roots. It was strongly reinforced by

acceptance of the doctrine of limited liability in the early nineteenth century in the United States and several decades later in England. With the development of limited liability for shareholders, *entity law* became firmly established as the legal framework that preserved a bright line of demarcation between the corporation conducting the enterprise and the shareholders who owned the enterprise.

When American corporations at the end of the nineteenth century were at last generally authorized to acquire the stock of other corporations, the operation through subsidiaries became possible for the first time, and a momentous change occurred in the structure of business. The major corporate undertaking soon ceased to be conducted by a single corporation owned by ultimate investors. The typical major enterprise increasingly developed a highly complex structure with various parts of the business allocated to numerous subsidiaries according to function (sales, manufacturing, finance, or the like) or geography. The distinction between the subsidiary corporation and its shareholder, the parent, no longer corresponded to the distinction between the enterprise and the ultimate investor, the concept on which *entity law* had been based. The parent and subsidiary together represented the enterprise. The older law of entity reflecting the older world of simple business organizations became anachronistic, particularly when the issues of substantive liability were not involved.

In the area of bankruptcy law, as in procedure, the objectives and underlying policies of the law do not typically involve concerns of limited liability, although such concerns occur more frequently in the area of procedure. In bankruptcy, the courts act as courts of equity with the overriding objective of achieving *equality of distribution* and *fairness for creditors*. Thus, it is to be expected that when the bankruptcy relates to one or more constituent corporations of a corporate group, the courts in many cases will not treat transactions between the bankrupt debtor or insolvent constituent of a group and its parent or controlling shareholder or affiliated corporation in the same manner as transactions between separate legal entities that are entirely unrelated. Increasingly, *enterprise law* has been applied to transactions involving "*insiders*," and *entity law* has been abandoned in order to achieve the goals of equality of distribution and fairness to creditors. This is particularly evident in the specialized areas of equitable subordination and substantive consolidation of proceeding. However, this approach is less evident in other areas of bankruptcy of corporate groups. [6]

This work studies the American case law regarding this matter and provides new approaches and principles to the less developed Continental Civil Law in a comparative law basis.

The corporate fiction, the doctrine that a corporation represents a separate entity distinct from its shareholders with its own rights and obligations, is the very foundation of the doctrine of limited liability. Disregard of legal entity to achieve the underlying purpose of an applicable statute or judicial rule is much more likely to occur when the imposition of substantive obligations and the overriding of the principle of limited liability are not involved. Where the question is disregard of corporate entity to impose contract or tort liability on the shareholder, judicial resistance, as might be expected, is at its strongest. When a subsidiary (or controlled corporation) is bankrupt, under what circumstances will a court impose liability on its parent (or controlling shareholder) for the obligations of the bankrupt? In a bankruptcy court applying equitable principles, will the court be more inclined to impose liability upon a parent or controlling shareholder for the debts of a subsidiary than in a contract or tort action in a court of general jurisdiction? If *fairness* is indeed the guiding standard of the bankruptcy court, does it provide a greater impetus for the court to disregard the barriers of *entity law* in order to impose liability on affiliated companies in appropriate cases? [7]

## II. Cases Imposing Liability

The review of American cases discloses at least about two dozen cases, not all in bankruptcy, that have upheld liability on a parent (or controlling shareholder) for the obligations of an insolvent subsidiary (or controlled corporation). [8] Most of these have relied on the *"piercing the corporate veil"* jurisprudence in a greater or lesser degree.

In *Baltimore & Ohio Tel. Co. v. Interstate Tel. Co.*, [9] the oldest case, the Court of Appeals for the Fourth Circuit reached a comparable result. A creditor with an unsatisfied judgment against an insolvent subsidiary was successful in a suit on the judgment against the parent. The court relied in part on a *"complete identity in action"* of the two

companies, with all the subsidiary's transactions under the direction of the parent. It also relied on the *"trust fund"* doctrine pointing to the subsidiary's distribution of all of its assets.

In 1941, *Consolidated Rock Products Co. v. Du Bois*, [10] a case that involved the fairness of a reorganization plan under Section 77B of the Bankruptcy Act, the Supreme Court of the United States imposed liability on a parent in reorganization for the debts of a subsidiary also in the proceedings. It relied on *"piercing the corporate veil"* precedents and such factors as the lack of "meticulous regard to corporate forms", the commingling of the assets and operations, and the assumption by the parent of all management functions of the several components of the corporate group, resulting in the conduct of the enterprise as a single "unified operation".

In 1949, *Rounds & Porter Lumber Co. v. Burns*, [11] an action brought by a creditor, the Arkansas Supreme Court also imposed liability on the parent for lumber sold to the subsidiary. In this and the following case it should be noted that during the subsidiary's reorganization proceedings the parent emerged as the only secured creditor with a mortgage on the debtor's fixed assets, and that the proposed arrangement would have yielded unsecured creditors between fifteen and twenty percent on their claims. [12] In the 1951 case of *Henderson v. Rounds & Porter Lumber Co.*, [13] the court imposed liability upon the bankrupt company's controlling shareholders where they had manipulated the company's affairs to their own advantage. The shareholders' interest in the corporation was not to maximize its profits but to operate it as a source of supply at below market prices. The bankrupt company had accordingly been compelled to sell lumber and flooring to the shareholders below cost. Under these circumstances, the court concluded that the general rule of respecting the corporate entity did not apply. In the familiar rhetoric of *"piercing the corporate veil"* jurisprudence, it termed the corporation a "mere agency or department for the advancement of the parent's own interest."

In the 1966 case of *Palmer v. Stokely*, [14] the court held that the cancellation of intercompany indebtedness owed by a sister company that was a second−tier subsidiary of the debtor's controlling shareholders was a fraudulent transfer by the debtor under Section 67(d)(2) of the Bankruptcy Act. The court then relied on the *"instrumentality rule"* of *Fish v. East* [15] to find the controlling shareholders "alter egos" of the subsidiary and liable for the improperly cancelled indebtedness.

In 1967, the court in *In re Long v. Mc.Glon* [16] denied a motion to dismiss a complaint by a trustee of a bankrupt corporation to hold its two shareholders, who had also been officers and directors, personally liable. The complaint alleged intermingling of assets with corporate funds deposited in the shareholders' personal accounts and corporate debts paid out of their personal accounts. The court concluded that an *"alter ego"* relationship had been established and that the corporate form could be disregarded.

In the 1980 case of *In re Typhoon Industries, Inc.*, [17] a bankruptcy court imposed liability on one affiliate for the tax liabilities of its three sister companies which had been dissolved. The corporations had functioned as "a single unit" under the common management of the sole shareholder and shared the same office with the same telephone. The debtor paid all major expenses and approved all contracts for its affiliates, deposited their sales proceeds in its bank account, appropriated all cash surpluses, and described the affiliates as its divisions on its letterhead. The court concluded that the affiliates were "mere instrumentalities and alter egos" and that it would be inequitable to allow the debtor to escape the affiliates' tax liability.

According to Blumberg, [18] the leading case is *Federal Deposit Insurance Corp. v. Sea Pines Co.*, [19] decided in 1982. In this case, the court held a parent liable for the bank debt of its 90 percent−owned insolvent subsidiary where the parent had caused the insolvent subsidiary to mortgage an unencumbered property to secure the debts of the parent. It essentially relied on the conclusion that the acts of the parent were *"fundamentally unfair,"* without referring to the *Uniform Fraudulent Conveyance Act* ("UFCA"), although the mortgage was obviously a fraudulent conveyance. The court invoked the doctrine that when a corporation becomes insolvent, those in control have a *fiduciary duty* to creditors and may not divert corporate assets for their own benefit to the detriment of creditors. [20] The *"piercing the corporate veil"* doctrine was otherwise applicable, based on intrusive management interference and inadequate capitalization. [21] In this case, the decision turned on the inherent "*fundamental unfairness*" to a creditor of a controlling shareholder's appropriation of its subsidiary's assets *after* the subsidiary had become insolvent. Liability was based on considerations virtually indistinguishable from the bankruptcy doctrine of *fraudulent conveyance.*

This case does not rest squarely on the conventional approach of *"piercing the corporate veil"* jurisprudence but rather, rests on concepts of *fairness to creditors* arising from the subsidiary's insolvency at the time of the challenged transactions. It recognizes a remedy from common law that imposes liability on the parent by reason of the depletion of the insolvent's estate. Liability is imposed if assets are diverted to the parent (or for its benefit) and the transaction has the nature of a fraudulent conveyance, whether or not the technical requirements of the UFCA or the bankruptcy laws are satisfied. The common law *fiduciary obligation* of the controlling shareholder to creditors arising from the subsidiary's insolvency, not bankruptcy law, is the basis for the cause of action. The doctrine enunciated by *Sea Pines* thus significantly expands the remedies of a creditor or the trustee to attack transactions of this nature that may not completely satisfy the provisions of the UFCA or the bankruptcy laws. Among other matters, an extended statute of limitations in place of the two−year limit under the bankruptcy laws will become available. Further, an individual creditor may pursue the remedy and obtain a judgment against the parent for its sole benefit without the recovery passing through the insolvent subsidiary's estate. Obviously, if the subsidiary was in bankruptcy, the cause of action would be the property of the estate, and if pursued by the trustee, within the exclusive jurisdiction of the bankruptcy court. The result in this case can be understood only by assuming that the subsidiary was not in bankruptcy and that there were no other objecting creditors. [22]

In 1982, a bankruptcy court in *In re D. H. Overmyer Telecasting Co*. [23] imposed liability on a controlling shareholder and on all affiliated corporations of an integrated group for all debts of the affiliated companies. Control in this case was so "pervasive" that a "unity of interest" existed, making it inequitable to treat the parties as separate entities. The court did not find it necessary to refer to *"piercing the corporate veil."*

In *Ozark Restaurant Equip. Co*., [24] a case involving closely held affiliated companies, the bankruptcy court imposed enterprise liability. After avoiding preferential payments to a bank on loans guaranteed by insiders within one year of the bankruptcy petition, the bankruptcy court held the insiders personally liable for the debts of the debtor company. The debtor had been grossly undercapitalized with only $1,000 in capital and debt of $109,000 and as a result was insolvent from the inception. Intragroup transactions had manipulated the debtor to its detriment with inside sales at low or no mark−ups and no interest payments on deferred receivables. Corporate formalities were not always respected. The court mentioned the insiders' *fiduciary duties* to creditors and characterized the debtor and the affiliates as "*mere instrumentalities*" of the controlling shareholders. On appeal, the district court reversed, holding that the trustee lacked standing to bring a state law action resting on "*piercing the veil jurisprudence*" that did not involve a fraudulent transfer or voidable preference. The Court of Appeals for the Eighth Circuit affirmed. [25]

In the same year, the court in *In re FDIC v. Allen*, [26] involving the Jake Butcher banking insolvency, found fraudulent transfers and imposed personal liability on the controlling shareholders relying on *"piercing the corporate veil"* jurisprudence.

As Blumberg points out, in five of these cases, the trustee had instituted the action for the benefit of all creditors by reliance on the familiar jurisprudence of *"piercing the corporate veil,"* just as if an individual creditor was proceeding at law. [27] There is no indication in these cases, with the exception of the *Sea Pines* case, that the equitable considerations governing bankruptcy provided any special incentive for the courts to disregard the barrier of the separate entity.

As stated earlier in this article, [28] equitable subordination provides a much more acceptable avenue for the application of *enterprise law* than the direct imposition of liability. Although in form, equitable subordination of the parent's claim is not an imposition of liability, the result in the overwhelming number of cases will be the same. The subsidiary's assets will typically be inadequate to pay all claims. As a result of subordination, assets otherwise going to the parent will be paid to the public creditors. [29]

"*Piercing the corporate veil*" jurisprudence is the traditional safety valve in *entity law*, under which in "exceptional" cases liability may be imposed on a parent or controlling shareholder for the debts of its subsidiary. The decisions in *Long v. McGlon, Palmer v. Stokey, FDIC v. Allen* and *Henderson v. Rounds & Porter Lumber Co*. rest squarely on this conventional approach and are readily understood, with the exception of *Sea Pines*.

In summary, these case cases upheld the following doctrines and emphasized the following factors:

1. The *fundamental unfairness* of mortgaging an unencumbered property of an insolvent subsidiary to secure the debt of the parent.
2. When a corporation becomes insolvent, those in control (often called "insiders") have a *fiduciary duty* to creditors and may not divert corporate assets for their own benefit to the detriment of creditors. The common law *fiduciary obligation* of the controlling shareholder to creditors arising from the subsidiary's insolvency is the basis for the cause of action, not bankruptcy law.
3. Intrusive managerial interference exercised by the parent over the subsidiary.
4. Inadequate capitalization of the subsidiary by the parent.
5. The doctrine of *"piercing the corporate veil,"* especially in these situations: the lack of "meticulous regard to corporate forms"; the commingling of assets and operations; the parent's assumption of all management functions of the several components of the corporate group, resulting in the conduct of the enterprise as a single *unified operation*; the *alter ego doctrine*: a relationship that has been established so that the corporate form could be disregarded; the labeling of the bankrupt corporation as a mere agency or department for the advancement of the parent's own interests.
6. Complete identity in action of the two companies, with all the subsidiary's transactions under the direction of the parent.
7. The *trust fund* doctrine pointing to the subsidiary's distribution of all of its assets.
8. The insolvency of the debtor from its inception, with a gross undercapitalization (a capital of $1,000 and debt of $109.000).
9. Intragroup transactions manipulated by the parent to the detriment of the debtor consisting of inside sales at low or no mark−ups and no interest payments on deferred receivables (money that is owed to a business and has not yet been received).
10. Corporate formalities not always respected.
11. The characterization of the debtor and the affiliated as *mere instrumentalities* of the controlling shareholder.
12. When the control was so *pervasive* that a *unity of interest* existed, it was inequitable to treat the parties as separate entities.
13. Intermingling of assets.
14. Corporate funds deposited in the shareholders' personal accounts and corporate debts paid out of other personal accounts.
15. The cancellation of intercompany indebtedness owed by a sister company that was a second−tier subsidiary of the debtor's controlling shareholders. This constitutes a *fraudulent transfer* by the debtor under Section 67d(2) of the Bankruptcy Act.
16. The *instrumentality rule*, finding the controlling shareholders "*alter egos*" of the subsidiary liable for the improperly cancelled indebtedness.
17. The manipulation of the bankrupt company's affairs to the advantage of its own controlling shareholders, consisting of the shareholders' interest in the corporation was not to maximize its profits but to operate it as a source of supply at below market prices and below costs.
18. The depletion of the insolvent's estate, when its assets are diverted to the parent or for its benefit.
19. The fact that in the subsidiary's reorganization proceedings the parent emerged as the only secured creditor with a mortgage on the debtor's fixed assets, and that the proposed arrangement would have yielded unsecured creditors between fifteen and twenty percent on their claims.
20. An affiliate of three dissolved sister companies was found liable for them because the corporations had functioned as *a single unit* under the common management of the sole shareholder and shared the same office with the same telephone. The affiliates were found to be *mere instrumentalities and alter egos*.
21. The inherent *fundamental unfairness* to a creditor of a controlling shareholder's appropriation of its subsidiary's assets after the subsidiary had become insolvent.
22. The bankruptcy doctrine of *fraudulent conveyance* of a transaction intragroup whether or not the technical requirements of the Uniform Fraudulent Conveyance Act or the bankruptcy laws are satisfied.
23. The existence of *preferential transfers* within the bankruptcy proceedings.

III. Cases Denying Liability

In contrast with the foregoing decisions imposing liability on the parent of the insolvent subsidiary, trustees in bankruptcy and creditors of an insolvent subsidiary (or controlled corporation) have been unsuccessful in their efforts to impose liability upon the parent corporation (or controlling shareholder) in the overwhelming majority of cases. [30] These decisions have typically analyzed the issue by referring to "*piercing the corporate veil"* jurisprudence and have inquired whether the subject case was an "exceptional case" calling for the remedy.

The English law is quite similar. [31] The same result has followed where creditors of a parent (or controlling shareholder) have attempted to impose liability on a subsidiary (or controlled corporation). This result is obviously sound where creditors have bargained for the credit of a particular component of a group without reliance on the credit of other components of the group. In the absence of such a showing, the decisions rest on a choice of *entity law* over *enterprise law*. Common officers and directors, stock ownership, and the exercise of control are insufficient in themselves to uphold rejection of entity concepts or limited liability within the corporate group. The ultimate decision reflects consideration of numerous factors, including such matters as adequacy of capitalization; compliance with customary corporate formalities, including separate bank accounts, separate books and records, and separate meetings of directors and shareholders; the intrusive participation by the parent in the managerial decision−making of the subsidiary; the extent of economic integration of products; the subsidiary's administrative and financial dependence on group support; the use of group trademarks, logos, and warranties; presentation of the subsidiary to the public as an independent business or as an integral part of the group; and whether the subsidiary and the parent are engaged in the collective conduct of a single integrated economic enterprise.

In the tax law field, at least one court has refused to allow a trustee to assert a claim of personal liability for debts of the debtor against its shareholder based on an "alter ego" theory, holding that this gave rise to a claim in favor of creditors, not a corporate claim which the trustee could assert. [32]

## IV. The Insolvency Law Concerning The Matter in Argentina

### A. The Bankruptcy Act System

#### 1. The Liability of Third Parties.

In the Argentine Bankruptcy Act system [33] there was only one provision covering the subject of this article: the liability of third parties in the case of bankruptcy, in section 173 of the Bankruptcy Act of 1995. [34]

As a general rule under section 173.2 of the Bankruptcy Act, the dominant party can be made liable in case of bankruptcy. Normally the law penalizes a person as a counterpart of the company for benefiting from the reduction of the assets. Thus, it is reasonable that it must penalize the worst case in which the third party not only takes part in that reduction but also in the decision−making process of the company creates the damage. The additional consequence is the loss of all rights in insolvency proceedings. [35]

In my opinion, the American case law described above is applicable to the Argentine legal system and in particular the first paragraph (liability of representatives and directors) and the second paragraph (liability of third parties) of section 173 of the Bankruptcy Act 24.522, [36] by means of analogy.

The first time these provisions were enforced was in 1972, by the Bankruptcy Act nº 19.551. [37]

This is applicable both in the case of *de facto* and *de jure* directors. [38] It is obligatory that the conduct of the dominant party would be fraudulent and not merely negligent in the corporate governance. [39] The parties with legal standing to claim the action are: a) the Trustee in Bankruptcy, and b) the creditors in the bankruptcy proceedings. [40] The goal of the provision is to substantially punish the violation of the duty of the debtor to maintain the solvency of his patrimony. [41]

Unfortunately, there is no case law concerning the matter, but in my opinion the American cases studied above are a strong examples for the future, which is in the hands of the lawyers and the judges.

2. Extension of the Bankruptcy Proceedings

In 1969 there was a *Bankruptcy Act Draft* in Argentina (section 168) that promoted the automatic extension of the bankruptcy proceedings in the case of bankruptcy of a subsidiary corporation *versus* the parent [42] . Because of its rigidity, it has been rejected by the authors and failed to be enacted as the Bankruptcy Act. [43]

Nevertheless, the Bankruptcy Act of 1972 nearly copied the provisions of sections 99 and 101 of the French Bankruptcy Act of 1967 (and the subsequent sections 180 and 182 of the French Bankruptcy Act of 1985), called *"the extension of the bankruptcy proceedings"* in English. The Bankruptcy Act of 1983 increased extension up to three and issued additional provisions regarding other details for the consequences of the extension. It also made it possible to extend the bankruptcy to any individual or corporation. Later, the Bankruptcy Act of 1995 put this provision under section 161. [44] These rules are applicable to corporate groups by analogy.

For some authors, like Manóvil, this extension of bankruptcy may be considered a type of liability. [45]

Regarding the *onus probandi* matter, the modern theory of *"dynamic burdens"* [46] imposes the obligation on the party that is in better condition to produce evidence. The justice can also order *ex officio* any means of proof, independently from that offered by the parties, according to Argentine Procedural Law.

In Argentina, there was an intense discussion about this provision because of its rigidity and automatism. [47] It has been said that it is better to have a system of liability rather than *proceedings for the extension the bankruptcy*. [48] And, *in extremis*, it is possible to obtain a bankruptcy decree with a sentence imposing the liability against the parent corporation.

Doubtless a huge bankruptcy case in Argentina in 1971 was an important antecedent of the Bankruptcy Act of 1972, which introduced the "*the extension of the bankruptcy proceedings*" in a legal statute for the first time. [49] The applicable law and jurisdiction of the court to decide on the extension of bankruptcy are those that pertain to the main bankrupt debtor. Yet the difficulties faced for a foreign jurisdiction to recognize a bankruptcy declared beyond its frontiers constitute another argument in favor of the choice to exercise liability actions rather than the extension of bankruptcy. [50] This is especially applicable to the *Swift−Deltec* case, because, as it seems, the bankruptcy decree was rejected in the United States or at least not formally accepted by a court where the American assets were located. And it seems there was no litigation on that point.

This extension of the bankruptcy proceedings was imposed before 1972 in some judicial cases about corporate groups, [51] and also afterwards. [52] In some cases the courts denied the extension within corporate groups due to procedural reasons. [53] There had been also procedural issues discussed in case law. [54] In one case the Government put in force special regulations by two acts: number 22.229 and number 22.334 for a whole group called "Greco." [55]

Since the Bankruptcy Act of 1995, it is possible to include a whole corporate group in a sort of reorganization process or "*preventive insolvency proceedings*" (called generally "*concurso preventivo*" in Spanish). [56] The statute becomes operative only when the *whole group* submits to the bankruptcy reorganization from the very beginning. [57]

The extension of bankruptcy due to conduct originated in self−interest (section 161.1 of the Bankruptcy Act of 1995) is not limited to the case of the straw man or party. It punishes a conduct with causal linkage with tie insolvency, yet it is not important in whose benefit such a conduct was displayed, but that it was not in the interest of the main debtor, even if the damage or the insolvency was unintended. The element *fraud to creditors* is superfluous and can be taken as not written. [58]

The extension of bankruptcy to the controlling party due to corporate interest deviation (section 161.2 of the Bankruptcy Act) is worded with an ineffective accumulation of terms and super−abundant requirements: a) all deflection of the corporate interest (the rule refers to the interest *of the company*) is unlawful; b) the reference to the beneficiary of the conduct of the person to whom the rule is applied is of no material relevance; c) the means to produce the deflection, submission to unified management, is another irrelevant fact, not consistent, additionally, with the fact that the rule attaches effects to the exercise of control and not to the configuration of a group. [59]

In itself, the extension of bankruptcy proceedings is not a repressive civil penalty but a case of tort liability that requires of all its configuring elements. The most relevant of these elements is the causal link between the conduct displayed and the insolvency, both in its chronological aspect and in its quantitative and qualitative aspects. Yet its existence must be presumed: the burden of the proof must be imposed according to the dynamic principle because of the peculiarities of the circumstances. [60]

The extension of bankruptcy due to commingling of assets (section 161.3) also includes subjective commingling, and it is difficult to judge. It is more frequent that the formation of a sole estate be declared due to the commingling of assets than to find an isolated case of extension of bankruptcy for this reason. It is necessary to consider each case because it is impossible to quantify in the abstract. [61]

In the case of actions in self−interest and commingling, bankruptcy may be extended to any kind of subject. Therefore, it also extends to any type of controlling person. However it is only direct or indirect, legal (*de jure*) or factual, internal controllers and not external controllers, that can be subject of the extension of bankruptcy due to the deviation or deflection of the corporate interest. [62]

The horizontal extension of bankruptcy has no legal foundations in any Argentine Act, that is to say, the extension to the affiliate corporations of the same parent, except in case of commingling of assets. [63]

In case of insolvency the extension of the bankruptcy proceedings, particularly to the controlling party, is not always the most adequate answer to the interests of the bankrupt state. The actions of liability of section 54.1 and 54.2 of the Companies Act of 1983 or the declaration of ineffectiveness of the legal personality or section 54.3 of the Companies Act and even the responsibility under insolvency proceedings (section 173 of the Bankruptcy Act) may be more effective. [64]

There are no reasons in Argentine law to hold the position that, in insolvency proceeding of bankruptcy the intragroup credits can be subordinated, as is the case in the American law, or eventually turned down, as is the case in German law. Regarding voting rights of creditors in preventive insolvency proceedings, the exclusion of the controlling shareholder of the new section 45 of the Bankruptcy Act of 1995 embraces all kinds of control, and according to the rationale for the rule, also embraces all creditor corporations whose decision−making process is controlled by that controlling shareholder. [65]

In United States law, the notion of undercapitalization of the insolvent corporation is used to underpin different answers. In German law, doctrine advocates holding partners liable due to undercapitalization. In Argentine law, section 2 of the Companies Act may be relied upon to assert that the use by individuals of a type of company with limited liability for partners presupposes the duty of those partners to create and maintain a corporate patrimony sufficient to start and develop the corporate endeavor. In certain circumstances and with due consideration, section 173 of the Bankruptcy Act and sections 54.1 and 54.2 of the Companies Act can be applied. [66]

A. The Companies Act System.

In Argentine law, the Companies Act number 19.550, as amended in 1983, contains four provisions concerning the above−discussed matter. The first two provisions are section 54, paragraphs 1 and 2; the third is section 54, paragraph 3; and the fourth is section 274. These provisions are applicable both in the case of a *de facto* or shadow director, and in the case of *de jure* director. [67]

1. Section 54, Paragraphs 1 and 2 of the Companies Act Number 19.550 as Amended 1983

Sections 54.1 and 54.2 were introduced in 1983. [68] Both sections are applicable to individuals and to any type of corporation. [69] The rule refers to either continuous or sporadic corporate governance, and also refers to shareholders, dominant shareholders, and non−shareholder dominant parties. Any type of control is included: *de facto* or *de jure*, internal or external, direct or indirect. [70]

The foundations of the system of group liability in Argentine law are structured in both sections of the Companies Act. The norm is not linked to the position of manager, partner, or controlling person to which it makes reference. Therefore, it is not related to the concept of *de facto* manager, which offers the advantage of not requiring an extensive and permanent intrusion to constitute the *de facto* administrator. The provisions are applicable to any type of person, category of partner, and category of dominant party, even if not a partner or shareholder. Therefore, indirect control, control exercised through intermediaries, and external control are included. [71]

The requisites of the rule are: a) damage against the subsidiary caused by a shareholder or a dominant or parent corporation, including non−shareholder dominant parties (section 54.1 embraces all kinds of damage to tangible and intangible assets that are caused by fraud or fault, act or omission, actual business, general policies, and liability in tort, including damage to business opportunities and b) unfairness or negligence in the corporate governance.

The consequence is a compensation of the losses to the subsidiary or the subsidiary's creditors, or the restitution of the resources and undue profits of the businesses. To compensate for the damages (in kind or money), the regulations of the Civil Code are applicable. As in German law, compensations with benefits and advantages (e.g., the frequently invoked benefit of being a member of the group) are specifically excluded, unless such advantages result from the same causal link. [72]

Section 54.2 is complementary to the first paragraph. It includes the transfer of assets and the use of effects without any significant profit to the company. The word "effects" must be interpreted broadly: it includes intangibles assets, prestige, business opportunities, background, and the reputation or standing of the company. The duty to return the profits to the company includes all profits, not only those proportional to the share of the person who made use of such effects. In cases where evaluation is difficult, the interpretation should be that the obligation to return the profits obtained in the course of business to the controlled company is applicable when the funds or effects used were a substantial or main part of the necessary elements to carry out that business. [73]

The plaintiffs legitimated by the statute are: a) the subsidiary corporation, b) the shareholders (exercising "corporate action," as opposed to "individual action"), c) the subsidiary corporation's creditors (only in the case of oblique action [74] ), d) the trustee in bankruptcy, and e) the creditors in the bankruptcy proceedings, instead of the trustee. [75]

The group or domination link, as a fact of objective reality, does not end in the imposition of liabilities for the settlement of the subsidiary's debts. It also casts effects over other areas of the activities of the companies involved, as a consequence of their lack of autonomy. In relation to the external contractual relationships, the category of *linked legal relationships* was put forward (i.e., cases of intrusion in negotiation, cases in which other members of the group to which the party belongs enter or perform contracts on its behalf, and extension of effects to other legal subjects). Significant here are the comfort letters and the application of the doctrine of apparent standing of created trust and the doctrine of "own acts." Similar effects correspond to the application of the principles related to unjust enrichment in the fulfillment of certain contractual obligations and rights. For example, negative obligations (i.e., to abstain from doing something) that can be applied to the other members of the group depending on the sense they might have in each specific case, and the determination of good or bad faith or the knowledge of the circumstances within the group. Included are the liabilities due to the performance of straw or fictitious companies, liabilities resulting from the artificial continuity of the performance of a subsidiary, and the possible liabilities of the dominant company for the damages caused by the subsidiary, its workers, or effects. [76]

2. The "Ineffectiveness of the Corporate Personality"—The Doctrine of Piercing the Corporate Veil: Section 54, Paragraph 3 of the Companies Act Number 19.550 as Amended 1983.

Section 54.3 was also introduced in 1983. [77] This statute was the first of its kind in the European Civil Law system. [78] This provision embraces diverse cases of imputation: duties and rights of the company to the partner or controlling party and actions and duties of the controlling party or partner towards the company. Included is the "*friendly*" [79] *disregard of the legal personality* in favor of the company, the partners, or the controlling companies due to the application of analogy. Many years earlier, Argentine jurisprudence accepted the doctrine of *piercing the corporate veil* without any duly enacted statutory provision. [80] The norm establishes the futility of certain legal effects of the corporate personality, which is limited to the concrete act or legal situation at stake and not to the effects of the type of

company. [81]

With regard to the interpretation of the legal wording of the statue: a) it embraces a performance as well as an act; b) overall, what is discussed is not the existence of the company, but rather, its performance; c) the objectives outside those of the company referred to are related to the notion of the final *"causa"* of the company, and this is related to the joint entrepreneurial risk which is always appraised in connection to a specific case; d) to "conceal" does not mean to hide, for it is the same whether the penalized action is public or hidden; e) the "mere" means to which the rule refers to is not a synonym of a fictitious or straw company, as it does not matter if the penalized conduct is the only conduct displayed by the company; f) "*ordre public*" must be understood in its strict sense as not embracing merely imperative rules; the infringement of good faith must also embrace the hypothesis of acts against morals and moral customs frequently included in bad faith. Moreover, to apply the rule of no proof of subjective element is required to constitute the legal basis of ineffectiveness. [82]

It has also been said that the norm is applied to any kind of partner, shareholder, or controlling party, either direct of indirect, internal or external. Also, the ineffectiveness in steps or stages is possible. Third parties have legal standing to claim the ineffectiveness of the legal personality. Liability imposed by section 54.3 is independent of the declaration of ineffectiveness of the legal personality (or legal entity) in itself. Section 54.3 is not restricted to the true holders of the rights, or to those that benefit from the unlawful conduct. Further, it is not limited to only those who performed the conduct, but rather includes every person that, by action or omission, made it possible. Yet, the corporation is not liable. All those who suffered the damage are entitled to compensation. The damages to be compensated are not only those due to the unlawful action of the corporation, but also includes those that result from the declaration of ineffectiveness. [83]

The judgment declaring that the juristic personality (legal entity) is not opposable can be of detriment to third parties acting in good faith. The norm prevails over such third parties, except for third parties acting in good faith that acquired specific rights on specific assets which can be affected by the ineffectiveness. For the same reason, the bankruptcy or insolvency proceedings are not opposable to third parties that obtained the declaration of ineffectiveness of the legal personality in order to transfer the legal entitlement to assets. When the imputation of legal relationships is transferred, this happens with its assets and liabilities; the compensation of credits and debts between the third party and the person to whom the imputation is transferred to proceeds. [84]

3. The Liability of the Administrators and Directors of a Corporation: Section 274.1 of the Companies Act Number 19.550 as amended 1983.

Section 274.1 of the Companies Act governs the liability of the administrators and directors of a corporation, [85] and it can be applied by analogy to the administrators or directors of the dominant or subsidiary corporation, [86] under the standard of section 59. [87]

Except where a domination contract has been celebrated in Germany, in all other regulations the administrators of the subsidiary must act in the interests of the corporation that they manage. In the case of a conflict with the interests of the parent corporation, it is their duty to prefer the interests of the corporation they manage, that is, the subsidiary. When judging the due conduct of the managing board of the subsidiary in relation to the instructions or directives imposed by the parent corporation, a distinction must be made according to whether or not those instructions were imparted by the formal organic channels. The common rules of liabilities for directors are applied, and where applicable, so are the rules of liability in the system of insolvency proceedings. [88]

B. The Civil Code System.

In the Argentine Civil Code, there are three provisions applicable by analogy to liability within corporate groups. These provisions are sections 43, 1109 and 1113 of the Civil Code.

Section 43 of the Civil Code was partially reformed in 1968 and establishes the liability of corporations in general for any wrongdoing of their directors or administrators, [89] and the authors apply this norm by analogy to the dominant corporation when it directs a "subordinated" individual or corporation. In this provision, it is sufficient if there exists a

*subordination relationship:* an order or mandate, contractual or not contractual, permanent or temporary, remunerative or not. [90] The subsidiary or dependent person must be appointed by the dominant or parent in order to obey his instructions, which are considered mandatory. In other words, one person with the right to command and another person with the duty to obey, all in the interest of the commander. [91] Even the *subordination relationship* could be *de facto* or *de jure*, with or without a labor relationship or any other contractual relationship. [92]

Section 1109 of the Civil Code [93] is applicable by analogy to corporate groups because it governs generally and implicitly wrongful or fraudulent corporate governance. [94] This section has a strong connection with section 274 of the Companies Act.

Section 1113 of the Civil Code was also reformed in 1968 and establishes the liability of any person who causes any damage, even for the action of a subordinated person. [95] But the liability of the dominant is not automatic. There must exist an *unfair act* against the subsidiary because the first party has intended only his personal interest and has thus caused damage to the second party. There must be an unfair prevailing interest of the dominant against the interest of the subsidiary. [96] Other requirements for liability are: a) the liability of the dependent person (because this is a case of reflexive or ancillary liability), b) damage caused to the subsidiary person, and c) a relationship between the orders and the damage. [97]

## V. A Proposal From The Author

One of the fundamental theses of this work is to assert that in no case is it suitable to apply the *extension of the bankruptcy proceedings* among the companies of a group, when one or some of the companies are undergoing insolvency. Moreover, the author believes that any liability system is preferable to the application of the different *extension of the bankruptcy proceedings* hypothesis. In the case of corporate groups, in such insolvency situation, I propose as a better solution an alternative *liability system of the director of the group*, derived from his control or his unified economic policy. An essential condition for such liability is that the debts of the bankrupt company have been incurred as a result of his control. On the other hand, to facilitate the procedural requirements I propose to invert the burden of the proof to the opposite side: to the holding or dominant company.

This attitude is, then, the application of the most modern comparative doctrine, legislation and case law (European and American) regarding liability within the group. In our case, it is fitting to apply them to the bankruptcy hypothesis with due analogies, by means of the argument *a maiore ad minus*.

The proposed doctrine is based, among others, on the American, English and German law. These completely ignore the institute of the *extension of the bankruptcy proceedings* and have instead other tools for the liability issues within bankruptcy procedures. The American sources are based on equity, a specifically bankrupt principle in view of the nature of the American bankruptcy courts. The others are based on current legal texts and case law. That is why I call this law a *"New or Modern Corporate Groups Enterprise Law,"* to distinguish it from the old or traditional corporate law of isolated companies (the so called *"entity law"* in Blumberg's terminology).

In substance, I do not consider applicable to the case of corporate groups the Italian and French doctrines which justify the *extension of the bankruptcy proceedings* in the case of the *hidden businessman* or the *director of the business*. On the contrary, I consider the rulings of the American, English and German institutions analyzed here more adequate, as regards the liability of the director of the group, because they are more proportioned to the nature and way of operating of such corporations within a corporate group.

These rulings do not recognize the *extension of the bankruptcy proceedings* within the group. Instead they have more or less developed liability systems of the director of the group called in German law *"Geschäftsführerhaftung"* or *"Geschäftsleiterhaftung."* In this law, I can add to these, on the one hand, the *"Durchgriffhaftung"* a modified and more systematized version of the American doctrine of *disregard of legal entity* or *piercing the corporate veil*, although rarely and exceptionally applied in Germany. Finally, *"Konzernhaftung"* is a doctrinarian variation of the liability in factual groups made up of limited liability companies, specifically called *"qualified groups,"* a creation that never came into force in Germany. This last category was not enacted in the German amendment to the Limited Liability Companies Act of 1980, but it has been widely developed in theory and applied by case law in some recent

cases.

In such conditions, one of the fundamental theses of this work can be summarized in that the dominant company must be responsible, in case of bankruptcy of a subsidiary, for the excess or negligence or fraud in the exercise of management and control, against its own social interest or against the social interest of the subsidiary. To that end, I suggest, that the director of the corporate group be liable for the debts of the subsidiary in insolvency proceedings originated as a result of his control and unified economic policy. But giving him the opportunity to escape such liability if he can prove that the unified economic policy has not been practiced in a negligent or fraudulent way, and that the interest of the subsidiary has been loyally preserved during its execution.

In addition, and given the procedural inferiority situation of the creditor of the bankrupt subsidiary to make the ruling of liability for the control effective, I also propose two presumptions *iuris tantum*. The first one refers to the existence of a unified economic policy in case of being the dominant or holding company: that means the existence of any type of control. The other one refers to the existence of liability if the bankrupt credits were born within the exercise of such policy, that is, under the holding company's control. Finally, I propose the inversion of the burden of the proof of these extremes to the holding or dominant company.

As an originality, it seems fair to us that, exceptionally, the holding company that is being sued can be freed from such liability by showing that there was no professional negligence in the decision and execution of the unified economic policy. In other words, that there has been acceptable diligence in the liability liberation, in spite of the bankrupt debts, which will irremissibly remain unpaid, applying by analogy what happens in accidental bankruptcies, as opposed to negligent or fraudulent ones. Stating that such professional diligence cannot exist for being in insolvency proceedings any of the companies of the group could rebut this approach. However, I support that the liberating hypothesis, though improbable, is not impossible. This is as regards the category of accidental bankruptcies, which are economically justified in fortuitous or unforeseen circumstances and in other types of external economic situations alien to the bankrupt company and to the director of the group. Among other examples it can be mentioned sudden changes in the policies, in the government, in the legislation, in the market variables, in the international situation and in the public administration criteria.

As regards the bankruptcy case of the dominant or holding company, I adhere to the *non−extension of the bankruptcy proceedings* of the other companies in the group. Instead, I prefer the dispossession of all the rights over the latter ones as part of the bankrupt's winding up of the former. From our point of view, this would avoid many conflicts and speed up by large the insolvency proceedings.

The novel attitudes I have adopted on this subject can be briefly summarized in the texts I propose *de lege ferenda infra*. These opinions can be considered a novelty within the framework of the studied comparative law, and applicable *de lege lata*, at least by the case law in countries with European Continental System or Civil Law System. In case of being adopted, except for a better opinion of other writers based on law, a few steps forward in the analyzed matter could be given and useful tools *de lege ferenda* could be supplied to adequately solve the problems posed here in the near future.

A. Proposal Of Legal Text "De Lege Ferenda"

As a consequence of a part that has been stated in this study, and in order to put into words what I have studied and my opinions, I suggest a legal text *de lege ferenda* for the case of corporate groups in insolvency proceedings. Logically, it is provisional and subject to criticism by the reader, based on the law:

1. *In case of bankruptcy of the director or owner or holding or dominant company of a corporate group, under no circumstances does the extension of the bankruptcy proceedings apply to the subsidiaries. Instead, all the rights owned by the former over the latter will be disposed of, including those ones inherent to the subordination relationship and to the power of unified economic policy, in the corresponding bankruptcy stage, as part of the bankrupt's liquidation.*
2. *In case of bankruptcy of one or some of the subsidiaries of a corporate group:*

a. In no case is the extension of the bankruptcy proceedings possible among them or against the dominant individual.
b. The dominant company or individual will be responsible for all but only those bankrupt liabilities or debts, after the final distribution of the liquidated bankrupt subsidiaries, coming from one or several business decisions taken under his control or unified economic policy.
c. The director of the corporate group can be free from this liability by proving that there was no professional negligence in the decisions and execution measures of the unified economic policy that gave rise to the unpaid debt of the bankrupt subsidiary. Where this cannot be proved, it will be presumed that at least such professional negligence has existed and therefore he will be responsible for such debt.
d. The director of the group is in charge of showing that such business decisions were not taken under his control or under the unified economic policy or that they were taken autonomously by the subsidiary companies or individuals or that they have been born accidentally or due to external circumstances for which he should not be responsible as director of the group.

1. In case of inseparable commingling of assets, the extension of the bankruptcy proceedings will not be declared to the whole group. Instead, the total or partial substantial consolidation of the bankruptcy proceedings and liabilities will be declared, and they will be disposed of according to the assets of the bankruptcy formed in the most convenient way, taking into account the interests of the parties involved, the possibility of the accounting reconstruction of the assets, its onerousness and the time needed for its confection.
2. In case of more than one bankruptcy of corporations or individuals who are part of a corporate group, the procedural consolidation or accrual can be declared, if necessary, for the sake of procedural economy.
3. This system is independent of liability of third parties established by the bankruptcy or corporate rulings for undue co−authorship, aggravation or prolongation of the bankrupt condition, or other damages caused to bankrupt creditors, including the board of directors taking part in corporate groups.

All this, except for a better opinion based on law to be considered.

## VI. Conclusion

Liability of a parent for obligations of an insolvent subsidiary strikes directly at limited liability. *Entity law*, as may be expected, remains the rule. Although a number of cases show signs of change, *entity law* continues to be strong. This is the last area in which *enterprise law* will prevail, even if accepted elsewhere. Equitable subordination provides a much more acceptable avenue for the application of *enterprise law* than the direct imposition of liability. Although in form, equitable subordination of the parent's claim is not an imposition of liability, the result in the overwhelming number of cases will be the same. The subsidiary's assets will typically be inadequate to pay all claims. As a result of subordination, assets otherwise going to the parent will be paid to the public creditors. [98]

Piercing the corporate veil

jurisprudence is the traditional safety valve in *entity law* under which in exceptional cases liability may be imposed on a parent (or controlling shareholder) for the debts of its subsidiary.

With limited liability at stake, the courts appear firmly wedded to the traditional concepts of *entity law* when faced with possible imposition of liability for the debts of a bankrupt subsidiary (or controlled corporation) upon its parent (or controlling shareholder). The jurisprudence of *piercing the corporate veil*, not the special concerns of bankruptcy, provides the basis for exception in *"exceptional"* cases. As the United States Court of Appeals for the Second Circuit noted in another context, the "corporate veil" is not disregarded in bankruptcy "merely because it would make for an efficient and economical administration of the debtor's estate." [99]

The relief made available in the *Sea Pines* case with respect to the diversion of the subsidiary's assets for the benefit of the parent after the subsidiary has become insolvent highlights the importance of state law remedies. There is

substantial state law authority providing relief in such cases of diversion of the insolvent subsidiary's assets. Such a remedy, based on the considerations underlying the *fraudulent conveyance doctrine*, but not subject to the statutory limitations of the Code and UFCA, may prove important to creditors and trustees when for some reason the protection of the statutory remedies is not available. [100]

It is noteworthy that the Argentine Companies Act, as amended 1983 with its section 54.3, is the first one that places the overriding jurisprudence of *piercing the corporate veil* involving corporate groups (especially in bankruptcy cases) in a statute text in one European Civil Law System.

Also noteworthy is the statute concerning the extension of bankruptcy proceedings in the Argentine Bankruptcy Act, but in my opinion the norms regarding liability (applicable in the case of corporate groups by analogy) are preferable, because they are more flexible and reliable, particularly in the case of multinational corporate groups in insolvency.

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**FOOTNOTES:**

[1] J.D. (National University of Buenos Aires, Argentina), LL.M. ("Trustee in Bankruptcy Law Specialization") (Tucumán, Argentina), J.S.D., Doctor Juris (Navarra, Spain). Professor of Bankruptcy Law, Austral University, Buenos Aires, Argentina. E−mail: hmiguens@austral.edu.ar. Back To Text

[2] This article contains citations to the Argentine Bankruptcy Act, the Companies Act and the Civil Code. The author has provided an unofficial translation for the cited provisions of them. Back To Text

[3] El Derecho, La Ley and Jurisprudencia Argentina are three different collections of case law, comments on judgements and articles in Argentina. CNCom. is the acronym of the Commercial Court of Appeals of Buenos Aires, the main court of commercial matters in Argentina. It is divided into five sections of three judges each, designated A,B,C,D and E. CSJN is the acronym for the (Federal) Supreme Court of Justice of Argentina. CNCiv. is the acronym for the Civil Court of Appeals of Buenos Aires, the main court of civil affairs of Argentina. It is divided into nine divisions of three judges each. RDCO is the acronym of Revista del Derecho Comercial y de las Obligaciones, a Review of Commercial Law and the Law of Obligations edited in Buenos Aires. Back To Text

[4] For example, by 1982, the 275 largest American manufacturing corporations represented 66.4 percent of the sales and 72.4 percent of the profits of all American manufacturing corporations. See Statistical Abstract of the United States, Table 921, at 546 (1984); Phillip I. Blumberg, The Law of Corporate Groups, Problems in the Bankruptcy or Reorganization of Parent and Subsidiary Corporations, Including the Law of Corporate Guaranties xxxiv (Little, Brown and Co., Boston. 1985) [hereinafter The Law of Corporate Groups]. By 1993, the United Nations, Trans−national Corporations and Management Division estimated that there were 35,000 multi−national enterprises with 170,000 foreign affiliates. They were highly concentratred, with the largest 100 multinationals (excluding those in banking and finance) having assets of about $3.1 trillion, of which $1.2 trillion was outside their home countries. See U.N. Transnational Corp. and Mgmt. Div., 1993 World Inv. Rep. Studies, cited in Survey, Multinationals−Back in Fashion, The Economist, Mar. 27, 1993, at 5. Back To Text

[5] For example, in 1982 the 1,000 largest American industrial corporations had an average of 48 subsidiaries each. Mobil Oil Corporation, as an extreme example, operated in 62 different countries through 525 subsidiaries. See The Law of Corporate Groups, supra note 3, at 465−68. Back To Text

[6] See The Law of Corporate Groups, supra note 3, at xxxiv−xxxvi. Back To Text

[7] See The Law of Corporate Groups, supra note 3, at 589−90. See generally Richard M. Cieri et al., Breaking Up is Hard to Do: Avoiding the Solvency−Related Pitfalls in Spinoff Transactions, 54 Bus. Law. 533 (1999) (discussing impact of subsidiary's contingent liabilities on parent's solvency in context of spinoff transactions); J. A. Bryant, Jr., Annotation, Liability of Corporation for Contracts of Subsidiary, 38 A.L.R. 3d 1102, 1146−54 (1971); Jonathan M. Landers, A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy, 42 U. Chi. L. Rev. 589, 606−28 (1975); Note, Creditors' Rights Upon Insolvency of a Parent Corporation or Its Instrumentality, 46 Harv. L. Rev. 823 (1933). Back To Text

[8] See generally Consol. Rock Prods. Co. v. Du Bois, 312 U.S. 510, 523−24 (1941); FDIC v. Sea Pines Co., 692 F.2d 973 (4th Cir. 1982), cert. denied, 461 U.S. 928 (1983); Baltimore & Ohio Tel. Co. v. Interstate Tel. Co., 54 F. 50 (4th Cir. 1893); Norfolk & W.R.R. v. Wasserstrom, 1991 U.S. Dist. LEXIS 12969 (E.D. Pa. 1991); FDIC v. Martinez Almodovar, 671 F. Supp. 851 (D.P.R. 1987); FDIC v. Allen, 584 F. Supp. 386 (E.D. Tenn. 1984); Long v. McGlon, 263 F. Supp. 96 (D.S.C. 1967); Palmer v. Stokely, 255 F. Supp. 674 (W.D. Okla. 1966); Henderson v. Rounds & Porter Lumber Co., 99 F. Supp. 376 (W.D. Ark. 1951); In re Plantation Realty Trust, 232 B.R. 279 (Bankr. D. Mass. 1999); In re Mass, 178 B.R. 626 (M.D. Pa. 1995); In re Keene Corp., 164 B.R. 844 (Bankr. S.D.N.Y. 1994); In re Hillsborough Holdings Corp., 144 B.R. 920 (Bankr. M.D. Fla. 1992) (denying motion for summary judgment); In re Farley, Inc., 1992 Bankr. LEXIS 1801 (Bankr. N.D. Ill. 1992) (denying motion for summary judgment); In re Velis, 123 B.R. 497 (D.N.J. 1991); In re Major Funding Corp., 126 B.R. 504 (Bankr. S.D. Tex. 1990); In re Jarax Int'l, Inc. 122 B.R. 793 (Bankr. S.D. Fla. 1990); In re Haugen Constr. Serv., Inc., 104 B.R. 1013 (Bankr. ND. 1989); In re Charnock, 97 B.R. 619 (Bankr. M.D. Fla. 1989); In re Landbank Equity Corp., 83 B.R. 362 (E.D. Va. 1987); In re BDW Assocs., Inc., 75 B.R. 909 (Bankr. W.D. Pa. 1987) (noting sister controlled companies); In re F & S Cent. Mfg. Corp., 70 B.R. 569 (Bankr. E.D.N.Y. 1987); In re B & L Labs., Inc., 68 B.R. 264 (M.D. Tenn. 1986); In re Botten, 54 B.R. 707 (Bankr. W.D. Wis. 1985); In re Jones, 50 B.R. 911 (Bankr. N.D. Tex. 1985); In re Telemark Mgmt. Co., 47 B.R. 1013 (W.D. Wis. 1985); In re Ozark Rest. Equip. Co., 41 B.R. 476 (Bankr. W.D. Ark. 1984), rev'd, 61 B.R. 750 (W.D. Ark. 1986), aff'd, 816 F.2d 1222 (8th Cir. 1986), on demand, 74 B.R. 139 (Bankr. W.D. Ark. 1987); In re Tennessee Pools & Recreation, Inc., 36 B.R. 602 (Bankr. M.D. Tenn. 1983); In re D. H. Overmyer Telecasting Co., 23 B.R. 823, 930 (Bankr. N.D. Ohio 1982); In re Typhoon Indus., Inc., 6 B.R. 886 (Bankr. E.D.N.Y. 1980); Ayr Composition, Inc. v. Rosenberg, 619 A.2d 592 (N.J. Super. Ct. App. Div. 1993); Rounds & Porter Lumber Co. v. Burns, 225 S.W. 2d 1 (Ark. 1949). But cf. In re Mission of Care, Inc., 164 B.R. 877 (Bankr. D. Del. 1994) (stating sister corporation denied recovery of payments allegedly made on behalf of debtor). In Haugen, supra, the Court of Appeals for the Eighth Circuit subsequentrly held a final alter ego judgment against a controlling shareholder in bankruptcy rendered the shareholder liable for the amount of the claim on the date of the petition, as stated in the judgment. Since it was not appealed, the judgment creditor cannot subsequently contend that the shareholder is also liable for interest on the amount of the earlier judgment against the debtor corporation. In re Haugen, 998 F.2d 1442 (8th Cir. 1993); Kimberly Coal Co. v. Douglas, 45 F.2d 25, 27 (6th Cir. 1930); First Huntington Nat'l Bank v. Guyan Mach. Co., 5 S.E. 2d 532 (W. Va. 1939). Three additional cases have upheld objections to the discharge in bankruptcy of a controlling shareholder and imposed liability for the debts of the controlled corporation: In re Long, 35 B.R. 949 (Bankr. S.D. Ohio 1983); In re Harron, 31 B.R. 466 (Bankr. D. Conn. 1983); In re Wade, 26 B.R. 477 (Bankr. N.D. III 1983); see also In re Alport, 144 F.3d 1163 (8th Cir. 1998); In re Haakenson, 159 B.R. 875 (Bankr. D.N.D. 1993); In re Fitzgerald, De Arman & Roberts, Inc., 129 B.R. 652 (Bankr. N.D. Okla. 1991); Fentress v. Triple Mining, Inc., 635 N.E. 2d 102 (Ill. App. Ct. 1994). But cf. In re Hillsborough Holdings Corp., 176 B.R. 223 (M.D. Fla. 1994); In re Hillsborough Holdings Corp., 166 B.R. 461 (Bankr. M.D. Fla. 1994); In re Hillsborough Holdings Corp., 150 B.R. 817 (Bankr. M.D. Fla. 1993) (granting a motion for additional discovery); In re Hillsborough Holdings Corp., 144 B.R. 920 (Bankr. M.D. Fla. 1992); In re Criswell, 52 B.R. 184 (Bankr. E.D. Va. 1985); In re Emeral Oil Co., 61 B.R. 656, 660 (Bankr. W.D. La. 1984). Back To Text

[9] 54 F. 50 (4th Cir. 1893). Back To Text

[10] 312 U.S. 510, 523−24 (1941). Back To Text

[11] 225 S.W.2d 1 (Ark. 1949). Back To Text

[12] Id. at 4 (holding evidence supported conclusion arrangement was wrongfully beneficial at expense of creditor). Back To Text

[13] 99 F.Supp. 376, 378−81 (W.D. Ark. 1951). Back To Text

[14] 255 F. Supp. 674, 680 (W.D. Okla. 1966). Back To Text

[15] 114 F.2d 177, 191 (10th Cir. 1940). Back To Text

[16] 263 F. Supp. 96 (D.S.C. 1967). See generally Huntington Nat'l Bank v. Parton (In re Parton), 137 B.R. 902, 906−07 (Bankr. S.D. Ohio 1991) (holding "piercing veil" of corporation controlled by debtor president and sole shareholder but not finding debt dischargeable). Back To Text

[17] 6 B.R. 886, 890−92 (Bankr. E.D.N.Y. 1980); see Kimberly Coal Co. v. Douglas, 45 F.2d 25, 27 (6th Cir. 1930) (relying on "instrumentality" rule); In re Mushroom Transp. Corp., 90 Bankr. 718, 722−23 (Bankr. E.D. Pa. 1988) (finding parent liability based on ERISA rather than common law bankruptcy). See generally The Law of Corporate Groups, supra note 3, at chap. 16 (1989). Back To Text

[18] See The Law of Corporate Groups, supra note 3, at 591. Back To Text

[19] 692 F.2d 973, 975 (4th Cir. 1982), cert. denied, 461 U.S. 928 (1983). Back To Text

[20] See generally Davis v. Woolf, 147 F.2d 629, 633 (4th Cir. 1945) (stating "[w]hen a corporation becomes insolvent, or in a failing condition, the officers and directors no longer represent the stockholders, but by the fact of insolvency, become trustees for the creditors, and that they then can not by transfer of its property or payment of cash, prefer themselves or other creditors."). Back To Text

[21] Sea Pines Co., 692 F.2d at 975. Back To Text

[22] See The Law of Corporate Groups, supra note 3, at 596−97. Back To Text

[23] 23 B.R. 823, 930 (Bankr. N.D. Ohio 1982); see also In re Plantation Realty Trust, 232 B.R. 279, 282−83 (Bankr. D. Mass 1999) (approving proof of claim by creditor of debtor's affiliate based on blend of agency and enterprise law, despite "substantial gaps in the record" concening traditional veil−piercing factors). Back To Text

[24] 41 B.R. 476 (Bankr. W.D. Ark. 1984), rev'd, 61 B.R. 750 (W.D. Ark. 1986), aff'd, 816 F.2d 1222 (8th Cir. 1986), on remand, 74 B.R. 139 (Bankr. W.D. Ark. 1987). Back To Text

[25] In re Ozark Rest. Equip. Co., 816 F.2d 1222, 1231 (8th Cir. 1987) (affirming district court's order). Back To Text

[26] 584 F. Supp. 386, 398 (E.D. Tenn. 1984). Back To Text

[27] See The Law of Corporate Groups, supra note 3, at 595−96; see also; Bernard F. Cataldo, Limited Liability with One−Man Corporations and Subsidiary Corporations, 18 Law & Contemp. Probs. 473, 497 n.95 (1950); Note, Liability of a Corporation for Acts of a Subsidiary or Affiliate, 71 Harv. L. Rev. 1122, 1133 n.87 (1958); Note, Parent Corporation's Claims in Bankruptcy of Subsidiary: Effect of Fiduciary Relationship, 54 Harv. L. Rev. 1045, 1045−46 (1940). Back To Text

[28] See supra Part I (discussing, in last three paragraphs of introduction, bankruptcy courts acting as courts of equity with overriding objective being achieving equality of distribution and fairness for creditors). Back To Text

[29] Cf. The Law of Corporate Groups , supra note 3, at 596. Back To Text

[30] See In re Kreisler Group, Inc., 648 F.2d 86, 87 (2d Cir. 1981) (per curium) (affirming decision of District Court expunging claim of creditor against parent based on debt of wholly−owed subsidiary; otherwise asserting reluctance to pierce corporate veil); In re County Green Ltd. P'ship, 604 F.2d 289, 292 (4th Cir. 1979) (per curiam) (affirming bankruptcy court's decision not to pierce corporate veil of corporation that was general partner in building project, considering such extensions of liability must be taken "reluctantly and cautiously"); In re Bowen Transp., Inc., 551 F.2d 171, 171 (7th Cir. 1977) (affirming bankruptcy court's decision to sustain objection of debtor that adverse party was not its creditor and there was no basis for piercing corporate veil; showing reluctance to pierce veil); see also Duryee v. Erie R.R., 175 F.2d 58, 58 (6th Cir. 1949) (same); Beckley v. Erie R.R. 175 F.2d 64, 64 (6th Cir. 1949) (per curiam) (same); Madden v. Mac Sim Bar Paper Co. 103 F.2d 974 (9th Cir. 1930); Haskell v. McClintic−Marshall Co., 289 F. 405, 405 (9th Cir. 1923) (same); Martin v. Dev. Co. of Am., 240 F. 42, 42 (9th Cir. 1917) (same); In re Green

Valley Seeds, Inc., 27 B.R. 34, 34 (Bankr. D. Or. 1982) (same); In re Mathes, 23 B.R. 162, 162 (Bankr. S.D. Tex. 1982) (same); In re Nova Real Estate Inv. Trust, 23 B.R. 62, 62 (Bankr. E.D. Va. 1982) (same); In re Twin Lakes Village, Inc. 2 B.R. 532, 532 (Bankr. D. Nev. 1980) (same); Bartle v. Home Owners Coop., Inc., 309 N.Y. 103, 103 (1955) (same); Jersey Boulevard Corp. v. Lerner Stores Corp., 168 Md. 532, 532 (1935) (same); Marsch v. S. New England R. Corp., 230 Mass. 483, 483, (1918) (same); Pagel, Horton & Co. v. Harmon Paper Co., 258 N.Y.S. 168, 168 (4th Dep't 1932) (same); Ohio Edison Co. v. Warner Coal Corp., 72 N.E. 2d 487, 487 (Ohio 1946) (same). But cf. Gibraltar Sav. v. LDBrinkman Corp. 860 F.2d 1275, 1275 (5th Cir. 1988) (same); Standard Dyeing & Finishing Co. v. Arma Textile Printers Corp., 757 F. Supp. 230, 230 (S.D.N.Y. 1991) (same); In re Hillsborough Holdings Corp., 176 B.R. 223, 223 (M.D. Fla. 1994) (same); In re Parton, 137 B.R. 902, 905−06 (Bankr. S.D. Ohio 1991) (same); In re Moserbeth Assocs. I, L.P., 128 B.R. 716, 716 (Bankr. E.D. Pa. 1991) (same); In re Moran, 120 B.R. 379, 387−88 (Bankr. W.D. Va. 1990) (same); In re Woodstock Assocs. I, Inc., 120 B.R. 436, 449 (Bankr. N.D. III. 1990) (same); In re Denton, 120 B.R. 310 (Bankr. S.D. Tex 1990) (same); In re Murray, 116 B.R. 473, 476 (Bankr. E.D. Va. 1990) (same); In re P.R. Hotel Corp., 111 B.R. 22, 24−25 (Bankr. D.P.R. 1990) (same); In re McConnell, 122 B.R. 41, 44−45 (Bankr. S.D. Tex. 1989) (same); In re Nielson, 97 B.R. 269, 274 (Bankr. W.D.N.C. 1989) (same); In re Cycle−Rama, Inc., 91 B.R. 647, 649 (Bankr. D.N.H. 1988) (same); In re Simplified Info. Sys., Inc. 89 B.R. 538, 544−46 (W.D. Pa. 1988) (same); Butler v. Collins, 14 B.R. 546, 546 (E.D. La. 1981) (same); In re Tesmetges, 87 B.R. 263, 263 (Bankr. E.D.N.Y. 1988) (same); In re Lee, 87 B.R. 697, 699−700 (Bankr. M.D. Fla. 1988) (same); In re Rosecrest Enters. Inc., 80 B.R. 354, 357 (Bankr. W.D. Pa. 1987); Ipswich Bituminous Concrete Prods., Inc. 79 B.R. 511, 520 (Bankr. D. Mass 1987) (same); In re Burgess Mining and Constr. Corp., 68 B.R. 23, 25 (Bankr. N.D. Ala. 1986) (same); In re Gordon Car & Truck Rental, Inc., 65 B.R. 371, 376−77 (Bankr. N.D.N.Y. 1986) (same); In re Am. Cable Publ'ns, Inc., 62 B.R. 536, 539 (D. Colo. 1986) (same); In re Chism, 57 B.R. 23, 24 (Bankr. M.D. Ala. 1985) (same); In re Alta Indus., Inc. 53 B.R. 567, 569−70 (Bankr. W.D. Tex. 1985) (same); In re Int'l Horizons, Inc., 51 B.R. 747 (Bankr. N.D. Ga. 1985) (same); In re Nash, 49 B.R. 254, 260−61 (Bankr. D. Ariz. 1985) (same); In re Baker Fence. Inc., 47 B.R. 273, 277 (Bankr. D. Mass. 1985) (same); In re Carroll, 11 B.R. 812, 816 (Bankr. E.D. Va. 1981) (same); Wolf v. Walt, 247 Neb. 858, 865−70 (1995) (same). Back To Text

[31] See In re Southard & Co., Ltd., 1 W.L.R. 1198, 1208 (C.A. 1979) (refusing to "wind−up" insolvent company, wholly owned subsidiary, with its parent); L.C.B. Gower, The Principles of Modern Company Law 120 (4th ed. 1979); Clive Schmitthoff, The Wholly Owned and the Controlled Subsidiary, Journal of Business Law 218, 221 (1978); Michael Whincup, "Inequitable Incorporation"–The Abuse of a Privilege, 2 Company Law 158, 158−60 (1981). The English law still rests on the decision of the House of Lords in Salomon v. A. Salomon & Co. 75 L.T.R. 426 (1897). See The Law of Corporate Groups, supra note 3, at 598 n.1. Back To Text

[32] In re Green Valley Seeds, Inc., 27 B.R. 34, 36 (Bankr. D. Or. 1982); see also Ross Controls, Inc. v. United States Dep't of Treasury I.R.S., 160 B.R. 527, 532−33 (E.D. Pa. 1993) (finding company incorporated by debtor corporation's sole officer and shareholder after debtor's liquidation liable for liquidated company's tax indebtedness). But cf. Phillip I. Blumberg & Jonathan Fowler, The Law of Corporate Groups, Problems in the Bankruptcy or Reorganization of Parent and Subsidiary Corporations, Including the Law of Corporate Guaranties 384 (2000 Supplement, Aspen Law & Business, New York 2000) [hereinafter The Law of Corporate Groups 2000]. Back To Text

[33] The history of the Argentine Bankruptcy Law system is as follows: In 1862 the Commercial Code was put into force for the whole nation as a federal law. It is similar to the French Commercial Code of 1807. A part of it dealt with bankruptcy provisions, at that time pertaining only to commercial individuals and corporations. The local Procedural Law of each of the Provinces dealt with the bankruptcy provisions for non−commercial persons. This Commercial Code was reformed in 1889. In 1902 Argentina issued a Bankruptcy Act (the first one) separate from the rest of the Commercial Code, with the number 4.156 (the numbers of all the National (Federal) Legal Acts of Argentina have begun with the number 1 since 1853 when the first Federal Constitution was approved). It was completely replaced by another Bankruptcy Act in 1933 (number 11.719). It was again replaced in 1972 by a Bankruptcy Act (number 19.551). It was partially reformed by Act number 22.917 in 1983. This last Act unified all bankruptcy procedures for every type of persons: commercial and non commercial. Finally it was replaced by Bankruptcy Act number 24.522 in 1995. In 2002, five sections were reformed. Back To Text

[34] The text of Section 173.1 of the Argentine Bankruptcy Act of 1995 reads: "Los representantes, administradores, mandatarios o gestores de negocios del fallido que dolosamente hubieren producido, facilitado, permitido o agravado la situación patrimonial del deudor o su insolvencia, deben indemnizar los perjuicios causados." [unofficial translation: Representatives, managers or agents of the debtor who have willfully caused, facilitated, allowed or aggravated the debtor's economic condition or insolvency must pay damages arising therefrom.].

The text of Section 173.2 reads: "Quienes de cualquier forma participen dolosamente en actos tendientes a la disminución del activo o exageración del pasivo, antes o después de la declaración de quiebra, deben reintegrar los bienes que aún tengan en su poder e indemnizar los daños causados, no pudiendo tampoco reclamar ningún derecho en el concurso."[unofficial translation: Whoever willfully participates in any action intended to reduce the assets or increase the liabilities, before or after the entry of an order for relief in bankruptcy, shall return any property held in its possession, pay any damages arising there from and shall not be entitled to claim any rights in the bankruptcy proceeding.]. Back To Text

[35] See Rafael Mariano Manóvil, Grupos de Sociedos en el Derecho Comparado 773, 779 (Abeledo−Perrot, Buenos Aires 1998) [hereinafter Grupos De Sociedos]. Back To Text

[36] See supra text accompanying note 33. In Italy, a Committee directed by Giuseppe Ferri wrote the Draft Enterprise Statute in 1984, which is similar to the argentine section, but specifically refers to the dominant. It reads as follows:

[C]uando sea declarada la quiebra o el estado de insolvencia de la sociedad controlada, la sociedad controlante y sus administradores responden solidariamente por las obligaciones de la sociedad controlada, si el estado de insolvencia fue provocado o agravado por actos u omisiones perjudiciales a la sociedad, cumplidos por los administradores de la controlada a pedido o en interés de la sociedad controlante. [unofficial translation: Whenever an order for relief in bankruptcy or a state of insolvency is entered against a controlled company, the controlling companies and the managers thereof shall be jointly and severally liable for the obligations of the controlled company, if the state of insolvency was provoked or aggravated by actions or omissions detrimental to the company, carried out by the managers of the controlled company at the request or in the interest of the controlling company.]

Id; see also Grupos De Sociedos, supra note 34, at 669. Back To Text

[37] Section 166 of the Bankruptcy Act of 1972 (repealed in 1995) was quite similar to the new Act introduced in 1995. It reads:

Cuando con dolo o en infracción a normas inderogables de la ley se produjere, facilitare, permitire, agravare o prolongare la disminución de la responsabilidad patrimonial del deudor o su insolvencia, quienes han practicado tales actos por el deudor, ya sea como representantes, administradores, mandatarios o gestores de negocios, deben indemnizar los daños y perjuicios por los que se les declare responsables en virtud de tales actos.[unofficial translation: Any person who willfully and in violation of mandatory legal provisions, caused, facilitated, allowed, aggravated or prolonged the reduction of the property of the debtor or its insolvency, acting on behalf of the debtor, as its representative, manager or agent, shall pay damages that may be attributed to such person.]

Id. Back To Text

[38] See Grupos De Sociedos, supra note 34, at 672, 775. Back To Text

[39] See Julio Cesar Rivera, Horatio Roitman & Roque D. Vítolo, Concursos y Quiebras Ley 24.522, 283 (Rubinzal−Culzoni, Santa Fe 1995). This conduct is defined by Section 1072 of the Civil Code of Argentina, which states: "El acto ilícito ejecutado a sabiendas y con intención de dañar la persona o los derechos de otro, se llama en este Código delito." [unofficial translation: For the purposes of this Code, an intentional tort is any illegal action carried out willfully and with the intention of causing damage to the person or the rights of another person.]. Back To Text

[40] See Sections 174, 175 of the Bankruptcy Act of 1995. Back To Text

[41] See Salvador Dario Bergel & Martin Esteban Paolantonio, Las Acciones De Responsabilidad Patrimonial Contra Terceros En La Quiebra, En La Reforma Concursal Ley 24.522 239 Homenaje a Héctor Cámara, Derecho y Empresa 239 n.4 (Facultad de Ciencias Empresariales, Universidad Austral, Rosario 1995) [hereinafter Acciones De Responsabilidad]. Back To Text

[42] In this part of the article, we will only study cases concerning the extension of the bankruptcy proceedings referred to corporate groups in Argentina. Back To Text

[43] The text of Section 168 was: "La quiebra de la sociedad controlada importa la de la controlante, entendiéndose por ésta la que en forma directa o por intermedio de otra sociedad a su vez controlada, posee participaciones por cualquier título que importen la tenencia de más del cincuenta por ciento de los votos necesarios para formar la voluntad social." [unofficial translation: Bankruptcy of a controlled company results in bankruptcy of the controlling company, a controlling company being defined as a company that directly or through another controlled company, holds interest, for any title whatsoever, in excess of 50% of the voting stock necessary to adopt decisions.]; see 29 E.D. 917 (1969). Back To Text

[44] The text of Section 161 of the Bankruptcy Act of 1995 reads:

La quiebra se extiende:

1) A toda persona que, bajo la apariencia de la actuación de la fallida, ha efectuado los actos en su interés personal y dispuesto de los bienes como si fueran propos, en fraude a sus acreedores.

2) A toda persona controlante de la sociedad fallida, cuando ha desviado indebidamente el interés social de la controlada, sometiéndola a una dirección unificada en interés de la controlante o del grupo económico del que forma parte.

A los fines de esta sección, se entiende por persona controlante: a) Aquella que en forma directa o por intermedio de una sociedad a su vez controlada, posee participación, por cualquier título, que otorgue los votos necesarios para formar la voluntad social. b) Cada una de las personas que, actuando conjuntamente, poseen participación en la proporción indicada en el párrafo a) precedente y sean responsables de la conducta descripta en el primer párrafo de este inciso.

3) A toda persona respecto de la cual existe confusión patrimonial inescindible, que impida la clara delimitación de sus activos y pasivos o de la mayor parte de ellos.

[unofficial translation: Bankruptcy shall extend:

1) To any person who under the appearance of acting for the debtor has carried out actions in its personal interest and has disposed of property as if it were its own, in fraud of its creditors.

2) To any controlling person of the debtor, whenever it has unduly deviated the corporate interest of the controlled company, submitting it to a unified direction in interest of the controlling company or the economic group thereof.

For the purposes of this section, the term controlling person shall mean: a) Any person who directly or through a controlled company, holds interest, of any kind, that grants the necessary votes to adopt decisions; b) each of the persons who acting jointly hold interest in the proportion specified in a) above and are liable for the conduct described in the first paragraph of this subsection.

3) Any person as regards which property is commingled and cannot be separated so that it prevents a clear delimitation of its assets and liabilities or the majority thereof.].

This section is complementary to Section 172 of the Bankruptcy Act of 1995 which reads: "Cuando dos o más personas formen grupos económicos, aun manifestados por relaciones de control pero sin las características previstas

en el art. 161, la quiebra de una de ellas no se extiende a las restantes." [unofficial translation: Whenever two or more persons compose an economic group, even evidenced by control relations but without the features contemplated in Article 161, the bankruptcy of one of such persons will not extend to the others.]. Back To Text

[45] See Grupos De Sociedos, supra note 34, at 1113, 1117. That is why this author adds that if the defendant pays the plaintiff everything owed to the creditors as verified in the bankruptcy proceedings, he will evade subsequent bankruptcy decrees or judgements. Back To Text

[46] See id. at 1116. Back To Text

[47] See id. at 1059, 1062 (mentioning authors). Some authors opposed to this legal provision offer reasons such as: the need for conservation of the enterprise, the complexities of a multinational bankrupt group, the uncontrolled expansion of the macroeconomic crises, the loss of income due to the judicial liquidation, the loss of the going concern value, the bankruptcy proceedings imposed on a corporation without evidence of being insolvent. Back To Text

[48] See A. Tonón, "Extensión de Quiebra sin Finalidad Práctica," 107 E.D. 843 (1984); Héctor José Miguens, Extensión De La Quiebra Y La Responsabilidad En Los Grupos De Sociedade 1−6 (Depalma, Buenos Aires, 1998). Back To Text

[49] "Compañía Swift de la Plata SA," 151 L.L. 516 (1974). This case was a so−called "concurso preventivo," similar to a "Reorganization" in the U.S. Bankruptcy System. The judge of first instance, the Commercial Court of Appeals of Buenos Aires (Sala C) and the (Federal) Supreme Court of Argentina, applied the piercing the corporate veil doctrine and with this argument rejected the proposal of the debtor, declared the bankruptcy of the subsidiary, and extended the bankruptcy proceeding from the subsidiary to the whole group of companies, parents and daughters, some located in the United States and the Bahamas. Also the credits of the parent corporations were rejected and not considered for election of the "concurso preventivo" plan, although in Argentina subordination of credits in the bankruptcy process does not exist and at that time there was no conflict of interest in voting by a parent in the bankruptcy proceedings of a subsidiary, as defined in the new Secton 45 of the Bankruptcy Act of 1995. Undoubtedly, this case has political meaning that must be judicially analyzed in the future. See Alfredo Rovira, Responsibilities and Liabilities of Involent Companies in Argentina, 16 Int'l Bus. Law. 500 (1988); Juan Dobson, Lifting the Veil in Four Countries: The Law of Argentina, England, France and the United States, 35 Int'l & Comp. L. Q. 839 (1986); Michael W. Gordon, Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations, 16 U. Miami Inter−am. L. R., 301, 312 (1984); George C. McKinnis, The Argentine Foreign Investment Law of 1976, 17 Colum. J. Transnat'l L. 357, 383−84 (1978). Alfredo Rovira, Responsibilities and Liabilities of Involent Companies in Argentina, 16 International Business Lawyer 500 (1988).

On the problems of Private International Law of this case see Manuel E. Malbrán, La extraterritorialidad de la quiebra en el caso Cia. Swift de La Plata S..A., 54 E.D. 809 (1974). About the critical opinions of this case in the USA: see Phillip Blumberg, The Law of Corporate Groups, Bankruptcy (vol. II) p. 660−69; Michael W. Gordon, Argentine Jurisprudence: The Parke Davis and Deltec Cases, 6 Law Am. 320 (1974); Michael W. Gordon, Argentina Jurisprudence: Deltec Update, 11 Law. Am. 43 (1979); Keith S. Rosenn, Note, Expropriation in Argentina and Brazil: Theory and Practice, 15 Va. J. Int'l L. 277, 311−14 (1975); see also Alejandro P. Radzyminski, Sistema de derecho internacional privado concursal argentino, 1990−A RDCO 199; Alona E. Evans, Note, Judicial Decision. Jurisdiction− Forum Non Conveniens− Determination of Bankruptcy in Argentina as Presumptive Confiscatory Measure, 68 Am. J. Int'l L. 741 (1974); Ricardo V. Puno, Note, Multinational Enterprise: Reaching the Assets of Other Members of the Corporate Group After Bankruptcy of a Subsidiary−Separate Corporate Personalities Disregarded 15 Harv Int'l L. J. 528 (1974).

See Deltec Banking Corp. v. Compañía Italio−Argentina de Electricidad S.A., 362 N.Y.S.2d 391 (1st Dept. 1974) (Concerning the litigation in the Supreme Court of New York). See generally Deltec Banking Corp. Ltd. v. Compañía Italo−Argentina de Electricidad S.A., 16 Harv. Int'l L. J. 166 (1975).

Nevertheless some years later the Argentine Supreme Court dismissed the extension of the bankruptcy proceedings against a corporation member of the group called "Ingenio La Esperanza SA": see "Compañía Swift de La Plata SA," [1976−D] L.L. 314. The main reason given in the dictum was that in that case there was mere control, but not a unified enterprise policy which is the second and vital element for the existence of a group of corporations. The same solution was adopted in "Papelera Paysandú," CNCom. [1984−C] L.L. 219. Back To Text

[50] See Grupos De Sociedos, supra note 34, at 1233. Back To Text

[51] See "Nogoyá S.A," CNCom. [11−1971] J.A. 459 (commingling of assets and debts); "Talleres Inglemere SA," 1ª Inst. Buenos Aires 48 E.D. 361 (1971) (commingling of assets, debts and substantive and procedural consolidation). Back To Text

[52] In the majority of cases, the courts applied the "piercing the corporate veil" doctrine. See "Tecnoforest S.A.," CNCom. E.D. 332 (1998), (with comment by Luis María Games, Sociedad controlante. Extensión de quiebra); "Humberto J. Pontremoli S.A.," CNCom., [1996−B] L.L. 241 (with a note by G.E. Ribichini, Extraño caso de extensión de quiebra por confusión patrimonial al propietario aparente de los bienes ("collateral" extension: from subsidiary to another subsidiary)); "Reverdito y Cía. S.A.," CNCom., [1995−D] L.L. 615; "Tucson S.A.," CNCom. [1995−B] L.L. 400 (with a note by Ricardo Augusto Nissen, El trasvasamiento de sociedades (emptyness of a subsidiary comitted by another subsidiary)); "Exportadora Marly S.A.," CNCom. [1994−E] L.L. 664 (with comment by Guillermo Emilio Ribichini, Conjunto económico, control y extensión de la quiebra (extension against an already bankrupt corporation)); "Kapelusz Revistas S.A.," 1ª Inst. Buenos Aires 147 E.D. 369 (1991) (with note by Osvaldo Maffía, Autodenuncia y extensión de la quiebra por confusión patrimonial inescindible); "Celcar S.A.," CNCom. [1990−D] L.L. 242 (with a comment by Mariano Gagliardo, Alcances concursales del control societario (preventive bankruptcy proceedings of whole group with extension of bankruptcy proceedings afterwards)); "Cadenas Madariaga," CNCom. 138 E.D. 213 (1989); "Carracedo," Capel.CC (1987) (unpublished); "Auto Star S.A.," CNCom. (1986) (unpublished); "Tombut S.A.," CNCom. (1985) (unpublished); "Zárate Sulfúrico S.A.," CNCom. (1985) (unpublished); "Oddone," CNCom. [1984−D] L.L. 412 ("downstream" extension: from parent to subsidiaries); "Sasetru S.A.," CNCom. [1983−B] L.L. 650 (affirmation of bankruptcy agreement); "Sasetru S.A.," CNCom. [1983−C] L.L. 288 (extraordinary remedy granted by Commercial Court of Appeals); "Confecciones Galicia S.A.," CNCom. 102 E.D. 463 (1982) (intragroup guaranties); "Silos y Elevadores SA" CNCom. [1982−D] L.L. 295; "Sasetru S.A.," CNCom. [1981−C] L.L. 181 (extension from parent to thirty−five subsidiaries); "Marfinco S.A.," CNCom. [1980−C] L.L. 340, (commingling of assets); "Macrini S.R.L.," 1a Inst. 153 E.D. 652 (1993); "Margaria", 1ª Inst. Santa Rosa, [1984−I] J.A. 515; "Armadores Argentinos S.A.," 1ª Inst. Buenos Aires nº 11 [1983−B] L.L. 561 (centralized financing of whole group with fraudulent intragroup transactions); "Electronec S.R.L." 1ª Inst. Mar del Plata D.E. 67 (1978); "Pazmallmann S.A.," 1ª Inst. Buenos Aires [1978−B] L.L. 494 (straw corporations in only one group enterprise and commingling of assets). Back To Text

[53] See "Florcam S.A.," [1996−D] L.L. 750; "Nogoyá S.A.," CNCom. (1981) (unpublished) (accounts not available in commingling of assets and debts); "Transportes Versailles S.A.," CNCom. [1979−B] L.L. 103. Back To Text

[54] "Porcelanas Lozadur S.A.," CNCom. 157 E.D. 306 (1991) (term of prescription); "Costa del Sol S.A.," CNCom. 145 E.D. 187 (1991) (expiration, lapsing and suspension of the term); "Miño Pintos," 1ª Inst. San Isidro 160 E.D. 293 (1994) (suspension of term); see also doctrines in Roberto J.Porcel, Extensión de la quiebra, [1986−D] L.L. 832. Back To Text

[55] "Greco Hnos S.A.," CNCom. [1981−B] L.L. 360. There has been a lot of criticism of this case. See Rogasiano María Lo Celso, Grupo Greco: leyes 22.229, 22.334 y otras normas. ¿Cuánto poder, cuánto desorden, cuánta necesidad?, en El Derecho Legislación Argentina, 992 (1982); Fernando Jesús Pascual, Algunas cuestiones acerca de la ley 22.334 (quiebra de las sociedades del "grupo Greco"), [1981−C] Sección doctrina LLA 834−37; Cristobal Carvajal Moreno, Exámen crítico de la ley 22.229 de Intervención al "Grupo Greco" E.D. 279−83. The unconstitutionality of these provisions were denied by the court in "In re Greco Hnos. S. A." CNCom. [1981−B] L.L. 360−75. Back To Text

[56] The former case law has rejected that possibility. See "Gafyr S.A.," CNCom. 1994 RDCO 569 (conflict of jurisdiction); "Monómeros Vinílicos S.A.," CNCom. 160 E.D. 620 (1993) (conflict of jurisdiction); "La Elvira S.A. Establecimientos Agropecuarios," CNCom. 1982 E.D. 409; "Alfrombras Alpana S.A.," CNCom. [1981−D] L.L. 185; "Establecimientos Textiles Lobos S.A", CNCom. 95 E.D. 264 (1981); "Unzumatlán S.A." CNCom. 97 E.D. 689 (1981); "Comimar S.A..," CNCom. [1980−B] L.L. 494; "Fomalco S.R.L.," CNCom. [1980−C] L.L. 557 (with a comment by Salvador Darío Bergel, Conjunto económico y concurso preventivo); "Producciones Argentinas de Televisión S.A.," CNCom. [1976−B] L.L. 463; "Promotora Internacional de Ventas S.A", 1ª Inst. Buenos Aires 102 E.D. 557 (1982); Marcelo Gebhardt, Insolvencia del grupo empresario, 1985−D L.L. 899. Back To Text

[57] See "Leo Export S.A." CNCom. 171 E.D. 490 (1996); "Colasud S.A." CNCom. 167 E.D. 533 (1995); "Hormisur S.A." 1ª Inst. Buenos Aires [1997−A] L.L. 268 (with note by Lidia Vaiser Un fallo ponderable sobre terreno resbaladizo); "Turismo Winter S.R.L." 1ª Inst. Rosario 173 E.D. 572, fallo nº 48.110 (with a note by Carlos Odriozola, El concurso en caso de agrupamiento puede no incluir a todos sus integrantes.) Back To Text

[58] That is the opinion of Manóvil and others. See Grupos De Sociedos , supra note 34, at 1232. Back To Text

[59] See id. at 1232. Back To Text

[60] See id. Back To Text

[61] See id. Back To Text

[62] See id. Back To Text

[63] See Grupos De Sociedos, supra note 34, at 1233. Back To Text

[64] See id. at 1231. Back To Text

[65] See id. Back To Text

[66] See id. Back To Text

[67] See id. at 671−72; see also Juilio César Otaegui, Concentración Societaria 446 (Abaco, Buenos Aires 1984) [hereinafter Concentración Societaria] (citing Section 1725 of (federal) Argentine Civil Code, Sections 413 and 415 of (federal) Argentine Commercial Code, and Section 127 of Argentine Company Law of 1972 as amended in 1983). Section 1725 of the Civil Code reads as follows: "Todo socio debe responder a la sociedad de los daños y perjuicios que por su culpa se le hubiere causado, y no puede compensarlos con los beneficios que por su industria o cuidado le hubiese proporcionado en otros negocios." [unofficial translation: Every member must be liable vis−a−vis the company for damages arising thereof on account of its negligence if such member cannot offset them against the benefits that its industry or care would bring in the business.]. Sections 413 and 415 of the Commercial Code were replaced by Sections 54.1 and 54.2 of the Company Act of 1972 as amended 1983. (They are very similar in content.) Section 127 of the Company Act reads: "El contrato regulará el régimen de administración. En su defecto, administrará cualquiera de los socios indistintamente." [unofficial translation: The agreement shall regulate the administration of the company. In absence of provisions thereof, any member indistinctly shall administer the company.]. Back To Text

[68] Section 54.1 of the Companies Act reads: "El daño ocurrido a la sociedad por dolo o culpa de socios o de quienes no siéndolo la controlen, constituye a sus autores en la obligación solidaria de indemnizar, sin que puedan alegar compensación con el lucro que su actuación haya proporcionado en otros negocios." [unofficial translation: The members or those who not being members exercise control over the company shall be jointly and severally liable for any damage sustained by the company due to their willful misconduct or negligence, such members not being entitled to allege offsetting thereof against any profits they might have brought to the company due to their actions]. Section 54.2 of the Companies Act reads: "El socio o controlante que aplicare los fondos o efectos de la sociedad a uso o negocio de cuenta propia o de tercero, está obligado a traer a la sociedad las ganancias resultantes, siendo las pérdidas

de su cuenta exclusiva." [unofficial translation: The party or controlling party who uses assets or property of the company for its own business or the business of a third party shall be liable for bringing back to the company the profits arising therefrom and shall solely bear any losses incurred.]. Back To Text

[69] See Grupos De Sociedos, supra note 34, at 682. Back To Text

[70] See id. at 683−84. Back To Text

[71] See id. at 680−84. Back To Text

[72] See id. at 685−96. Back To Text

[73] See id. Back To Text

[74] "Oblique action" is defined by Section 1.196 of the Civil Code, which reads: "Los acreedores pueden ejercer todos los derechos y acciones de su deudor, con excepción de los que sean inherentes a su persona." [unofficial translation: Creditors may exercise all the rights and actions held by the debtor, except those that are exclusively personal.]. See 5 Belluscio, Augusto César & Zannoni, Eduardo, Código Civil Comentado, Anotado y Concordado 888 (Astrea, Buenos Aires 1984) [hereinafter Código Civil Comentado]. Back To Text

[75] See Grupos De Sociedos , supra note 34, at 697–710. Back To Text

[76] See id. at 721−40. Back To Text

[77] Section 54.3 of the Companies Act reads:

La actuación de la sociedad que encubra la consecución de fines extrasocietarios, constituya un mero recurso para violar la ley, el orden público o la buena fe o para frustrar derechos de terceros, se imputará directamente a los socios o a los controlantes que la hicieron posible, quienes responderán solidaria e ilimitadamente por los perjuicios causados. [unofficial translation: Any actions of the company that is beyond its corporate purposes, or is a mere sham to violate the law, public order or to impair the rights of third parties, shall be directly attributed to the members or controlling parties who made such action possible, they shall be jointly and severally liable for damages arising therefrom.].

Id. Back To Text

[78] See Grupos De Sociedos, supra note 34, at 1009. Uruguay has similar provisions in §§ 189, 190 and 191 of the Companies Act number 16.060 as amended 1989. The 1989 Uruguayan law embraced a larger scope of group situations, as it does not limit the extension or transfer of imputability to partners, shareholders and controlling parties. Back To Text

[79] Manóvil refers to the practice of following the German doctrine "Freundlicher Durchgriff." Grupos De Sociedos, supra note 34, at 1015−17, 1229. Back To Text

[80] See, e.g., "Fernandez Anchorena," CNPaz en Pleno [1969−III] J.A. 52; see also "Kellog Cia.," CSJN [1985−B] L.L. 414 (application in Argentine tax law) (with commentary by Arístides H. Corti, El caso Kellogg y el restablecimiento de la doctrina 'Parke Davis'); "Marlow," CNCom. [1995−C] L.L. 280 (application in subsequent jurisprudence). Back To Text

[81] See Grupos De Sociedos, supra note 34, at 1018; see also "Varrone," CSéptima Civ. y Com. de Córdoba [1996] L.L. Córdoba 372. Back To Text

[82] See Grupos De Sociedos, supra note 34, at 1229–30. See, e.g., "Morrogh Bernard," Civil and Commercial Court of Concepción del Uruguay [1979−D] L.L. 237 (with commentary by María Josefa Mendez Costa, Legítima y

sociedades de familia); "Astesiano," CNCom. [1978−B] L.L. 196 (demonstrating violation of statute's imperative provisions is one of foundations of norm) (with commentary by Eduardo Zannoni, La desestimación de la personalidad societaria −disregard− y una aplicación en defensa de la intangibilidad de la legítima hereditaria.) Back To Text

[83] See Grupos De Sociedos, supra note 34, at 1230. Back To Text

[84] See id. Back To Text

[85] Section 274.1 of the Companies Act reads:

Los directores responden ilimitada y solidariamente hacia la sociedad, los accionistas y los terceros, por el mal desempeño de su cargo, según el criterio del artículo 59, así como por la violación de la ley, el estatuto o el reglamento y por cualquier otro daño producido por dolo, abuso de facultades o culpa grave. [unofficial translation: Directors shall be jointly and severally liable vis−à−vis the company, the shareholders and third parties for any misperfomance of office, under the criterion of Article 59, as well as from any violation of the law and the by−laws and for any damage arising from their willful misconduct, abuse of office or gross negligence.]. Back To Text

[86] See Grupos De Sociedos, supra note 34, at 747−72; Acciones De Responsabilidad, supra note 40, at 235. Back To Text

[87] Section 59 of the Companies Act reads: "Los administradores y los representantes de la sociedad deben obrar con lealtad y con la diligencia de un buen hombre de negocios. Los que faltaren a sus obligaciones son responsables, ilimitada y solidariamente, por los daños y perjuicios que resultaren de su acción u omisión." [unofficial translation: The managers and representatives of the company must act with loyalty and with the diligence of a good businessman. Those who fail to comply with their duties shall be unlimitedly and jointly and severally liable for any damages arising from their actions or omissions.]. The officer or director must be tecnically prepared for each business in particular. See "Estancias Procreo Vacunos S.A.," CNCom. [1996−B] L.L. 193. Back To Text

[88] See Grupos De Sociedos, supra note 34, at 760−76. Back To Text

[89] Section 43 of the Civil Code reads:

Las personas jurídicas responden por los daños que causen quienes las dirijan o administren, en ejercicio o con ocasión de sus funciones. Responden también por los daños que causen sus dependientes o las cosas, en las condiciones establecidas en el título: "De las obligaciones que nacen de los hechos ilícitos que no son delitos." [unofficial translation: Legal entities shall be liable for damages caused by their managers or administrators in the course of their duties. They shall also be liable for damages caused by their dependents or by things, under the conditions established under the heading: "Obligations that arise from torts that do not qualify as crimes.]. Back To Text

[90] See Manóvil, supra note 34, at 661; "Acosta Héctor o Raúl," CNCiv., Sala B, 31.3.1966, 123 L.L. 424. Back To Text

[91] See Código Civil Comentado, supra note 73, at 434; Aida Kemelmajer de Carlucci & Carlos Parellada, Responsabilidad Civil 336–37 (Hammurabi, Buenos Aires 1992) [hereinafter Responsabilidad Civil]. Back To Text

[92] See "Sievano de Diaz María L.," CNCiv., Sala E, [1977−D] L.L. 306; "Máquina Juan," CNCic., Sala A, 30.10.1969, 140 L.L 782; "Pereyra Horacio R.," CNCom., Sala A, 21.4.1970, 141 L.L 710; "Acosta Héctor o Raúl," CNCiv., Sala B, 31.3.1966, 123 L.L. 424; "Barquín Arturo R.," CNCiv., Sala B, 29.2.1968, 131 L.L. 500; "Maza Atilio," CNCiv., Sala D, 22.12.1966, 126 L.L. 58; "Gómez Raúl M.," CNCiv., Sala F, 15.5.1969, 136 L.L. 848; "Presmanes Fernando A.," CNCiv., Sala F, 3.7.1969, 137 L.L. 758 (cited in Grupos De Sociedos, supra note 34, at 663 n.311). Back To Text

[93] Section 1109 of the Civil Code reads: "Todo el que ejecuta un hecho, que por su culpa o negligencia ocasiona un daño a otro, está obligado a la reparación del perjuicio. Esta obligación es regida por las mismas disposiciones relativas a los delitos del derecho civil." [unofficial translation: Any person who performs an action, that due to his/her negligence or fault causes damage to another person, shall be liable for redressing such damage. This obligation is governed by the same provisions as those applicable to civil torts.]. Back To Text

[94] See Grupos De Sociedos, supra note 34, at 756; Acciones De Responsabilidad, supra note 40, at 235. Back To Text

[95] Section 1113 of the Civil Code reads: "La obligación del que ha causado un daño se extiende a los daños que causaren los que están bajo su dependencia, o por las cosas de que se sirve, o que tiene a su cuidado." [unofficial translation: The obligation of anyone who causes damage extends to any damage caused by those who are under his/her control or by the things used or under his/her control.]. Back To Text

[96] See Responsabilidad Civil, supra note 90, at 338 (noted in Grupos De Sociedos, supra note 34, at 663). But see Concentración Societaria , supra note 66, at 448 (disagreeing with Manóvil's position and arguing that in this case, Sections 54 and 272 of the Argentine Companies Act, as amended in 1983, are applicable. Sections 54 and 272 establish liability of corporate directors acting in conflict with interests of parent corporation and subsidiary). Back To Text

[97] Grupos De Sociedos, supra note 34, at 664. Back To Text

[98] See The Law of Corporate Groups 2000, supra note 31, at 596. Back To Text

[99] Feldman v. Trs. of Beck Indus., Inc. (In re Beck Indus., Inc.), 479 F.2d 410, 419 (2d Cir. 1973) (internal quotation marks in original omitted). Back To Text

[100] Cf. The Law of Corporate Groups 2000, supra note 31, at 603. Back To Text