CORPORATE CONSPIRACY: HOW NOT CALLING A CONSPIRACY A CONSPIRACY IS WARPING THE LAW ON CORPORATE WRONGDOING

By

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ABSTRACT

The intracorporate conspiracy doctrine immunizes an enterprise and its agents from conspiracy prosecution based on the legal fiction that an enterprise and its agents are a single actor incapable of the meeting of two minds to form a conspiracy. The doctrine, however, misplaces incentives in contravention of agency law, criminal law, tort law, and public policy. As a result, harmful behavior is ordered and performed without consequences, and the victims of the behavior suffer without appropriate remedy.

Especially in the wake of the financial crisis, prosecutors and the public are searching for new tools to combat corporate conspiracy. The most obvious and tested tool would be to roll back the intracorporate conspiracy doctrine. In the absence of this solution, frustration with applying the doctrine has led to over-reliance on alternative methods of holding agents of enterprises responsible for their actions. Examples of such alternative doctrines include piercing the corporate veil, responsible corporate officer doctrine, and unusual approaches such as denying "retroactive" imposition of the corporate veil and adopting "reverse" piercings of the corporate veil.

But these doctrines were fundamentally developed in and adapted to other circumstances. They do not take into account the coordination of actions within an enterprise and the unique nature of conspiracy that fall—and should fall—into the heart of behavior that would trigger liability if not for the intracorporate conspiracy doctrine. Using alternative doctrines to impose liability on behavior that would otherwise be recognized as intracorporate conspiracy results in inconsistent decisions and disproportionate awards. In sum, not calling a conspiracy a conspiracy asks the wrong questions and sends the wrong signals throughout the law on corporate and individual responsibility.

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I. INTRODUCTION

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

The limited exception to the intracorporate conspiracy doctrine's immunity applies when an agent's actions fall outside the scope of the principal's interest: when he or she acts for her own benefit and not for the benefit of the principal. However, the more an employee's intent, for example, is to protect the reputation and interests of his or her employer, the more the employee and employer share a common purpose in performing their illegal acts, which is an essential test of whether a conspiracy exists. Yet the intracorporate conspiracy doctrine's provision of immunity from prosecution is strongest when an agent is acting on behalf of his or her principal. The more this exception to the intracorporate conspiracy doctrine applies, the more it also undermines the common intent requirement of criminal and tort law.[4]

For example, the failure of the prosecution of Monsignor Lynn for his twelve years of methodically transferring predator priests within the Roman Catholic Church Archdiocese of Philadelphia to hide the impact of their sexual abuse on victims recently made international news headlines.[5] The sister work to this Article closely detailed how the intracorporate conspiracy doctrine blocked that prosecution and many others like it.[6]

The contribution that this Article makes to the debate over the intracorporate immunity doctrine is to show how the strength of the doctrine has affected and warped related doctrines in the law on corporate and individual responsibility for wrongdoing. Only one other commentator has even noted the doctrinal connection between the intracorporate conspiracy doctrine and piercing the corporate veil, and he did not notice how one distorts the other.[7]

In addition, where academic articles have called for greater liability for non-director corporate officers,[8] they have missed the central importance of reforming the intracorporate conspiracy doctrine in their efforts.[9] Fundamentally, no other approach now being debated properly identifies and solves the problems with corporate conspiracies that reducing the power of the intracorporate conspiracy doctrine would accomplish.

These arguments to roll back the intracorporate conspiracy doctrine need to be made particularly now because the intracorporate conspiracy doctrine continues to become increasingly established and powerful. Movements like Occupy Wall Street,[10] regulators,[11] and forums questioning why no institutions[12] or top executives[13] have been found criminally liable for their manipulations leading to the financial market crash need tools such as presented in this Article to re-evaluate the expanding protections that associations have built into the unlegislated common law.

Frustration with the impact of the intracorporate conspiracy doctrine continues to rise. Judge Rakoff of the federal Southern District of New York, for example, decries this change in accountability over time. After describing a series of prosecutions that took place before growth of the intracorporate conspiracy doctrine, he writes that "[i]n striking contrast with these past prosecutions, not a single high-level executive has been successfully prosecuted in connection with the recent financial crisis."[14] Professor Garett's new book documents that, between 2001

and 2012, the U.S. Department of Justice (DOJ) failed to charge any individuals at all for crimes in sixty-five percent of the 255 cases it prosecuted.[15] The data are even more stark in cases involving publically held companies, which tend to be larger. The DOJ failed to prosecute individuals for crimes in seventy-five percent of those 125 convictions or pleas.[16] Similarly, Stanford business school professor David Larcker and his co-author Brian Tayan note how often in modern times the same businesses are fined for repeat behavior, making such fines a mere slap on the wrist and a routine cost of doing business rather than an effective mechanism of deterrence for executives.[17]

This public and judicial frustration with the intracorporate conspiracy doctrine's grant of immunity to corporate agents in criminal and tort cases has led to over-reliance on alternative methods of holding employees of enterprises responsible for their actions. Examples of such alternative doctrines include piercing the corporate veil, responsible corporate officer doctrine, and permutations in equity such as denying "retroactive" imposition of the corporate veil and adopting "reverse" piercing of the corporate veil. These doctrines, however, were mainly developed and adapted to other circumstances. They do not take into account the coordination of actions within an enterprise and the unique nature of conspiracy that fall—and should fall—into the heart of behavior that would trigger liability if not for the intracorporate conspiracy doctrine. Using alternative doctrines to impose liability on behavior that would otherwise be recognized as intracorporate conspiracy results in inconsistent decisions and disproportionate awards. As commentators have noted about those distorted doctrines, they appear "[l]ike lightning… rare, severe, and unprincipled."[18] In sum, the overexpansion of the intracorporate conspiracy doctrine asks the wrong questions and sends the wrong signals throughout the law on corporate and individual responsibility.

Finally, rolling back the intracorporate conspiracy doctrine would paradoxically benefit even the groups that have pushed for the doctrine's expansion. In recent years, some attorneys have pushed for broad expansion of the doctrine because they argue that they should be doctrinally immune for their actions as a client's agents.[19] But these attorneys' concern is misplaced. As described in this Article,[20] other legal doctrines and the rules of attorney ethics already harbor behavior within ethical boundaries, and they better help maintain the profession's reputation.

This Article makes its argument in five parts. Part I introduces how the intracorporate conspiracy doctrine is a problem in corporate conspiracy prosecutions. Part II examines the recent spread of the intracorporate conspiracy doctrine, and it documents the escalating social cost of corporate conspiracy. Part III describes the current state of scholarship and practical pressures to expand the intracorporate conspiracy doctrine. Part VI documents how overexpansion of the intracorporate conspiracy doctrine has warped related doctrines in the law. Part V concludes that rolling back the intracorporate conspiracy doctrine would be the most efficient and tested way to realign the law to prevent principal-agent direction of illegal activities. This simple change would both better prevent corporate crime and it would more consistently mitigate the impact of wrongdoing on victims now being injured without predictable recourse.

II. THE POWER OF THE INTRACORPORATE CONSPIRACY DOCTRINE

This Part describes the intracorporate conspiracy doctrine in more detail, the doctrine's recent spread, and its social costs.

A. Details of the Intracorporate Conspiracy Doctrine

The intracorporate conspiracy doctrine holds that because an association and its agents, such as its employees, are one legal entity, there are no two minds that can meet to conspire. As the American Jurisprudence (2d) entry on conspiracy explains: "a corporate entity cannot conspire with itself because employees of a corporation are considered part of the corporate entity." [21] Thus, for example, the "intracorporate conspiracy doctrine prevents liability from being imposed under the federal civil rights conspiracy statute for actions of co-employees of a governmental entity."[22]

More generally, according to American Jurisprudence (2d), "a corporation cannot conspire with its agent when the agent is acting within the scope of his or her authority, or in his or her official capacity, and a corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction, and control of the corporate affairs where the individuals are acting only for the corporation and not for any personal purpose of their own."[23] The term "corporation" is used broadly in discussions of the doctrine to refer to all types of business, charitable, and public associations.[24]

The way around the protection provided by the intracorporate conspiracy doctrine is to allege that the agent of an enterprise is acting outside the scope of his or her duties. Thus a "corporate official may… conspire with his or her corporation if he or she is acting in his or her individual capacity or outside the scope of his or her employment. …[I]mmunity to a conspiracy claim is excepted when the agent of the corporation has an 'independent personal stake' in achieving the corporation's impermissible objectives."[25]

In other words, "[f]or a claim of intracorporate conspiracy to be actionable, the complaint must allege that the corporate officials, employees, or other agents acted outside the scope of their employment and engaged in conspiratorial conduct to further their own personal purposes and not those of the corporation." [26]

Most courts have read acting "outside of the scope" of an agent's authority very narrowly. For example, even in civil rights litigation under 42 U.S.C. § 1985(1) & (2), the U.S. Court of Appeals for the Third Circuit has held that a conspiracy between a corporation and its officer may exist solely "if the officer is acting in a personal, as opposed to official, capacity."[27] Thus, according to the Third Circuit, the fact that the agent may have acted in bad faith or even with illegitimate purpose toward the principal, does not, by itself, bring the agent's actions outside the scope of the relationship. As long as the agent was not "acting in a purely personal capacity,"[28] the intracorporate conspiracy doctrine immunizes the agent's actions.

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

The current power of the intracorporate conspiracy doctrine in the courts is sweeping. To illustrate the power of the doctrine, in an opinion criticized by other appellate courts, the U.S. Court of Appeals for the Eleventh Circuit has been unique in halting the application of the intracorporate conspiracy doctrine at the door of criminal liability.[29] The few commentators other than Professor Pritikin[30] who have argued against application of the intracorporate conspiracy doctrine have limited their objection to its application primarily to suits under the federal civil rights Ku Klux Klan Act of 1871, now codified as 42 U.S.C. § 1985(3).[31]

The intracorporate conspiracy doctrine has now been approved beyond the Supreme Court's antitrust context of a parent and wholly-owned subsidiary in *Copperweld*[32] by large numbers of states in contexts from civil rights[33] to economic frauds[34] and other conspiracies.[35] Even pro-consumer states such as California apply the intracorporate conspiracy doctrine broadly.[36] Virginia courts have held that a bank and its agent are the same person for purposes of proving conspiracy.[37] In the middle of the country, two subsidiaries of the same corporation cannot conspire for the same reason.[38] The court in that case was interpreting claims based in Missouri law, but stated that "the case was not based on any concept unique to Missouri," and it cited for support in applying the intracorporate immunity doctrine both U.S. Supreme Court and Eighth Circuit precedent.[39] Articulating the position of many courts, the Supreme Court of Tennessee broadly promulgates: "we hold that there can be no actionable claim of conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents, each acting within the scope of his or her employment."[40]

A last hold-out is in the federal courts of appeal on the application of the intracorporate conspiracy doctrine to the section of the RICO[41] statute that prohibits conspiracies with others, specifically listing a "principal."[42] The U.S. Courts of Appeals for the Seventh,[43] Ninth,[44] and Eleventh[45] Circuits have held that civil RICO claims for conspiracy under § 1962(d)[46] are not barred by the intracorporate conspiracy doctrine. The Courts of Appeals for the Fourth[47] and Eighth[48] Circuits have held that the intracorporate conspiracy doctrine does bar these civil RICO claims.

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

C. The Social Cost of Corporate Conspiracy

In attempting to quantify the price of corporate conspiracies to society, economists are at a loss for ways to estimate the full cost of the harms and lost opportunities resulting from conspiratorial behavior. The cost of antitrust conspiracies to U.S. consumers alone, for example, rise into the billions. One single, famous antitrust conspiracy involving the price of vitamins cost U.S. consumers in the decade from 1989 to 1999 an estimated $1.2 to $1.5 billion.[49]

Intracorporate conspiracies are the segment of conspiracies causing damage to the public and other businesses that are executed within an enterprise or by an enterprise and its agents. The number and extent of intracorporate conspiracies are notoriously difficult to quantify, but a recent survey of global business activity found that forty-two percent of directors and senior managers were aware of corruption within their own companies in the form of revenues recorded improperly, costs underreported, or customers required to buy items that they did not need.[50]

In cases of physical or emotional harm from intracorporate conspiracies, the damage to members of society may be greater than from purely economic crimes, but even more difficult to quantify. In the alleged corporate conspiracy regarding the hiding of sexual abuse by priests within the Roman Catholic church across the United States, the cost to victims of sexual abuse across the country has risen into the billions of dollars in mental health therapy, lost wages, and other long-term damage. In the single year of 2002, for example, files turned over by the Roman Catholic

Archdiocese of Boston to the Office of the Attorney General for the Commonwealth of Massachusetts revealed that 789 victims had complained of sexual abuse by priests.[51] Two-hundred-and-fifty priests and church workers in that single archdiocese had been accused of acts of rape and sexual assault on children.[52] Settlement payments by the Archdiocese of Boston amounted to $85 million;[53] as far back as 2004, settlement payments by the Roman Catholic Church across the county were estimated at $750 million and growing.[54] Estimates as of 2013 are in the billions.[55]

A key conclusion of the Attorney General's report was that the widespread, and unchecked, long-term, sexual abuse of children by priests and church workers was "due to an institutional acceptance of abuse and a massive and pervasive failure of leadership" within the Archdiocese.[56] Church leaders of additional archdioceses across the country have admitted that the scale of sexual abuse by priests and other church workers was partially due to those leaders' decisions in supervising their employees.[57] In other words, if the organization of the Church had not covered up the behavior of its priests and workers, much of the sexual abuse of those children would have been preventable. Records reveal that the intracorporate conspiracy doctrine was used to block these type of conspiracy charges against the Church in the neighboring state of Connecticut five years earlier.[58]

Other types of alleged intracorporate conspiracy may be more small-scale and grab fewer headlines, but are also damaging to the victims involved. In a classic case from the California courts that still strongly enforce the intracorporate conspiracy doctrine, a group of six agricultural companies and two stakeholders sued a bank for civil conspiracy when the bank's employees induced the agricultural companies to continue investing in crops under the assumption developed over seventeen years of business that the bank would float the agricultural companies loans for the harvest time.[59]

The bank missed its contractual deadline to inform the agricultural companies that the bank would not float the companies a loan that year.[60] Meanwhile, the bank employees repeatedly reassured the agricultural companies that the bank would float the companies the loan when harvest time came.[61] Those assurances from bank employees had the allegedly calculated effect of making sure that the crops would be more valuable when the agricultural companies were forced to declare bankruptcy without the promised loan and the bank foreclosed on the harvest.[62] Three of the six agricultural companies had to file bankruptcy as a direct result of the bank employees' actions.[63] All eight entities sued the bank and its employees for civil conspiracy, including fraud, breach of the covenant of good faith and fair dealing, and the intentional infliction of emotional distress.[64] The case was dismissed under the intracorporate conspiracy doctrine without examination of the claims,[65] leaving plaintiffs without remedy.[66]

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

Academic theories, attorneys' fear of prosecution, and caseload pressures have all contributed to the growth of the intracorporate conspiracy doctrine. This Article will return in particular to attorneys' contribution to the growth of the doctrine at the end of Part IV on the warping of alternative doctrines.

A. Current State of Scholarship

The intracorporate conspiracy doctrine is now broadly applied by courts to all types of cases. Furthermore, the majority of commentators have pushed for its expansion.[67]
One of the boldest pushes has been by Professor Shaun Martin[68] after the *Copperweld* Court[69] permitted application of the intracorporate conspiracy doctrine in antitrust. He argued for broadening the intracorporate conspiracy doctrine into the realm of criminal law because corporations should be protected from what Professor Martin considered too close to vicarious liability.[70] As Professor Martin explained, "Under respondeat superior agency principles, a corporation is liable for the conduct of its agents because it has 'taken their place.'" The problem with applying conspiracy laws to a corporation is therefore that "the corporation becomes identical to, and stands in the shoes of, all the conspirators. As a result, when analyzing the corporation's involvement in the conspiracy, there is only one conspirator: the corporation, acting, as it must, through its agents."[71]

Although the larger question of when vicarious liability for corporate acts may be appropriate is too broad for this Article, the law of conspiracy requires a meeting of the minds. This requirement implies a burden of proof that the corporation itself, if considered one of these minds, is being represented by sufficient behavior within the corporation to be considered the policy of the corporation itself. That required behavior is much more extensive than mere vicarious liability from the corporation standing in each of its agents' shoes.
Moreover, the various agents of the corporation perform different functions: it is a fallacy to see all agents of a corporation as interchangeable. Professor Martin's argument would put the same face of the corporation on all its bodies in all of its shoes, whether the agent is the chief operating officer or the operator of a forklift.[72]

Professor Pritikin[73] has been one of the very few voices to challenge the rationale behind the agent's immunity rule, which is based in part on the intracorporate conspiracy doctrine.[74] He argues broadly that because "[t]he principal is not 'privileged' to commit fraud, so the agent is not privileged to induce the principal to commit fraud, and likewise should not be immune from conspiring with the principal to commit it."[75] Furthermore, as a matter of logic, if "the defendant can be held directly liable for committing the tort, [he or] she should also be subject to secondary liability for conspiring with another to commit that tort."[76] Professor Pritikin continues that, "just as acting in concert cannot destroy a privilege or 'abrogate an immunity,' it should not create a privilege or immunity."[77] He does not, however, address the dramatic growth of the intracorporate conspiracy doctrine into criminal law;[78] how the Restatements of Torts and Agency should curtail the doctrine's application;[79] or how the expansion of the intracorporate conspiracy doctrine has warped related doctrines around it.[80]

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

Much of the expansion of the intracorporate conspiracy doctrine into tort and criminal law has come, as may be expected, from businesses pushing to insulate themselves from conspiracy charges.[81]

But a second influential group is behind the expansion of the doctrine as well. Much of the resistance to considering whether wrongful conduct between principal and agent rises to the level of conspiracy comes from attorneys. Attorneys have been sued for civil conspiracy with clients for bringing cases against individuals and companies.[82] As one bar association article explained, "[a] theory that allows an attorney to be sued …[because] his or her professional acts were somehow utilized by a client in the commission of a tort, without a required showing of

some level of culpability on the part of the attorney, goes against a foundation of public policy that 'demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interest of their clients.'"[83]

The same bar association article, however, goes on to survey the state of the law on an attorney's liability for a client's actions and glosses over the requirement in conspiracy law that "the agreement between two or more individuals to act for the purposes of one common goal is a fundamental requirement."[84] Additionally, for tort liability, the act must include an "unlawful purpose or means."[85] For an attorney to commit an independent civil tort does indeed then show "some level of culpability on the part of the attorney."[86]

The American Bar Association's rules of ethics already prohibit attorney misconduct far short of committing independent torts. Model Rule of Professional Conduct Rule 1.2, for example, bars lawyers from counseling or assisting clients in "conduct the lawyer knows is criminal or fraudulent."[87]

Attorneys who violate the rules of ethics face disbarment. It is not unreasonable for tort liability for actual commission of a tort to follow, especially because the threshold for tort liability is so high and because attorneys are presumed to be knowledgeable about the boundaries of the law. [88]

Moreover, the Restatement (Second) of Torts makes clear that an attorney should be punished for abuse of the legal system as any other tortfeasor would be. Thus, if an attorney files suit "for an improper purpose, …he is subject to the same liability as any other person."[89] Similarly, under the Restatement (Third) of the Law Governing Lawyers, "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances."[90]

In addition, a lawyer in an outside firm should not benefit from the single-legal-entity rationale of a client's business enterprise to argue that the attorney and his or her client cannot conspire. The attorney often serves many enterprises, and it would be inappropriate for him or her to operate solely as the agent of the business enterprise that is his or her current client.[91] An outside attorney's independence should, in the best possible circumstances, serve as a benefit to the business enterprise to provide another perspective on the case.[92] Moreover, in discussing corporate crime, there always exists the danger of overly protecting "house counsel" such as the Gambino crime family's lawyer, as well as "captive" law firms whose "key feature is almost total dependence on a limited number of clients."[93]

Most importantly, just as many victims of conspiracies have harms from conspiracies that cannot be addressed through other types of suits, there are specific harms unique to conspiracy claims against attorneys that cannot be remedied through other suits. An article describes such a problem in the civil rights context: "Imagine that *A* is involved in a suit against *B*, and *B* and his attorney threaten suit in another court against *C*, one of *A*'s witnesses, to keep *C* from testifying. *A* may not have a cause of action against *B*—only *C* would. But *A*, not *C*, is the primary victim of the conspiracy, because it is *A*'s suit that suffers if *C* is too intimidated to testify."[94]

If it is not proper for a client intentionally to injure or to intimidate other parties, it should not be proper for the attorney to have the same purpose. This principle should hold whether the agent is an attorney, a doctor, an accountant, or any other professional capable of conspiring to commit harm through misuse of the tools of his or her profession. Indeed, a key legislative purpose of The Sarbanes-Oxley Act,[95] was to make professionals accountable for rendering their appropriate professional judgment whether they work inside or outside of a named enterprise.[96] Finally, appropriate safeguards for attorneys already exist for liability from conspiracy.[97]

First, the ABA/BNA Lawyers' Manual On Professional Conduct[98] explains that good faith lawyering is generally immune from liability. "[C]ourts have been reluctant to impose any professional liability where the lawyer deals at arm's length with a client's antagonist… within minimum bounds of decency and orderly judicial process."[99] According to the Restatement (Second) of Torts, an attorney who "acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim" [100] rather than to harass or to intimidate the opposing party will not face liability even if he knows that the claim is unlikely to succeed.[101]

Second, even the most vocal bar association article describes the law of civil conspiracy against attorneys as "underdeveloped," noting that its "application in the context of attorney professional liability is even more limited." [102] Part of this under-development is due to an explicit "litigation privilege" extended to attorneys as a bar to civil conspiracy suits.[103] This wide-spread doctrine is cited in courts as diverse at Tennessee, Illinois, Minnesota, Missouri, New York, Oregon, Hawaii, and West Virginia.[104]

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

In federal courts, Fed. R. Civ. P. 9(b) establishes the heightened pleading requirement that: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[105] One of the key purposes of Rule 9(b)'s standard is that the rule "protects defendants from harm to their goodwill and reputation."[106] As explained by the U.S. Court of Appeals for the Fourth Circuit, "lack of compliance with Rule 9(b)'s pleading requirements is treated as a failure to state a claim under Rule 12(b)(6)."[107] This standard is routinely applied to conspiracy as a form of fraud. In evaluating conspiracy claims, Rule 9(b) thus prevents "every business dispute over unfair competition [from] becoming a business conspiracy claim"[108] in the federal courts.

States have implemented their own pleading requirements to prevent garden-variety business claims from being elevated to conspiracy cases. Virginia's courts, for example, have adopted a standard that requires that "[t]here should be some details of time and place and the alleged effect of the conspiracy."[109]

Fourth, in practical terms, it is very difficult to prove conspiracy between an attorney and client because the attorney-client privilege[110] shields most of these communications from standard discovery.[111]

The U.S. Supreme Court case of *United States v. Zolin*[112] prescribes the procedure for *in camera* review of materials to determine if the attorney-client privilege is being abused to commit a fraud or crime. Any opponent of the privilege must produce "evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." [113] Once an opponent has overcome that hurdle, the court alone determines whether the materials constitute "communications made for the purpose of getting advice for the commission of a fraud or crime."[114]

Ultimately, the attorney-client privilege also operates only in the interest of the attorney being accused of conspiracy. A lawyer may waive the attorney-client privilege to defend him or herself from suit for conspiracy when reasonably necessary. According to the Restatement (Third) of the Law Governing Lawyers, "The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding…. to defend the lawyer… against a charge by any person that the lawyer… acted wrongfully during the course of representing a client."[115]

C. Caseload Pressures

In further explaining the exponential growth of the intracorporate conspiracy doctrine since 1984 when the Supreme Court decided *Copperweld*, the practical pressure of increasing caseloads coincides with and may help explain the courts' less-than-critical embrace of the doctrine's bar to conspiracy suits. In the same year that *Copperweld* was decided, Chief Justice Burger wrote in his Year-End Judiciary Report that "Supreme Court Justices must now work beyond any sound maximum limits."[116] Large caseloads leave judges without "the precious time for reflection so necessary to a court that decides cases with far-reaching consequences [that] has been reduced to, and possibly below, an absolute minimum." [117] Chief Justice Burger noted that judges in lower courts were similarly suffering from "inflation," with district court "caseloads up by 7.4 percent last year and those of the appeals courts up by 6.2 percent."[118]

In 1992, the earliest date for which statistics are available at www.uscourts.gov, there were 265,612 cases filed in the federal district courts.[119] By 2012, that number had increased thirty-six percent to 360,550.[120] In 2013, a hearing before the U.S. Senate warned that "continued budget cuts would devastate the nation's system of justice—threatening public safety, constitutional rights and economic well-being."[121]

It is understandable why courts would be interested in finding a quick way to dismiss conspiracy claims that would otherwise take time, jury attention, and legal analysis.[122] But merely because the intracorporate conspiracy doctrine is a simple way of reducing caseloads for courts does not mean that courts should permit and drive the overexpansion of this common law doctrine. Not only would courts be shirking their responsibility to provide a forum in which legitimate claims to redress wrong-doings are heard, but the doctrine's overexpansion is not properly rooted outside antitrust as courts have assumed in agency, criminal, or tort law.[123] Finally, the overexpansion of the intracorporate conspiracy doctrine puts pressure for equitable relief against intracorporate conspiracies onto alternative doctrines. This pressure on alternative doctrines further warps the law on corporate and individual responsibility for wrongdoing.

IV. How Overexpansion of the Intracorporate Conspiracy Doctrine Has Warped Related Doctrines in the Law

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

When a conspiracy is not tried as a conspiracy, these other doctrines are ill-suited to reach the behavior that conspiracy law is designed to prevent. Doctrines such as piercing the corporate veil, responsible corporate officer doctrine, and additional approaches such as courts rejecting "retroactive" imposition of the corporate veil and the recent growth of "reverse" piercing cases all demonstrate how warped the law has become in imposing liability on corporations and their agents for coordinated wrongdoing.

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

It is not controversial that courts have turned to piercing the corporate veil as an equitable remedy when other means of imposing liability on corporate wrongdoings fail.[124] But equally as

uncontroversially, "[v]eil piercing jurisprudence is unpredictable, inconsistent, and largely unprincipled."[125]

To articulate what can be said about this alternative doctrine, Black's Law Dictionary defines piercing the corporate veil as "The judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts."[126] As one commentator explains, however, "despite the enormous volume of litigation in this area, the case law fails to articulate any sensible rationale or policy that explains when corporate existence should be disregarded. Indeed, courts are remarkably prone to rely on labels or characterizations of relationships (such as 'alter ego,' 'instrumentality,' or 'sham') and the decisions offer little in the way of predictability or rational explanation of why enumerated factors should be decisive."[127]

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

> There are essentially two major views of the nature of a corporation. A corporation may be regarded as a privilege granted by the state and treated as an 'artificial entity' to be operated by its members. According to this view, it is viewed as a privilege that carries with it the responsibility to operate in accordance with the public interest. Thus, the corporate veil should be pierced if there is an abuse of the corporate form.
>
> In the alternative, a corporation may be viewed as a mere contractual arrangement between individuals. As such, the state should not interfere with the corporate form any more than it would a private contract. Accordingly, the corporate veil should be pierced only when it appears that something in the original 'contract' has gone amiss.[128]

The most common method for piercing a corporate veil is use of the alter ego theory, also variously described as the existence of an "instrumentality" or a "sham" corporation. The alter ego theory posits that, when an individual[129] has abused the corporate form for his or her own benefit, he or she has forfeited the legal protection that the corporate form affords.[130] According to the most authoritative treatise in this area, "[u]nder the alter ego doctrine, when a corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded."[131] To implement equitable remedies, courts "disregard the corporate entity and hold the individuals responsible for their acts knowingly and intentionally done in the name of the corporation."[132]

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

> While the factors that will justify piercing the corporate veil vary from jurisdiction to jurisdiction, a number of courts will disregard the existence of a corporate entity when the plaintiff shows: (1) control, not merely majority or complete stock control, but complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control was used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or to commit a dishonest and unjust act in contravention of the plaintiff's legal rights; and (3) that the aforesaid control and breach of duty proximately caused the injury or unjust loss.[133]

In an interesting parallel with the intracorporate conspiracy doctrine, veil-piercing doctrine originated in the context of piercing one corporation's veil to reach another corporation.[134] The doctrine was only later adapted to its primary use and identification with piercing a corporate veil to reach an individual. Further, this development parallels the recent—and very rapid—evolution of the intracorporate conspiracy doctrine from its roots in antitrust parent-subsidiary litigation to litigation against employers and individual employees.[135] In addition, piercing a wholly-owned subsidiary to reach its parent corporation remains a particularly "ripe" situation for courts to apply the doctrine.[136]

On the surface, however, the intracorporate conspiracy doctrine and piercing the corporate veil should remain very different doctrines, utilizing precisely opposite approaches. First, for example, it is theoretically an agent's lack of independent will from the principal that protects the agent of a corporation from conspiracy suit under the intracorporate conspiracy doctrine, while it is the existence of independent will on the part of the agent that protects the principal from liability under piercing the corporate veil doctrine. The concept of whether there is a second "mind" present, however, is the same: if an entity is a "sham" or "alter ego" under piercing the corporate veil doctrine, the entity has "no separate mind, will or existence of its own."[137] The difference between the two doctrines is that, under the intracorporate conspiracy doctrine, the existence of a single "mind" immunizes the agent and principal from liability, whereas, under veil-piercing doctrine, the existence of the single "mind" justifies a court's imposition of liability on the principal as well as the agent.

Second, by stark contrast with what the theory of "mind" results should suggest, the practical breadth of license that an agent has to exercise independent judgment while still being protected under the intracorporate conspiracy doctrine is much greater than his or her license to exercise independent judgment in most cases in which courts will pierce a corporate veil. Under the intracorporate conspiracy doctrine, the U.S. Court of Appeals for the Third Circuit, for example, has held that no conspiracy between a corporation and its officer may exist as long as the agent is not "acting in a purely personal capacity."[138] Note how much room for independent thought and action on the part of the agent is preserved under this standard for granting immunity from liability. By contrast, under veil-piercing doctrine, even when all corporate formalities have been observed, courts may still pierce the corporate veil when they find a corporate form to be a "dummy" entity that fails to exercise independent functions such as management or control of assets.[139] When a principal is liable under piercing the veil doctrine, a "dummy" entity has little room for independent thought and action.

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

An explicit rationale for piercing the corporate veil is to punish entities that neglect corporate formalities.[140] Typical cases emphasize "whether the corporate form has been adhered to, whether corporate assets are treated as such or as personal assets, and whether there has been an attempt to deceive third parties."[141] Accordingly, courts have often fused a threshold disregard for corporate formalities with the existence of wrongdoing on the part of the entity controlling the corporation's behavior.[142]

By contrast, in 1984, the U.S. Supreme Court specifically interpreted the intracorporate conspiracy doctrine to provide protection from suit in opposition to what corporate formalities should dictate. In *Copperweld Corp. v. Independence Tube, Corp.*,[143] the Supreme Court held that the intracorporate conspiracy doctrine shielded a parent company from being able to

conspire with its wholly-owned subsidiary for purposes of Section 1 of the Sherman Act because, despite both entities' observance of corporate formalities, the companies should not have been considered separate economic entities.[144] Moreover, since the *Copperweld* decision, attorneys have been further pushing the boundaries of the intracorporate conspiracy doctrine in an attempt to blur the legal distinctions between clients and their outside attorneys as separate entities.[145]

Fourth, returning to the two underlying justifications for protection of the corporate form, both justifications should result in greater protection from piercing of the corporate veil than against prosecution for intracorporate conspiracy. In the absence of the intracorporate conspiracy doctrine's immunity from suit, both the corporation and its agent would be liable for their parts in an intracorporate conspiracy. This default would comport with basic principles of agency law,[146] tort law,[147] and criminal law.[148] In addition, a corporation's liability in tort or criminal law does not pierce the corporate veil itself to reach shareholders or other entities behind its form. Thus, in evaluating the two justifications for protection of the corporate form, repeal of the intracorporate conspiracy doctrine's immunity neither harms the state's privilege of the corporation as an "artificial entity"[149] nor interferes with the "contract" among individuals who formed the firm.[150] Piercing the corporate veil, by contrast, specifically vitiates the state's privilege for the corporation as an "artificial entity" *and* interferes with the "contract" among individuals who formed the firm.[151]

These four basic distinctions aside, the case law itself demonstrates that litigants and courts are *de facto* turning to piercing the corporate veil to allow claims that should be litigated as conspiracies if not for what has become the absolute bar of the intracorporate conspiracy doctrine.[152] This substitution of one doctrine for another sows confusion and randomness in at least the four dimensions that should distinguish the doctrines.

The most blunt statement of a court's willingness to find an equitable remedy under piercing the corporate veil when such a remedy would be blocked by the intracorporate conspiracy doctrine has come from the federal courts. In the 2011 case of *Morelia Cons., LLC v. RCMP Ent., LLC*,[153] the Middle District of Pennsylvania flatly asserted that "plaintiffs have raised allegations sufficient to pierce the corporate veil. As such, the intra-corporate conspiracy doctrine [i.e., an entity cannot conspire with one who acts as its agent] does not apply to the case."[154] Despite overwhelming obstacles, the court was determined to allow plaintiffs' case to proceed. Because the intracorporate conspiracy doctrine would be an outright bar to liability, the court considered exactly the same facts under the more flexible, but volatile, piercing the corporate veil doctrine instead.

Interestingly, *Morelia* was a civil RICO case.[155] As noted previously, RICO claims are a last type of claim in which the federal courts across the country have applied the intracorporate conspiracy doctrine.[156] Although the U.S. Court of Appeals for the Third Circuit, under which the *Morelia* court functions, has not taken a position on whether the intracorporate conspiracy doctrine would bar a civil RICO claim under § 1962(d), its discussion of RICO's § 1962(c) would suggest so,[157] and two of its other district courts[158] have already found that such a claim would be barred by the doctrine.[159]

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

> Since the court has determined that plaintiffs have properly alleged that the corporate veil should be pierced, the individual defendants may be liable for corporate actions and any distinction created by the intra-corporate doctrine does not exist. Moreover, plaintiffs have alleged that the defendants engaged in fraudulent and negligent misrepresentation, as well as a number of violations of the RICO act, and that the individual defendants acted in combination and as part of a scheme to commit these violations. Plaintiffs have therefore stated a claim for civil conspiracy.[160]

Regarding its test for piercing the corporate veil, the *Morelia* court further overruled its magistrate's recommendation by focusing on plaintiffs' arguments regarding undercapitalization, and its decision included only a single footnote about the disregard of corporate formalities.[161] The *Morelia* court, however, is not alone in its frustration with the intracorporate conspiracy doctrine and in its attempt to link analysis under the intracorporate conspiracy doctrine with the stronger equitable tenets of piercing the corporate veil. More subtly, courts across the country have started to entangle the two doctrines' contradictory requirements as the intracorporate conspiracy doctrine has become stronger and courts have increasingly had to rely on piercing the corporate veil as an ill-fitting alternative to permit conspiracy claims to proceed.

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

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

The Supreme Court of Nebraska's decision in *Renner v. Wurdeman*[162] provides an illustration of this trend. In *Renner*, the court reversed a lower court's grant of summary judgment to the president and sole owner of a real estate company who had promised to award stock to his only employee as compensation for services rendered, but who then fired the employee when the employee attempted to exercise the promised stock option.[163] The employee alleged tortious interference with a business relationship on the basis of a conspiracy between the president, as president of the company, and the same man, Wurdeman, as individual owner of the company, with the company's promise of stock options to the employee.[164]

The lower court had dismissed the employee's tortious interference claim as duplicative of his claim that the owner and the company had breached their stock agreements.[165] But the Supreme Court found the employee's tortious interference claim more complicated. The court concluded that "[s]ince it cannot be said as a matter of law that the company had the right to terminate Renner's employment for any cause or no cause at all, summary judgment"[166] could not be granted to Wurdeman and the company under the intracorporate conspiracy doctrine. But why should the following of proper form and procedures under the contract by the company be determinative of liability for conspiracy under the intracorporate conspiracy doctrine if the question is how much the principal controls its agent's actions?

The court's formulation of the argument here sounds more like a test for piercing the corporate veil: the court has started to fuse the lack of the company's oversight with the existence of wrongdoing on the part of the agent. Could not the corporation itself have failed to obey the formalities of the contract? Why should the failure to observe those formalities focus the court's inquiry on Wurdeman himself behind the corporate veil? For Renner to win his case, the Nebraska Supreme Court has substituted a piercing the corporate veil rationale for his

argument blocked by the intracorporate conspiracy doctrine. And the result is to find, in the manner of veil-piercing rather than under the intracorporate conspiracy doctrine, that Wurdeman, as owner rather than as the president of the company, could be personally liable.

Second, courts are granting more license to combine personal and official capacities before reaching judgment under the intracorporate conspiracy doctrine through use of another part of piercing the corporate veil doctrine. Courts are improperly performing piercing the corporate veil's "dummy" corporation analysis in the guise of applying the intracorporate conspiracy doctrine.

Continuing to follow the reasoning of the Nebraska Supreme Court in the *Renner* case, for example, if "Wurdeman and the company acted improperly in terminating Renner's employment to prevent the exercise of Renner's rights under the stock option agreement, then Renner does have a basis for claiming that Wurdeman may have acted in his individual capacity and tortiously interfered with Renner's business relationship with the company."[167]

Why should it be the act of "improperly" terminating Renner's employment that somehow separates Wurdeman's actions in his "individual capacity" from his official capacity as president of the company? The court's analysis *sub silencio* assumes that the appropriate "will" of the corporation was being overruled by Wurdeman's actions in terminating Renner. Certainly, the court recorded in its recitation of the facts how well Renner had performed for the company while Wurdeman had been unexpectedly incapacitated.[168] The company had compensated Renner for that performance through the promise of stock—but then so had Renner been compensated by Wurdeman as the sole owner of the company who had made this decision also possibly as an act of personal gratitude for Renner's services.

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

Third, courts are importing piercing the corporate veil's emphasis on the existence of formal corporate structures into the intracorporate conspiracy doctrine's inquiry regarding the purpose and direction of agents by a principal. The Missouri Court of Appeals made exactly this leap in the often-cited case of *Mika v. Central Bank of Kansas City*.[169]

In facts similar to *Black's* California bank fraud,[170] the appellants in *Mika* alleged that a bank, its board members, another company named UHS, and various UHS associates conspired to induce appellants to sell their property to the bank in a false "friendly foreclosure" proceeding.[171] Appellants asserted that appellees violated their promises and fraudulently conspired to induce appellants to stop servicing the debt on their notes in order to sell appellants' subsequently foreclosed property to UHS.[172]

Appellants offered the court a set of arguments under the intracorporate conspiracy doctrine that appellee agents could be self-interested because they were "high ranking officers that would benefit anytime the bank made money," and because they "wanted to keep their jobs and promote their relationships with the members of the board."[173]

The *Mika* court's analysis, however, veered into entirely different territory. Turning to precedents that should long have been superseded by the U.S. Supreme Court's 1984 *Copperweld* decision, the *Mika* court found it important for the purposes of proving intracorporate conspiracy liability that entities be "separately incorporated."[174] It quoted with

approval a rule that "without such an organization legally distinct from the principal defendant, it would be impossible for an employee to have an interest that was truly independent."[175] Accordingly, the *Mika* court dismissed the charge of intracorporate conspiracy against the bank's agents.[176]

Where did this strange requirement of formal corporate structure to the detriment of an inquiry regarding the direction of agents by the principal come from? Again, the court's analysis appears to be imported from reliance on corporate formalities in piercing the corporate veil doctrine.[177] Even the Missouri federal court has followed down the *Mika* court's rabbit hole, stating in 2009 that agents in another action could not be structurally liable under the intracorporate conspiracy doctrine because they "are co-owners of, and financially invested in" the same corporate entity.[178]

The *Mika* court, however, was responding to a basic frustration with how the current intracorporate conspiracy doctrine operates. When corporate structures are indistinct and attorneys further push the intracorporate conspiracy doctrine's principal-agent analysis to bleed across legal forms, courts can be understandably confused and annoyed with the indeterminate reach of the doctrine. As another federal district court wrote in dismissing use of the intracorporate conspiracy doctrine: "In a very broad sense, perhaps, every conspirator could be considered an 'agent' of the overarching conspiracy. Defendants' position would seem to require that any person enlisted into a conspiracy necessarily becomes an 'agent,' and therefore he cannot be a conspirator because there is only a single entity, but this cannot be right."[179]

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

Furthermore, conversely examining cases originally litigated as piercing the corporate veil cases, courts have often found shareholders liable for conspiracies where there should merely have been limited liability on the part of the company and its officers if the cases could have been brought under a conspiracy argument. One empirical study, for example, found that the most predictive factor in a court's decision to pierce the corporate veil is deception by corporate insiders. Piercing was approved in an astonishing ninety-four percent of those cases.[180] The magnification of liability through piercing the corporate veil can be attractive because, as another commentator has explained, "The veil-piercing notion of 'looking through' the agency relationship to reach the facts becomes common sense when one recognizes that a claim of civil conspiracy 'is essentially a tort action.'"[181]

In 1996, the U.S. Supreme Court unsuccessfully attempted to rein in this over-reliance on piercing the corporate veil in *Peacock v. Thomas*.[182] Respondent Thomas filed suit under the Employee Retirement Income Security Act of 1974 (ERISA)[183] against his employer, Tru-Tech, and Peacock, an officer and shareholder of Tru-Tech. The Supreme Court's opinion specifically noted that Peacock was a shareholder of the corporation.[184] Thomas's first suit alleged breach of fiduciary duties in administering the employer's pension benefits plan.

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

In Thomas's first suit, the district court entered judgment against Tru-Tech alone. The district court reasoned that only the employer was a fiduciary for the benefits plan under ERISA.[185] But, when Thomas could not collect judgment against Tru-Tech, he initiated a second suit against Peacock as shareholder of the corporation.

In his second suit, Thomas sought to pierce the corporate veil to collect against Peacock.[186] Peacock had allegedly conspired to siphon off Tru-Tech's assets in order to prevent Thomas from satisfying the original judgment.[187] Further, Thomas alleged that Peacock had fraudulently conveyed Tru-Tech's assets in violation of South Carolina and Pennsylvania law.[188] The district court agreed. It pierced the corporate veil to award Thomas judgment against Peacock in the amount that Tru-Tech had owed, plus interest and fees.[189] On appeal, the court of appeals affirmed the district court's judgment against Peacock.

The U.S. Supreme Court reversed.[190] Although the language that the Court used was to discuss federal jurisdiction and the statutory details of ERISA, the sharp warning of the Court's holding was that, if Thomas could not have won his original suit against Peacock as an officer of the corporation, the federal district court should not have resorted to piercing the corporate veil to reach Peacock as a shareholder. As the Court wrote:

> Thomas' veil-piercing claim does not state a cause of action under ERISA and cannot independently support federal jurisdiction. Even if ERISA permits a plaintiff to pierce the corporate veil to reach a defendant not otherwise subject to suit under ERISA, Thomas could invoke the jurisdiction of the federal courts only by independently alleging a violation of an ERISA provision or term of the plan. Piercing the corporate veil is not itself an independent ERISA cause of action, 'but rather is a means of imposing liability on an underlying cause of action.'[191]

The effect of the Court's decision is to caution federal courts not to exceed their jurisdictional boundaries by magnifying the liability that a corporate officer might otherwise expect to incur. Peacock was both a corporate officer and a shareholder of the corporation. In this case, as would be typical, his liability as a corporate officer was more limited than if a court were permitted to pierce the corporate veil and reach him as a shareholder. One analysis is not a substitute for the other, just as liability under piercing the corporate veil doctrine is not an appropriate substitute to satisfy equities thwarted by the intracorporate conspiracy doctrine.

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

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

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

> (1) the individual is in a position of responsibility which allows the individual to influence corporate policies or activities; (2) there is a

> nexus between the individual's position and the violation in questions such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.[192]

Courts have been most likely to impose responsible corporate officer liability on individuals in cases of statutory violations when they "would normally not be liable under traditional corporate, tort, or agency law principles."[193]

In 1975, the U.S. Supreme Court first approved application of responsible corporate officer doctrine liability under the Federal Food, Drug, and Cosmetic Act.[194] In *United States v. Park*,[195] the Court found that:

> [K]nowledge or intent were not required to be proved in prosecutions under its criminal provisions, and that responsible corporate agents could be subjected to the liability thereby imposed. Moreover, the principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime. The principle had been applied whether or not the crime required "consciousness of wrongdoing," and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.
>
> In the latter class of cases, the liability of managerial officers did not depend on their knowledge of, or personal participation in, the act made criminal by the statute. Rather, where the statute under which they were prosecuted dispensed with "consciousness of wrongdoing," an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability. It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of.[196]

Other versions of this doctrine include the increasingly-popular "control person" theory of liability[197] under Section 20 of the Securities Exchange Act of 1934[198] and the Foreign Corrupt Practices Act.[199]

Since 1975, however, not much development occurred in the doctrine until a recent explosion of cases starting in 2009, after prosecutions for conspiracy in the financial crisis were blocked by growth of the intracorporate conspiracy doctrine. In fact, in 2003, before the financial crisis, personal responsibility for corporate officers under a theory of vicarious liability took a step backwards in the U.S. Supreme Court when the Court refused to extend personal liability to a corporate officer in the civil rights context for alleged racial discrimination under the Fair Housing Act.[200]

But, in 2009, in its search for new tools to prosecute corporate conspiracy in the wake of the financial crisis, the U.S. Securities and Exchange Commission (SEC) settled with Nature's Sunshine Products (NSP) for violations of the Foreign Corrupt Practices Act over NSP's payment of bribes to prevent enforcement of Brazilian regulations on medicine imports.[201] This NSP case is assumed to be "the first time the SEC has held public company officials responsible for an FCPA-related books and records violation based solely upon their status as 'control persons.'"[202] Under the terms of the settlement, NSP's CEO and former CFO each paid a $25,000 civil penalty under the theory of "control person" liability for not preventing the behavior.[203]

Importantly, under "control person" liability, the SEC made no attempt to tie the liability of the corporate officers to their knowledge or complicity in the violations. Regarding the import duties, the "CEO and CFO of NSP were not accused of having booked the inaccurate entries themselves. In fact, they were not accused of even knowing about the inaccurate entries. Rather, without having any specific knowledge of the entries in question, they were held accountable for the violations simply because of their operational positions within the company and their responsibility for maintaining accurate books and records."[204]

The next year, as a further response to perceived corporate wrongdoing during the financial crisis, the Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,[205] which reinforced the SEC's approach by codifying the agency's authority to assert this form of control person liability.[206]

Commentators have noted the subsequent change in regulatory agencies' enforcement tactics. In 2012, an article concluded that the NSP case was simply the first of many such actions that regulators would take under "control person" liability.[207] With Congressional validation of the SEC's technique, "[e]xpanded use of such claims by the SEC in FCPA cases likely will lead to an increased number of enforcement actions against individuals and larger settlements."[208] In late June 2013, the Commodity Futures Trading Commission (CFTC) brought its first suit under a similar theory of control person liability.[209]

The fundamental problem with substituting responsible corporate officer doctrine and control person liability for reforming the intracorporate conspiracy doctrine is that these alternative doctrines represent exactly what Professor Martin[210] objected to: actual imposition of blind "respondeat superior" liability.[211] Thus, for example, under these doctrines, "in most federal courts, it is not necessary to show that the corporate official being charged had a culpable state of mind."[212] Instead, the issue before the court is merely whether the officer had control and responsibility for the alleged actions. Accordingly, it is not a defense to control person liability that the officer did not "knowingly participate in or independently commit a violation of the Act."[213]

But simply penalizing the officer who is in the wrong place at the wrong time does little to define and encourage best practices. Moreover, unlike conspiracy doctrine, responsible corporate officer doctrine and its correlates fail to reward the party who changes course to mitigate damages or to abandon further destructive behavior.[214] Under the Model Penal Code on renunciation of conspiracy, "It is a defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal intent."[215]

By contrast, under corporate officer doctrine, although the price of the damages may be smaller with a lesser harm if the officer renounces the corporation's destructive course, the officer's personal career and reputation may still be destroyed by entry of a judgment. The incentives under responsible corporate officer doctrine are thus either not to get caught, or to perpetrate a crime large enough that the monetary value of the wrongdoing outweighs the damage to the officer's career. Litigating responsible corporate officer doctrine has become a new volatile high-wire strategy.[216]

In addition, because as many as ninety-nine percent of public U.S. companies carry director's and officer's liability insurance (D&O insurance), the individual charged with personal liability under responsible corporate officer doctrine for actions that he or she has renounced has an incentive to litigate in such a way that D&O insurance will cover the claim.[217] This often means refusing to accept any degree of responsibility for damages. Delaware law requires for

corporate indemnification, for example, that the individual has been "successful on the merits or otherwise in defense of any action, suit or proceeding."[218]

Moreover, with these and other explosive hazards for corporate service, it should be no surprise that top executives are demanding and receiving ever-increasing compensation for often short-term positions.[219] In 2013, the CEO of J.C. Penny Co., for example, was exposed for making 1,795 times what the average U.S. department store employee made.[220] Since 2009, the year that the NSP case establishing "control person" liability was settled, the discrepancy in pay between top management and the average worker has been growing dramatically. As measured across Standard & Poor's 500 Index (S&P 500) of companies, since 2009 "the average multiple of CEO compensation to that of rank-and-file workers" has increased by twenty percent to 204.[221]

It is true that the financial crisis did reduce executive compensation packages before 2009, and that there has been a historical trend towards the growth of executives' salaries as a multiple of average workers' salaries. For example, "[es]timates by academics and trade-union groups put the number at 20-to-1 in the 1950s, rising to 42-to-1 in 1980 and 120-to-1 by 2000."[222] But the jump from 2009 has been extraordinary, and the new emphasis on vicarious liability for individuals under the responsible corporate officer doctrine since that date must be considered part of executives' demands for such high compensation for their risky positions.[223] The average duration of a CEO's time in office has diminished as well. In 2000, the average tenure of a departing S&P 500 CEO in the U.S. was ten years; in 2010, it was down to eight years.[224] In 2011, merely a year later, the average tenure of a Fortune 500 CEO was barely 4.6 years.[225] In 2013, that former CEO of J.C. Penny Co. served for only eighteen months.[226] With an eighteen-month tenure, it might be difficult for a chief executive even to discover what wrongdoing his or her new company is committing, much less to design and institute good preventative measures to guide his or her subordinates to avoid that harm.

Finally, in yet another expression of frustration with not being able to prosecute intracorporate conspiracies as conspiracies, responsible corporate officer doctrine may have begun to merge with elements of piercing the corporate veil. In late fall of 2013, the federal Consumer Product Safety Commission (the "CPSC") relied on the responsible corporate officer doctrine to add the former chief executive and owner of a dissolved corporation to a recall action, potentially making him "personally responsible for the estimated recall costs of $57 million."[227]

Although by now responsible corporate officer doctrine is being used frequently against executives in criminal cases, the doctrine's use in a purely administrative action in which no laws are alleged to have been broken is, as the agency confirmed to the news media,[228] a first. Aware of the potential impact of the CPSC's new approach, the National Association of Manufacturers, the National Retail Federation, and the Retail Industry Leaders Associations filed a brief to urge the administrative law judge to drop the case against the former CEO.[229] To date, the administrative law judge has refused.[230]

The fact that the company at fault in the CPSC case is no longer in existence, and that the agency is seeking to reach through its corporate form to hold an owner of the company personally responsible for damages, strongly resembles piercing the corporate veil. The charges have the equitable characteristics of piercing cases as well: the CPSC's recall was based on serious dangers to children from Buckyballs, the small, strong magnets that the company sold, and the agency's apparent frustration with the company's resistance to the recall.[231] As the agency explained about filing suit against the former owner, "The core issue for [the CPSC is

that] we did not see progress on safety to children…. The labels were not effective… Children were getting access to this product."[232] The agency documented some 1,700 emergency room visits by children who had ingested the product, including cases of ripped intestines and other damage.[233]

As in other piercing of the corporate veil cases, the former CEO in this case is both a person who "controlled" the company's activities and one of its original founders and shareholders.[234] *Peacock*, *Renner*, and many other examples show that there is a unique intersection for the courts when the key officer is also a major shareholder of the corporation.

This set of similarities with veil-piercing cases, however, highlights another problem in relying on responsible corporate officer doctrine to replace prosecuting intracorporate conspiracies as conspiracies. Importing elements of piercing the corporate veil begins to limit corporate liability by the sophistication of the corporation. According to a famous empirical study, no court has ever pierced the veil of a public corporation.[235] There are simply too many layers of authority and principal-agent control for alter-ego-based piercing arguments to be successful. Out of approximately 1,600 cases, the study found that only four cases even attempted to pierce the veil of a public corporation: this number represents less than 0.25 percent of the total, with a 0.0 percent success rate.[236]

Although it could be argued that the disclosures required of public corporations should limit wide-spread wrongdoing, the statistics from private surveys of the officers of public corporations would seem to dispute this claim.[237] Ultimately the largest acts of coordinated wrong-doing appear to have been performed by public corporations, in part because they are so much bigger institutions and have better mechanisms of employee control and coordination than smaller-scale private corporations.[238] The prosecution of corporate conspiracies as conspiracies would focus on these mechanisms of principal-agent control in a way that currently escapes both piercing the corporate veil and responsible corporate officer doctrines.

C. Fracturing the Principal: Reactions to "Retroactive" Imposition of the Corporate Veil and Growing "Reverse" Piercing of the Corporate Veil

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

Fracturing the principal can been seen in two different lines of cases that essentially accomplish the same thing. The first line of cases pushes back against "retroactive" imposition of the corporate veil under the entity doctrine. Courts have been willing to pierce the single entity of corporate clients to recognize that an attorney's true client may be the constituent part of a larger corporate client, and that covering such constituents with the umbrella of a single entity misunderstands the true interests and incentives of the parties involved.

The second line of cases highlights the recent growth of "reverse" piercing of the corporate veil doctrine, which holds a corporation liable for the debts and misbehavior of its shareholders or subsidiaries. This approach essentially changes the meaning of imposing a larger corporate veil by holding that, if shareholders and subsidiaries act improperly, then the corporation becomes additionally liable for their actions. The language of "reverse" piercing, however, does not describe its approach as extending a corporate veil over the shareholders and

subsidiaries. Instead, "reverse" piercing employs the concepts of "direct" piercing of the corporate veil explored earlier to obtain equitable results in reaching assets and in repairing damage caused to third parties by improper coordination among corporate forms or between a shareholder and a corporation to defeat the satisfaction of judgments.

The ultimate result of both of these movements in the law is the opposite of results under the intracorporate conspiracy doctrine. The outcome of what are essentially conspiracy cases under these approaches is *not* to find immunity from prosecution for both a principal and its agent as under the intracorporate conspiracy doctrine. Instead, these alternative doctrines impose liability on *both* the principal and the agent. As in the warping of other doctrines to reach conspiracy claims, many problems exist in using these alternate approaches to achieve equitable outcomes in lieu of charging intracorporate conspiracies as conspiracies, but courts are actively stretching these rules to impute liability within and across intracorporate entities and legal forms rather than to permit the agency relationship among parties to allow them to escape liability.

The question of when a corporate entity should be fractured to impose liability on its components underlies all three of these doctrines. One set of answers for when a principal should be fractured is rooted in agency theory. The moment that an agent conspires with other agents for purposes that are his own and not in the interest of the principal, he loses the protection based in agency law.[239] But the protection of agents in following the interests of the principal under the intracorporate conspiracy doctrine is often overly broad: personal motivations such as job protection and increased salary compensation do not cross the line into completely personal motivations for some courts.[240] The limits of the intracorporate conspiracy doctrine in traditional agency theory were recently explored in a companion piece to this Article.[241]

But there exists another set of answers to the question of when a corporate entity should be fractured to impose liability on its components that comes from these unusual permutations of piercing the corporate veil doctrine such as denying "retroactive" imposition of the corporate veil and adopting "reverse" piercings of the corporate veil. Ultimately, these ideas based in equity and in the functional analysis of relationships have been used to impose liability in circumstances in which the intracorporate conspiracy doctrine would bar such claims. Even more pertinent to the recent history of the intracorporate conspiracy doctrine as documented in this Article, almost all of these cases have been generated by the role of attorneys in the representation of clients.

First, to initiate this discussion, courts have left suggestions in the intracorporate conspiracy doctrine that they may be willing to import these equitable ideas for breaking apart a principal for the purposes of imposing liability. Key cases from California and Virginia reveal this opening.

Pushing traditional notions of agency theory, for example, in 1989 the California Supreme Court left open the argument that corporate directors and officers who directly order, authorize, or participate in tortious corporate conduct may not be protected by the intracorporate conspiracy doctrine solely as part of the principal.[242]

In *Doctors' Co. v. Superior Court of Los Angeles County*, the real party in interest was Jose Antonio Valencia, who challenged the ruling of the L.A. Superior Court dismissing his claim of unfair practice against a medical malpractice insurer, the insurer's attorneys, and a doctor who testified for the insurer at trial.[243] Valencia had been injured at birth by a doctor's negligence. The doctor had been insured by the Doctors' Co. insurance company.

In order to evade appropriate settlement in what eventually became a $2 million jury verdict for Valencia, the insurer allegedly conspired with its attorneys "to locate [another] local doctor who would agree to only partially review the facts and records and subsequent depositions

surrounding the birth of [plaintiff]."[244] That doctor, Russell, agreed to "give a false medical opinion which provided [insurer] and [attorneys] a plausible sounding excuse to deny [plaintiff's] request for a prompt, fair and equitable settlement of his claims."[245] Russell, in turn, allegedly conspired with the insurer and its attorneys by agreeing with them not to review the medical records of Valencia's birth properly before giving his opinion under oath for the insurer.[246] California law permitted plaintiffs who obtained a tort judgment against a defendant to sue the defendant's insurer "for violating section 790.03(h)(5), which specifies failure to attempt settlements of claims as an unfair practice in the business of insurance."[247] But the attorneys and Dr. Russell were not in the business of insurance. The case thus posed the issue "whether the insurer, the attorneys and Dr. Russell can be held liable for a conspiracy to violate a duty peculiar to the insurer."[248]

Relying on the intracorporate conspiracy doctrine,[249] the court included the attorneys and Dr. Russell as agents of the insurance company.[250] Ultimately the court held that Valencia's claim for unfair practices failed because the insurance company's agents "did not personally share the statutory duty alleged to have been violated."[251]

But the court's decision also included a long analysis of the responsibility of attorneys, and it was explicit that attorneys can still be liable for conspiracy with clients under certain circumstances. Not only did the court mention the traditional exception to the intracorporate conspiracy doctrine when agents engage in "conduct which the agents carry out 'as individuals for their individual advantage' and not solely on behalf of the principal",[252] but it suggested the finding of independent tort liability through the fracturing of a unitary principal when facts describe "corporate directors and officers who directly order, authorize or participate in the corporation's tortious conduct."[253]

This holding reaffirmed the same court's 1979 statement that "[d]irectors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct."[254]

In addition, as recently as 2000, a California appellate court quoted both the 1979 statement and *Doctors' Co.* to affirm that "[p]ersonal liability, if otherwise justified, may rest upon a 'conspiracy' among the officers and directors to injure third parties through the corporation."[255]

In a related line of cases, the Virginia state courts are using the language of "acting outside the scope of the alleged agency relationship" effectively to fracture the principal of corporations in conspiracy suits.

In 2005, the Virginia Circuit Court held that, because defendants, "acting in their individual capacities, joined to form [the corporation] with the purpose of willfully and maliciously injuring" plaintiff, the intracorporate conspiracy doctrine did not apply to the corporation to shield defendants' actions.[256] In addition, the court applied an extra procedural protection to intracorporate conspiracy claims that "'[a]ny intra-corporate/agency immunity defense requires a factual determination as to whether the acts complained of were within the scope of the alleged agency relationship' and cannot be resolved on demurrer."[257] The court cited precedents as recent as 2000 for its special scrutiny of when the intracorporate conspiracy doctrine could bar claims.[258]

Similarly, the Virginia Circuit Court held in *Singer v. Dungan*[259] that a conspiracy claim could be supported when two of a company's three stockholders acted in concert to issue additional stock in order to take control of the corporation. The court found that the two

stockholders, by virtue of issuing the additional stock in their effort to take control of the corporation, had acted as individuals so as to bar application of the intracorporate conspiracy doctrine to the unitary principal of their corporation.[260]

Second, in their discussions of the two alternative doctrines, courts have developed arguments regarding fracturing the principal tailored for challenging the intracorporate conspiracy doctrine. Case law from many states reveals this trend.

Starting with courts that have pushed back against "retroactive" imposition of the corporate veil, the facts of the *Singer* intracorporate conspiracy case have particular echoes in a Delaware chancellery court case rejecting a single entity interpretation of the corporate veil to describe an attorney's client. In *Opdyke v. Kent Liquor Mart*,[261] the Delaware chancellery court held that, in buying out the shares of two of a corporation's three shareholders in opposition to its third shareholder, the corporation's attorney was really acting as the "attorney for three joint adventurers," instead of on behalf of a single corporation.[262] Not only had the attorney breached his fiduciary duty to his corporate client, but the internal machinations of constituencies within his client had split apart the protection of the corporation's unitary form.[263] Although there was no conspiracy alleged in *Opdyke*, the *Singer* and *Opdyke* courts utilized the same functional analysis of principal-agent behavior to facture the corporations into multiple principals.

"Retroactive" imposition of the corporate veil doctrine started to gain significant strength, however, in 1992. The Wisconsin Supreme Court in *Jesse v. Danforth*[264] endorsed the "retroactive" imposition of a corporate veil to cover individual doctors before they had formed a medical corporation. A group of doctors, while still individuals, engaged a law firm to help them incorporate. Later, separate plaintiffs hired the law firm to pursue medical malpractice claims against two of the doctors within the medical corporation. The corporation itself was not named in plaintiffs' suit. The question before the Wisconsin Supreme Court was whether the doctors had been clients of the law firm for the purpose of finding that the firm had a conflict of interest in representing plaintiffs in the medical malpractice action against them.[265]

The court reasoned that, when the doctors first approached the law firm, the firm must have been representing the doctors personally because no corporation had yet been created.[266] But the purpose of the firm's representation was limited to the creation of the corporation. The court thus invented a retroactive single-entity rule to hold that the firm never actually represented the doctors as individuals. As the court promulgated its rule:

> Where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.[267]

The *Jesse* court explained that the purpose of its rule was to "enhance the corporate lawyer's ability to represent the best interests of the corporation without automatically having the additional and potentially conflicting burden of representing the corporation's constituents."[268] In other words, the rule permits attorneys to retain what is typically their most lucrative client, the corporation, without having an obligation to defend or advise the actions of its agents.

Very quickly, by 2000, the retroactive imposition of the corporate veil, or so-called "entity" approach to clients composed of multiple individuals was adopted by the American Bar Association in its model code of ethics. Model Rule of Prof'l Conduct 1.13, as amended, cites

the Wisconsin Supreme Court's opinion in *Jesse*, and holds that an attorney "employed or retained by an organization represents the organization."[269]

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

> The law tends to characterize… organizations as unitary "entities" or "legal persons" and to suggest the lawyers' duties to such clients are analogous to their duties to individual clients. In fact, however, these organizations consist of multiple individuals with potentially differing interests, and hence they are prone to internal conflicts that do not arise in individual representation.[270]

The fundamental problem, as Professor Simon identifies, is that, even for attorneys, "as a general approach to corporate disqualification issues, the retroactive approach seems either superfluous or unsatisfactory. It is superfluous where the conflict arises between a constituent and a third party…. It is unsatisfactory where… the dispute is between constituents."[271] In the case of a dispute between constituents, "[a]pplying the retroactive entity approach… yields an immediate, clear answer only if we conflate corporate interests with those of the current control group."[272] As Professor Simon further demonstrates, it is improper for attorneys to conflate corporate interests only with the interests of the current control group.[273]

Serious attorney intraclient dilemmas exist under this expansive corporate form approach, for example, in corporate takeovers,[274] and in providing guidance to clients that are closely held corporations.[275] Moreover, as Professor Ibrahim notes in the context of close corporations, attorneys "have faced potential civil liability and disciplinary actions for failing to appreciate the entity-owner distinction and clients are usually even more confused."[276]

In addition, Professor Simon has identified a line of cases counteracting the retroactive imposition of the corporate veil that he describes as "piercing the veil for professional responsibility purposes."[277] All of these cases take into account a functional analysis of the attorney-client relationship and reject the overreach of a corporate umbrella. The important insight here for challenging the intracorporate conspiracy doctrine's parallel approach is that courts in these cases have been willing to fracture the unitary entity protection of the corporate client to find that the attorney actually represents each of its principals.

For example, when an attorney represented a closely held corporation owned by a husband and wife, the attorney could not represent the husband in a divorce proceeding against his wife. As the California Court of Appeals explained: "In representing an ongoing family corporation, [counsel] in a very real sense continues to represent [the] wife."[278] In another California case involving a business dispute between a husband and wife within a partnership, the same court wrote that attorney-client privilege was inapplicable as between the two individuals. "In the context of the representation of a partnership, the attorney for the partnership represents all the partners as to matters of partnership business. ...[The] attorney-client privilege will not bar disclosure of matters related to a partnership business simply because such business was conducted through a law firm."[279]

In a dispute between two closely held corporations, the Oregon Supreme Court promulgated the rule that: "Where a small, closely held corporation is involved, and in the absence of a clear understanding with the corporate owners that the attorney represents solely the

corporation and not their individual interests, it is improper for the attorney thereafter to represent a third party whose interests are adverse to those of the stockholders and which arise out of a transaction which the attorney handled for the corporation."[280]

In a second case, the Oregon Supreme Court emphasized that closely held corporations involve very different client expectations, and that it is those expectations that should control the behavior of attorneys. As the court explained, "where the operator of the corporation either owns or controls the stock… it is reasonable to assume that *there is no real reason for him to differentiate in his mind between his own and corporate interests*."[281]

The federal Southern District of New York agreed with this functional approach to fracturing a principal when it found that corporate counsel could not represent one of two shareholders in a closely held corporation against the other because "it is indeed reasonable for each shareholder to believe that corporate counsel is in effect his own individual attorney."[282]

Importantly, not all of these cases involve closely held corporations. In *Westinghouse Elec. Corp. v. Kerr McGee Corp.*,[283] the U.S. Court of Appeals for the Seventh Circuit found that counsel for a trade association could not represent one of the association's members against the interest of its other members. Counsel for the trade association sought to represent Westinghouse Elec. Corp. in an antitrust action alleging illegal conspiracy in restraint of trade in the uranium industry. At the same time, counsel, representing the trade association, had just completed a confidential survey and report to the group's members on their uranium holdings and profits.[284]

The parties in *Westinghouse* were not unsophisticated entities: the American Petroleum Institute trade association included plaintiffs the Gulf Oil Corporation, the Kerr-McGee Corporation, and the Getty Oil Company; the attorneys involved were from the firm of Kirkland and Ellis. The uranium litigation had already involved the efforts of eight to fourteen of the firm's attorneys and generated some $2.5 million in legal fees.[285] Six more of the firm's attorneys represented the trade association.[286]

In its decision, the *Westinghouse* court found that not even the firm's internal "Chinese wall" between legal teams could overcome its conflict of interest in the case.[287] The court instead approved the broad definition of an attorney's client as: "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."[288] Staying with a functional approach based on the actual relationships of the intraclient entities involved, the court found, for example, that the "professional relationship for purposes of the privilege for attorney-client communications 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'"[289]

These courts' functional approach to relationships in fracturing apart principals for purposes of identifying the roles of intracorporate parties is the same analysis that must be performed in conspiracy cases. The same issues of control and real interest emerge in these courts' push-back against the "retroactive" imposition of the corporate veil as in the principal and agent questions that would underlie a case if it were filed as an intracorporate conspiracy charge. The important inquiry is not merely how the paperwork for a corporate form has been filed, but what unique members of an intracorporate group are doing to orchestrate and further organizational wrongdoing.

Naturally, there is a public policy argument that courts do not want to patrol behavior inside corporations because they do not want to be pulled into settling disputes among

constituents that may more closely resemble family arguments than criminal and tort wrongdoing. But the power of applying traditional conspiracy doctrine is that conspiracy doctrine has been vetted for its application against all types of individuals and constituents in small groups—on the street, in the pub, and, as the law used to be understood, to the corporate agent or subsidiary.

Finally, another method of using functional analysis to fracture otherwise unified interests behind the corporate veil is so-called "reverse" piercing of the corporate veil. In "reverse" piercing of the corporate veil, a corporation can be held liable for the conduct of its shareholder or subsidiary.[290]

Intriguingly, like direct piercing of the corporate veil and the intracorporate conspiracy doctrine itself, "reverse" piercing of the corporate veil was originally developed in the context of reaching through the parent-subsidiary relationship, and it has only since become adapted and known for reaching from individuals through to corporations.[291] Unlike its cousins, however, "reverse" piercing of the corporate veil in many jurisdictions has kept more of its original focus on corporate-to-corporate forms. Thus, for example, Tennessee courts recognize reverse piercing only in the context of the parent-subsidiary corporate relationship.[292] Furthermore, "reverse" piercing of the corporate veil still cannot, in almost any jurisdiction, be used against sole proprietorships.[293]

In addition, much of the growth of "reverse" piercing of the corporate veil has taken place very recently, in direct parallel with the limitation on conspiracy cases under the intracorporate conspiracy doctrine. In 2013, the major case interpreting reverse piercing was decided in Tennessee.[294] In 2008, the federal Southern District of New York, interpreting New York state law, ruled that a corporation could not use reverse piercing offensively by piercing a corporate veil that the corporation had created for its own benefit and treat damages suffered by another entity as its own.[295]

Also recently, "reverse" piercing of the corporate veil has ostensibly started to take on more characteristics of direct piercing by importing language from the alter-ego theory of liability against corporations. In 2012, for example, a federal bankruptcy court applied the alter ego doctrine under Wisconsin law in a reverse piercing case to reach assets transferred between the Archdiocese of Milwaukee and its parishes to evade collection by the victims of sexual assaults by priests.[296] According to the court, "it is appropriate to apply [alter ego doctrine] in reverse 'when the controlling party uses the controlled entity to hide assets or secretly to conduct business to avoid the pre-existing liability of the controlling party.'"[297] Echoing the factors of direct piercing, the court applied the following test to determine if the Archdiocese's parishes were a sham: "failure to observe corporate formalities, non-payment of dividends, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, and the absence of corporate records."[298] Astonishingly, even after reciting these factors, the court still approved the piercing of a very large and sophisticated set of corporate organizations.

Another current formulation of "reverse" piercing merges the language of the alter ego theory of liability with a much stronger emphasis on the performance of justice and equitable results. The Supreme Court of Colorado, for example, has written that courts may use reverse piercing of the corporate veil to satisfy the obligations of a shareholder or "other corporate insider" when "(1) the controlling insider and the corporation are alter egos of each other, (2) justice requires recognizing the substance of the relationship over the form because the corporate

fiction is utilized to perpetuate a fraud or defeat a rightful claim, and (3) an equitable result is achieved by piercing. "[299]

Finally, "reverse" piercing cases come in two varieties: so-called "inside" claims and "outside" claims. Inside claims are brought by a controlling insider against a corporation to satisfy a debt that the insider alleges is due to him or her and to protect assets from being used to satisfy obligations to third parties.[300] Insurance coverage is a good example. Outside claims are brought by third parties against a corporation to satisfy harms perpetrated by a shareholder, or, specifically in Colorado, "other corporate insider," when already pursing the same claim against the insider.[301] This category of "outside" claims sounds like cases that might otherwise be barred by the intracorporate conspiracy doctrine. Court after court has recently approved pursuit of such "outside" claims without mention that these results circumvent the intracorporate conspiracy doctrine.[302]

Just as in application of direct piercing of the corporate veil to conspiracy cases that should be charged as conspiracy cases, applying "reverse" piercing of the corporate veil to reach results barred by the intracorporate conspiracy doctrine inflicts damage on the coherence and predictability of reverse piercing as a general tool.

For example, it certainly strains conventional alter-ego analysis to find that the parishes of the Archdiocese of Milwaukee are shams.[303] But that court's conclusion must also be read as an attempt to rectify serious injustices that have resulted from applying the intracorporate conspiracy doctrine to bar the conspiracy claims of the victims of sexual assault by priests such as against the Diocese of Bridgeport.[304] In 2012, the facts of that case were back in the news when, after the U.S. Supreme Court ruled that incendiary details of the Diocese's handing of the priests must be released,[305] now-retired Cardinal Egan unfathomably described the Diocese's handing of such cases as "incredibly good."[306]

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

V. CONCLUSION

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

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

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

Attorneys, among others, have pushed hard to expand the intracorporate conspiracy doctrine's principal-agent analysis to bleed across legal forms. Not only has this push created confusion and annoyance in the courts,[307] but it has further reinforced a doctrine that misincentivizes corporations and their agents in ordering and performing coordinated wrongdoing. Ultimately, attorneys' push to extend the intracorporate conspiracy doctrine backfires on the profession as well. Other legal doctrines and the rules of attorney ethics already harbor behavior within ethical boundaries, and they better help maintain the profession's reputation.

Exactly as prosecutors and the public search for new tools to combat corporate conspiracy in the wake of the financial crisis, the Roman Catholic Church's sex-abuse scandal, and other recent examples of large-scale corporate wrongdoing, the overextension of the intracorporate conspiracy doctrine stands out as a fundamental problem. Courts are using other doctrines to get around its results, but those doctrines are ill-suited for imposing liability on conspiracies and more sophisticated corporate forms. The basic solution is the simplest, most efficient, and best-tested: courts and legislatures should roll back the intracorporate conspiracy doctrine and help repair its warping of related doctrines now distorting the incentives and responsibilities of corporations and their agents for coordinated wrongdoing.

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[1] Enterprises covered by the "intracorporate" conspiracy doctrine may be all types of associations. *See, e.g.*, Robin Miller, *Construction and Application of "Intracorporate Conspiracy Doctrine" as Applied to Corporation and Its Employees—State Cases*, 2 A.L.R. 6th 387, § 3 (2011) ("While the intracorporate conspiracy doctrine is typically applied to business corporations, it applies to corporations generally, including religious corporations and municipal corporations and other governmental bodies. The doctrine applies to all levels of corporate employees, including a corporation's officers and directors and owners who are individuals."). Accordingly, this Article uses the term "corporation" to cover the same enterprises.

[2] *See* 16 Am. Jur. 2d *Conspiracy* § 56 (West 2013) [hereinafter *Conspiracy*] ("[A] corporate entity cannot conspire with itself because employees of a corporation are considered part of the corporate entity.").

[3] These arguments about torts, criminal, and agency law were fully developed in the sister work to this Article. *See* J.S. Nelson, *The Intracorporate Conspiracy Trap* (2014), manuscript on file with author.

[4] *See generally* the sister work to this Article. Nelson, *supra* n. 3.

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

[6] *See generally* the sister work to this Article. Nelson, *supra* n. 3.

[7] *See* Barry Horowitz, *A Fresh Look at a Stale Doctrine: How Public Policy and the Tenets of Piercing the Corporate Veil Dictate the Inapplicability of the Intracorporate Conspiracy Doctrine to the Civil Rights Arena*, 3 NW. J. L. & SOC. POL'Y. 131, 133 (2008).

[8] Other recent academic efforts have focused solely on bolstering the jurisprudence of piercing the corporate veil and limited enterprise liability. Because piercing the corporate veil doctrine relies heavily on formalities, however, its application "neither guides good decision-making nor produces consistent or defensible results." Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 637 (2005). Another commentator would react in frustration with piercing the corporate veil doctrine by paradoxically increasing the single entity analysis of enterprises to recover larger judgments in the then-increasingly few circumstances when judgments could be recovered. *See, e.g.*, Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate*

Groups, 97 CALIF. L. REV. 195, 202-11 (2009) (expressing frustration with the limits of piercing the corporate veil and other existing frameworks, but then proposing an "enterprise liability" vision of the law which would paradoxically strengthen the unity analysis of commercial enterprises); *compare id.* at 210 ("[E]ntity theory, governed by principles of limited liability and piercing the corporate veil, can no longer cabin the realities of a globalized market dominated by mega-corporations in which extensive and fractured subsidiarization is the norm."), *with id.* ("Enterprise theory views the corporate group as a singular unit, rather than viewing each subsidiary or affiliated corporation as a separate legal entity."). This approach, however, would replicate the unpredictable and overly severe nature of the piercing the corporate veil doctrine. *Cf.* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985). ("'Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled."). *See also* Jennifer Stewart, *The Intra-Enterprise Conspiracy Doctrine after Copperweld Corp. v. Independence Tube Corp.*, 86 COLUMBIA L. REV. 1, 198 (1986) (arguing for the opposite approach of Dearborn in the *Cal. L. Rev.* by breaking enterprises into smaller components for purposes of assessing liability in the wake of the U.S. Supreme Court's decision on the unity of parent and subsidiary corporations).

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

[10] *Occupy Wall Street* (Dec. 5, 2011, 3:23 PM), News-Basics http://news-basics.com/2011/occupy-wall-street/.

[11] The lack of successful enforcement actions against financial institutions has been an embarrassment to regulatory officials. *See, e.g.*, Ben Protess & Susanne Craig, *S.E.C. Hopes for Validation in Goldman Sachs Trader Case*, N.Y. TIMES (Jul. 9, 2013), http://dealbook.nytimes.com/2013/07/09/s-e-c-seeks-validation-in-goldman-sachs-trader-case/?nl=todaysheadlines&emc=edit_th_20130710; Adam Liptak, *Stern Words for Wall Street's Watchdogs, From a Judge*, N.Y. TIMES (Dec. 16, 2013), http://www.nytimes.com/2013/12/17/us/judge-raises-questions-on-the-paltry-effort-to-prosecute-wall-street-executives.html?hp&_r=0 ("And what of the recent financial crisis? The statute of limitations on most plausible charges is running out, and it seems there will not be a single prosecution of a prominent figure in the entire mess.").

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

[13] This is the major objection of federal district court judge Jed Rakoff's recent opinion piece in the New York Review of Books. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, THE N.Y. REV. OF BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/. In agreement, practicing attorney Solomon Wisenberg writes that "the judge's most salient point… is his observation that there is no substitute for holding financial elites responsible for their major criminal misdeeds. The compliance and deferred prosecution agreements favored today are simply a cost of doing business for most big corporations. What's worse, in the current environment, DOJ is giving a walk to elite financial actors and simultaneously prosecuting middle-class pikers with a vengeance that is sickening to behold. The elite financial actors may not have committed criminal fraud, but many of them bear heavy responsibility for the ensuing mess. It is so much easier for DOJ to rack up the stats by picking the low hanging fruit." Solomon Wisenberg, *Judge Rakoff Wades In*, WHITE COLLAR CRIME PROF BLOG (Dec. 27, 2013), http://lawprofessors.typepad.com/whitecollarcrime_blog/2013/12/judge-rakoff-wades-in.html.

[14] Rakoff, *supra* n. 13.

[15] BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS, *forthcoming* Harv. Univ. Press (Fall 2014); Michael Rothfeld, *Firms Are Penalized, But Workers Aren't*, WALL ST. J. (Jan. 17, 2014), http://online.wsj.com/news/articles/SB20001424052702304419104579324962459771186.

[16] *See id.*

[17] *See, e.g.*, David Gillen, *Video: Business Behaving Badly*, N.Y. Times (Dec. 30, 2013), http://www.nytimes.com/video/business/100000002614034/business-behaving-badly.html?playlistId=100000002585027 (quoting Professor Larcker describing "serial bad-behaving companies" in

the context of modern corporate fines); *see also generally* DAVID LARCKER & BRIAN TAYAN, A REAL LOOK AT REAL WORLD CORPORATE GOVERNANCE (2013) ("Approximately 8 percent of publicly traded companies each year have to restate their financial results due to previous manipulation or error. Approximately 10 percent of Chapter 11 bankruptcy cases involve allegations of fraud… These are shocking figures that suggest agency problems are widespread and should not be ignored.").

[18] Easterbrook & Fischel, *supra* n. 9, at 89; *accord* Dearborn, *supra* n. 9, at 205-10 (expressing frustration with the unpredictability of alternate methods of imposing liability on enterprises).

[19] *See, e.g.*, Allon Kedem, *Can Attorneys and Clients Conspire?*, 114 YALE L. J. 7, 1819 (2005) (describing the push, for example, behind the Eleventh Circuit's case of *Farese v. Scherer*, 342 F.3d 1223 (11th Cir. 2003), which held it impossible for a conspiracy to violate federal civil rights to exist between attorney and client); *see also* Heffernan v . Hunter, 189 F.3d 405 (3d Cir. 1999) (holding in the Third Circuit attorney-client conspiracy impossible by analogy to the intracorporate conspiracy doctrine); Travis v. Gary Cmty. Mental Health Ctr., 921 F.2d 108 (7th Cir. 1990) (finding in the Seventh Circuit that a corporation and its outside counsel could not conspire under the intracorporate conspiracy doctrine).

[20] *Accord* Kedem, *supra* n. 19, at 1819. ("This Comment argues that the Eleventh Circuit's limitation on attorney-client conspiracies is illegitimate as a matter of statutory interpretation and ill-advised as a matter of policy…. a categorical rule against attorney-client conspiracies is misguided.").

[21] *Conspiracy*, *supra* n. 2, at § 56 (internal citations omitted).

[22] *Id.* (same).

[23] *Id*.

[24] *See, e.g.*, Robin Miller, *Construction and Application of "Intracorporate Conspiracy Doctrine" as Applied to Corporation and Its Employees—State Cases*, 2 A.L.R. 6th 387, § 3 (2011) ("While the intracorporate conspiracy doctrine is typically applied to business corporations, it applies to corporations generally, including religious corporations and municipal corporations and other governmental bodies. The doctrine applies to all levels of corporate employees, including a corporation's officers and directors and owners who are individuals.").

[25] *Conspiracy*, *supra* n. 2, at § 56 (internal citations omitted); *see also id.* ("For a claim of intracorporate conspiracy to be actionable, the complaint must allege that the corporate officials, employees, or other agents acted outside the scope of their employment and engaged in conspiratorial conduct to further their own personal purposes and not those of the corporation.").

[26] *Id.* (internal citations omitted).

[27] Heffernan v. Hunter, 189 F.3d 405, 412 (3d Cir. 1999). Notice echoes of the test for qualified sovereign immunity doctrine as well, discussed in the sister work to this Article. Nelson, *supra* n. 3.

[28] Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003).

[29] *U.S. v. Hartley*, 678 F.2d. 961, 11 Fed. R. Evid. Serv. 128 (11th Cir. 1982); *see also Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 790 (D.C. Cir. 1988), *rehr'g denied* (May 6, 1988) (distinguishing *Hartley*); *B.F. Hirsch v. Enright Refining Co., Inc.*, 751 F.2d 628, 663 (3rd Cir. 1984) (declining to follow *Hartley*).

[30] *See* discussion in text *infra* pp. 12-14.

[31] *See, e.g.*, Horowitz, *supra* n. 9; Catherine E. Smith, *(Un)Masking Race-Based Intra-Corporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL'Y & L. 129, 166-172 (2004) (limiting the article's argument against application of the intracorporate conspiracy doctrine to the particular wording and history of the Ku Klux Klan Act); Geoff Lundeen Carter, *Agreements within Government Entities and Conspiracies under Section 1985(3): A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. CHI. L. REV. 3, 1139 (1996) (limiting article's argument to litigation under Section 1985(3)).

[32] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770-71 (1984) (applying the intracorporate conspiracy doctrine in the antitrust context and holding that a parent corporation and its wholly owned subsidiary cannot conspire under Section 1 of the Sherman Act).

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

[34] *See, e.g.*, Transocean Group Holdings Pty Ltd. v. South Dakota Soybean Processors, LLC, 663 F. Supp. 2d 731 (D. Minn. 2009) (dismissing business suit against soybean processor for civil conspiracy).

[35] *See, e.g.*, Renner v. Wurdeman, 434 N.W.2d 536, 542 (Neb. 1989) ("A corporation cannot conspire with an agent when that agent is acting within the scope of his authority.") (citation and emphasis omitted); Collins v. Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 622 (Nev. 1983) ("Agents and employees of a corporation cannot conspire with

their corporate principal or employer when they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage."); Gray v. Marshall County Bd. of Educ., 367 S.E.2d 751, 752 (W. Va. 1988) ("A corporation, as a single business entity, acts with one 'mind' and the unilateral acts of a corporation will not satisfy the requirement of a [conspiracy].").

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

[37] Charles E. Brauer Co., Inc. v. NationsBank of Virginia, N.A., 466 S.E.2d 382 (Va. 1996).

[38] Davidson & Schaaff, Inc. v. Liberty Nat. Fire Ins. Co., 69 F.3d 868, 870-71 (8th Cir. 1995).

[39] *Id*.

[40] Trau-Med of America, Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 703-04 (Tenn. 2002) (emphasis omitted).

[41] RICO is the Racketeer Influenced and Corrupt Organizations Act, first passed in 1968 to combat organized crime. 18 U.S.C. § 1961–1968 (2013).

[42] RICO's Section 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (2013). Section (a) specifically describes a principal, for which the person in 1962(d) might be the agent: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a) (2013).

[43] Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989) (holding that, in contrast with the goals of antitrust laws, "intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers").

[44] Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996).

[45] Kirwin v. Price Communications Corp., 391 F.3d 1323 (11th Cir. 2004) ("Corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions.").

[46] 18 U.S.C. § 1962(d) (2013).

[47] Detrick v. Panalpina, Inc., 108 F.3d 529, 544 (4th Cir. 1997).

[48] Fogie v. THORN Americas, Inc., 190 F.3d 889 (8th Cir. 1999).

[49] MICHAEL A. UTTON, CARTELS AND ECONOMIC COLLUSION: THE PERSISTENCE OF CORPORATE CONSPIRACIES 70 (2011). It will be noted, however, that antitrust violations require a unique analysis. This Article agrees that the intracorporate conspiracy doctrine should be applied to Section 1 of the Sherman Act, see discussion *infra* at p. 25, and *Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752, 767-71 (1984). But these high damage figures do illustrate the pervasiveness of corporate conspiracy in general, of which intracorporate conspiracy is a slice.

[50] Floyd Norris, *A Troubling Survey on Global Corruption*, N.Y. TIMES (May 17, 2013), http://www.nytimes.com/2013/05/18/business/economy/a-troubling-survey-on-global-corruption.html (writing up survey results); *accord Cooking the Books*, N.Y. TIMES (May 17, 2013), http://www.nytimes.com/interactive/2013/05/17/business/Cooking-the-Books.html?_r=0 (interactive graphic with data).

[51] Office of the Attorney General for the Commonwealth of Massachusetts, *Report on the Sexual Abuse of Children in the Roman Catholic Archdiocese of Boston: A Report by the Attorney General*, 2 (July 23, 2003), *available at* www.bishop-accountability.org/downloads/archdiocese.pdf (hereinafter *Attorney General Report*).

[52] *Id.* at 2-3.

[53] Karen R. Long, *The Cost of Abuse*, THE CLEVELAND PLAIN DEALER (Feb. 28, 2004), http://www.cleveland.com/abuse/index.ssf?/abuse/more/1077975029236480.html [hereinafter *The Cost of Abuse*].

[54] *Id.*

[55] *See, e.g.*, *US Court*, *supra* n. 5 ("Child sex abuse cases across Roman Catholic churches in the US have cost billions in settlements, driving some US dioceses into bankruptcy.").

[56] *Attorney General Report*, *supra* n. 51, at 3.

[57] *See, e.g.*, *The Cost of Abuse*, *supra* n. 53 (reporting that the Roman Catholic bishop of Cleveland regretted his part in the sex abuse scandal, and that he personally admitted transferring "about" three priests after learning of sex abuse charges against them).

[58] *See v. Bridgeport Roman Catholic Diocesan Corp*, 20 Conn. L. Rptr. 271, 1997 WL 466498 (Conn. Super. Ct. 1997) (unpublished) (holding that the intracorporate conspiracy doctrine barred victims' claims without further analysis). For more discussion of this case and subsequent events, *see* Nelson, *supra* n. 3 (discussing application of the intracorporate conspiracy doctrine to this case).
[59] Black v. Bank of Am. N.T. & S.A., 35 Cal. Rptr. 2d 725, 728 (Cal. App. 1994).
[60] *Id.* at 726.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 727 ("It has long been the rule in California that '[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.'") (citing *Wise v. Southern Pacific Co.*, 35 Cal. Rptr. 652 (Cal. App. 1963), as reaffirmed and modified by *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 869 P. 2d 454 (Cal. 1994)); *see also id.* at 728 ("When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire.").
[66] *Id.* at 729.
[67] *See, e.g.*, *Douglas G. Smith, The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U.L. REV. 1125, 1149 (1996) (applauding the majority of courts for apply the intracorporate conspiracy doctrine even in the case of civil rights violations); *but see* Horowitz, *supra* n. 9, at 133 (arguing for not applying the intracorporate conspiracy doctrine in civil rights cases).
[68] Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399 (1998).
[69] Copperweld Corp. v Independence Tube Corp., 467 U.S. 752, 767-71 (1984).
[70] Martin, *supra* n. 68, at 401 (stating that the article "critically examines the values alleged to be enhanced by criminal punishment of intracorporate conspiracies and concludes that there is no substantial justification for imposing vicarious corporate criminal liability for wholly internal agreements.").
[71] *Id.* at 441-42.
[72] *Id.* at 442 ("[T]he corporation become becomes identical to, and stands in the shoes of, all the conspirators.").
[73] Martin H. Pritikin, *Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent's Immunity Rule*, 84 NEB. L. REV. 1 (2005).
[74] *Id.* at 3-4 ("A trace of the historical roots of the agent's immunity rule reveals that the rule is based on two distinct but related rationales…. First,…. Second, and more commonly, when agents act on behalf of the corporation, the corporation is deemed to be the sole legal actor; thus, there can be no conspiracy because the corporation cannot 'agree' with itself.").
[75] *Id.* at 4.
[76] *Id.* at 28.
[77] *Id.*
[78] *Id.* at 33 (dismissing the issue with outdated information); *id.* ("Courts have thus rejected the agent's immunity rule in the criminal context: there is no immunity for agents who conspire with their corporate principal or employer."). Note, as described *supra* in the text above at pp. 7-9, how far the intracorporate conspiracy doctrine has come in being applied in the criminal context since the 1940s and 50s when this was the rule. *See, e.g.*, United States v. Bach, 151 F. 2d 177, 179 (7th Cir. 1945) ("Corporate agents may be criminally liable individually for acts done by them on behalf of the corporation, even though the corporation may or may not be liable.").
[79] *See* the sister work to this Article. Nelson, *supra* n. 3.
[80] *See* discussion of warping doctrines in text of this Article, *infra* at pp. 21-52.
[81] *See, e.g.*, Silva v. New York Life Ins. Co., 2001 WL 1000325 (Conn. Super. Ct. 2001) (expanding the intracorporate conspiracy doctrine to hold that the doctrine could be used to bar alleged conspiracy suit between insurance company's office manager and an independent contractor for the company).
[82] *See, e.g.*, General Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003); Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999).
[83] Ryan D. Bolick and Meagan I. Kiser, *Lawyers' Vicarious Liability for Clients' Torts* at 42, FOR THE DEFENSE (January 2011), www.cshlaw.com/documents/FTD-1101-BolickKiser.pdf and www.agentsofamerica.org/article_detail.php?page=2&id_art=418 [hereinafter Bolick & Kiser] (quoting *Art Capital Group v. Neuhaus*, 70 A.D.3d 605, 606, 896 N.Y.S. 2d 35, 37 (2010) (citing *Hahn v. Wylie*, 54 A.D.2d 629, 387 N.Y.S.2d 855 (1976)).

[84] *Id*. (same).
[85] *Id*. (same)
[86] *Id*. at 42.
[87] MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983).
[88] *See also* Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers be "Privileged" to Assist Their Clients' Wrongdoing?*, 29 PACE L. REV. 75, 138 (2008). ("[A]t the end of the day, there is no readily apparent principled basis on which courts can grant lawyers a 'privilege' to aid and abet their clients' breaches of fiduciary duty without creating serious inconsistencies between those cases and the well-established lines of cases recognizing that such liability exists in the other two situations in which lawyers are most often sued for aiding and abetting—fraud and breach of trust.").
[89] RESTATEMENT (SECOND) OF TORTS §674 cmt. d (1977); *accord* United States v . McClatchey, 217 F.3d 823 (10th Cir. 2000) (reversing lower court award of new trial following conviction of attorney for conspiracy with client to commit fraud against Medicare and Medicaid); United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987) (affirming conviction of attorney for conspiracy to obstruct justice with client under 18 U.S.C. § 371 and § 1503); *see also* Nineteen N.Y. Props. Ltd. P'ship v. Uk Jee Kim, 674 N.Y.S.2d 642 (N.Y. App. Div. 1998) (holding that an attorney may be liable for the damage he causes from maliciously pursuing a baseless lawsuit).
[90] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 (2000).
[91] *See, e.g.*, U.S. SECURITIES AND EXCHANGE COMM'N, *SEC Proposes Rules to Implement Sarbanes-Oxley Act Provisions Concerning Standards of Professional Conduct for Attorneys* (Nov. 6, 2002), http://www.sec.gov/news/press/2002-158.htm (describing for Part 205 to 17 CFR, Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission: "The standards must include a rule requiring an attorney to report 'evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the company or any agent thereof' to the chief legal counsel (CLO) or the CLO and the chief executive officer of the company (or the equivalent); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors.").
[92] *Cf., e.g.*, the policy problems inherent in the capture of counsel by enterprises.
[93] *See* Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 193 (2005) (quoting John Gotti on the subject of the Gambino crime family's "house counsel," and Texas Supreme Court Justice Raul A Gonzales on "captive" law firms); *see also id.* at 194-96 (elaborating on the concept of "house counsel"); *id.* at 219-23 (elaborating on the concept of "captive" law firms).
[94] Kedem, *supra* n. 19, at 1824 (citations omitted); *see also id.* (citing, among other sources *Healy v. Labgold*, 271 F. Supp. 2d 303, 305 (D.D.C. 2003) ("While this court has inherent authority to sanction misbehavior by litigants in matters before it, no one has ever suggested that this inherent authority extends to misbehavior before another district court.") (footnote omitted)).
[95] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).
[96] *See, e.g.*, U.S. SECURITIES AND EXCHANGE COMM'N, *supra* n. 91.
[97] In addition, as Kedem concludes, "[n]o reason exists to believe that an attorney's accountability for intimidating or intentionally injuring parties or witnesses to federal suits poses any greater risk to his client's rights than conspiracy liability in other contexts. Zealous advocacy ceases to merit protection when attorneys use their legal skills for improper purposes such as interfering with the administration of justice." Kedem, *supra* n. 19, at 1822; *see also* RESTATEMENT (SECOND) OF TORTS § 674 cmt. d (1977) (articulating the rule that, when an attorney files a frivolous suit "for an improper purpose, …he is subject to the same liability as any other person").
[98] ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 301:602 (2003).
[99] *Id*.; *see also id.* at 301:602-03 (surveying cases in which courts have declined to impose liability for lawyers' good faith advocacy of their clients' interests).
[100] RESTATEMENT (SECOND) OF TORTS §674 cmt. d (1977).
[101] *See also* RESTATEMENT (SECOND) OF AGENCY § 320 cmt. a (1958); Richard Bertram, Inc. v. Sterling Bank & Trust, 820 So. 2d 963 (Fla. Dist. Ct. App. 4th Dist. 2002) (relying upon this part of the Restatement in an attorney-as-broker-dealer case to absolve the attorney of any liability for tortious interference with a business relationship).
[102] Bolick & Kiser, *supra* n. 83, at 42.
[103] *Id.* at 44; RESTATEMENT (SECOND) OF TORTS §586 cmt. a (1977).
[104] *See* Bolick & Kiser, *supra* n. 83, at 44 (describing the state of the law in courts).

[105] FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."); *see also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1297, at 590 (2d ed. 1990) (explaining that the "circumstances" required to be pled with particularity under Rule 9(b) are "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby").
[106] Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999) ("Rule 9(b) protects defendants from harm to their goodwill and reputation.") (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055, 1056-57 (S.D. Ga. 1990)).
[107] *Id.* at 783 n.5 (citing *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997)); *accord Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 662 (E.D. Va. 2010) (articulating pleading requirement under Rule 9(b)).
[108] Gov't Employees Ins. Co. (GEICO) v. Google, Inc., 330 F. Supp. 2d 700, 706 (E.D. Va. 2004) ("Business conspiracy, like fraud, must be pleaded with particularity, and with more than mere conclusory language. The heightened pleading standard prevents every business dispute over unfair competition becoming a business conspiracy claim.") (citation omitted); Schlegel v. Bank of Am., N.A., 505 F. Supp. 2d 321, 325-26 (W.D. Va., 2007) (same) (citing *Gov't Employees Ins. Co.*), *affirmed by* Schlegel v. Bank of Am., NA, No. 07-1765, 258 Fed. Appx. 543 (4th Cir., Dec. 13, 2007) (unpublished decision); *accord* David N. Anthony & Timothy J. St. George, *Common Law And Statutory Business Conspiracy—What They Are And Aren't* (Virginia CLE Jan. 25, 2011), *available at* www.troutmansanders.com/.../Conspiracy%20CLE%20Final%20-%20An... (summarizing developments in the law as of January 2011).
[109] Kayes v. Keyser, 72 Va. Cir. 549, 552 (Va. Cir. Ct. 2007) (denying plaintiffs' formulation of a heightened pleading requirement but quoting *Johnson v. Kaugers*, 14 Va. Cir. 172, 177 (1988)).
[110] *See* United States v. Zolin, 491 U.S. 554, 563 (1989) (describing the protections of attorney-client privilege).
[111] *Accord* Kedem, *supra* n. 19, at 1819 (arguing similar position that operation of the attorney-client privilege should be considered one of attorneys' protections from conspiracy charges under 42 U.S.C. § 1985).
[112] 491 U.S. 554 (1989).
[113] *Id.* at 574-75 (providing for an *in camera* review of the attorney-client communication only once the party opposing the privilege has presented "evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability.").
[114] *Id.* at 563 (holding that the privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime")(internal quotation marks omitted).
[115] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §83 (2000).
[116] Linda Greenhouse, *Burger Urges Congress to Help Cut Court Load* § 1 at 7, N.Y. TIMES (Dec. 31, 1984) (available through Lexis-Nexis).
[117] *Id.*
[118] *Id.*
[119] United States Courts Statistics, *Federal Court Management Statistics Archive, available at* http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cms.pl.
[120] *See* United States Courts Statistics, *U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending (Including Transfers) During the 12-Month Periods Ending March 31, 2011 and 2012*, tbl. D, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/D00CMar12.pdf; *id.* at tbl. C.
[121] *Senate Hearing Is Warned of Lasting Damage to Courts* (Jul. 25, 2013), http://news.uscourts.gov/senate-hearing-warned-lasting-damage-courts.
[122] Consider also the related problem of decreasing pay relative to inflation over time for federal judges. In 1984, Chief Justice Burger first raised the issue of low pay for federal judges to Congress as "unseemly" and "unjust." Blake Denton, *The Federal Judicial Salary Crisis*, 2 DREXEL L. REV. 152, 153 (2009) (internal citations omitted). By 2002, inadequate compensation for federal judges had been "raised in thirteen of the last twenty year-end reports." *Id.* In 2006, Chief Justice Roberts announced that judicial pay has "been ignored far too long and has now reached the level of a constitutional crisis." *Id.* at 154.
[123] *See* sister work to this Article. Nelson, *supra* n. 3.
[124] *See, e.g.*, Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 333 (2004) ("[A]lthough courts have utilized various 'veil piercing' theories to extend liability to shareholders, such theories cannot serve as a vehicle for meaningful reform.").

[125] *Id.*
[126] BLACK'S LAW DICTIONARY (9th ed. 2009).
[127] BARRY R. FURROW ET AL., HEALTH LAW § 5–4, at 182 (2d ed. 2000).
[128] WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41 (perm. ed., rev. vol. Sept. 2013).
[129] The additional use of the doctrine as a method of piercing the veil of one corporation to reach another corporation will be described below. *See* text *infra* p. 23.
[130] *See* FLETCHER, *supra* n. 128, at § 41.10.
[131] *Id.*
[132] *Id.*
[133] *Id.*; *accord* Laura Hunter Dietz et al., Am. Jur. 2d CORPORATIONS § 54 (Nov. 2013) ("The courts have found consistently that the key requirements to sustain a veil-piercing are that the owner exercised complete domination over the corporation with respect to the transaction at issue and that such domination was used to commit a fraud or wrong that resulted in the plaintiff's injury.").
[134] *See, e.g.*, FLETCHER, *supra* n. 128, at § 41.10 (describing how "the instrumentality doctrine [behind the alter ego theory] has its origins in the context of parent-subsidiary relationships"). The further significance of this distinction between parent-subsidiary and corporate-individual liability standards will be the subject of a next article.
[135] *See, e.g.*, Nelson, *supra* n. 3 (describing the intracorporate conspiracy doctrine's leap from parent-subsidiary corporate forms in antitrust to its current application in employer-employee litigation).
[136] *Id.*
[137] FLETCHER, *supra* n. 128, at § 41.10.
[138] Gen. Refractories Co. v. Fireman's Fund Ins. Co, 337 F.3d 297, 313 (3d Cir. 2003).
[139] Edward Finch Co. v. Robie, 12 F. 2d 360, 363 (8th Cir. 1926) (establishing a traditional rationale behind the equitable doctrine of piercing the corporate veil).
[140] *See, e.g.*, FLETCHER, *supra* n. 128, at § 41.10 ("One rationale behind the theory is that if the shareholders or the corporations themselves disregard the proper formalities of a corporation, then the law will do likewise as necessary to protect individual and corporate creditors. It has been said that the rule is designed to give incentives to those using the corporate form to obey the state's laws fully by maintaining the formalities and the legal separateness of the corporation. Thus, those who fail to maintain full corporate formalities cannot expect the state to grant them the limited liability that flows from the corporate form.").
[141] Winkler v. V.G. Reed & Sons, 638 N.E. 2d 1228, 1232 (Ind. 1994).
[142] *Accord* CORPORATIONS, *supra* n. 133, at § 54 ("The failure to observe corporate formalities will not lead to a disregard of the corporate entity if the informality neither prejudices nor misleads the plaintiff or where there is no showing that the separate legal identity of the corporation was used as a subterfuge or to justify a wrong.").
[143] 467 U.S. 752 (1984).
[144] *Id.* at 777.
[145] *See, e.g.*, discussion in text *supra* pp. 14-20.
[146] *See* Nelson, *supra* n. 3 (describing the basis of responsibility for collective action in agency law and how the intracorporate conspiracy doctrine violates agency law principles).
[147] *See id.* (describing the basis of responsibility for collective action in tort law and how the intracorporate conspiracy doctrine violates tort law principles).
[148] *See id.* (describing the basis of responsibility for collective in criminal law and how the intracorporate conspiracy doctrine violates criminal law principles).
[149] In fact, there is an argument that holding a corporation liable for its own wrongdoing more properly comports with the corporation's form as a legal "person" responsible for its actions in the same manner as all other legal persons.
[150] *See* two justifications for protection of the corporate form *supra* p. 22 and n. 128.
[151] *See id*.
[152] The U.S. Court of Appeals for the Fifth Circuit highlighted exactly this behavior by a litigant in *Arriba, Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th Cir. 1992). As the court wrote in dismissing the litigant's argument: "*Bancec* is inapposite to this case. First, the concept of piercing the corporate veil, or alter ego liability, that underlies *Bancec* involves the disregard of corporate status to reach the assets of the owners or of related corporate entities. No such facts are pleaded here. Arriba wants the federal court to disregard the Commission's separate status by lumping it with an entirely distinct entity: the Union's employer, Pemex. There is neither common ownership nor any similar legal relationship between these entities. One cannot pierce a non-existent corporate veil.

What Arriba seeks is more properly characterized as joint and several liability for conspiracy or tort, respondeat superior, or agency liability." *Id.* at 535 (internal citations omitted).
[153] 2011 U.S. Dist. LEXIS 101793 (M.D. Pa. 2011).
[154] *Id.* at *30-31 (quoting *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003)).
[155] *Id.* at *12 (stating that the case was brought under RICO Act, 18 U.S.C. §§ 1961 et seq).
[156] *See* discussion in text regarding RICO claims in federal courts, *supra* p. 9.
[157] Petro-Tech, Inc. v. The Western Co. of North America, 824 F.2d 1349, 1358 (3d Cir. 1987) ("In particular, this and most other courts have held that for purposes of § 1962(c) an enterprise may not be held liable under RICO.") (citing *Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 401-02 (7th Cir. 1984); and *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 n. 2 (9th Cir. 1986) (collecting cases)); *see also id.* ("The contrary rule has been adopted only by the Eleventh Circuit, in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982).").
[158] Pioneer Contracting, Inc. v. Eastern Exterior Wall Sys., Inc., No. 04-1437, 2005 WL 747221, at *1 (E.D. Pa. Mar. 30, 2005) (holding that a "conspiracy cannot lie against the corporation for the actions of its employees who violate RICO on its behalf. Moreover, employees of a corporation, while acting in the course and scope of their employment, cannot conspire with each other."); *accord* Greenberg v. Tomlin, 816 F. Supp. 1039, 1050 (E.D. Pa. 1993).
[159] *See also* the recent case of Walters v. McMahen, 795 F. Supp. 2d 350 (D. Md. 2011) (holding that the intracorporate conspiracy doctrine barred RICO § 1962(d) conspiracy claim that poultry processing company legally conspired to depress employees' wages through a scheme of hiring and falsely attesting to the work authorization of large numbers of illegal immigrants, where officers and managers were all employees of company acting within scope of their employment, and they had no interest in the object of the conspiracy independent of their relationship with company).
[160] *Morelia*, 2011 U.S. Dist. LEXIS at *35.
[161] *Id.* at *24-28 and n. 4.
[162] 434 N.W.2d 536 (Neb. 1989).
[163] *Id.* at 538-39.
[164] As the court explains "Renner seems to be arguing that Wurdeman the individual did not want to honor the stock option agreement and, therefore, caused himself, as the president of the company, to have the company terminate Renner's employment so that Renner could not satisfy the condition precedent to his right to exercise the option." *Id.* at 542.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 538-39.
[169] 112 S.W. 3d 82 (Mo. Ct. App. W.D. 2003) (analysis of Missouri fraud statute application superseded by legislation in 2011, but still routinely cited for pre-existing discussion of the intracorporate conspiracy doctrine).
[170] *See* discussion in text *supra* pp. 11-12.
[171] *Id.* at 84.
[172] *Id.*
[173] *Id.* at 94.
[174] *Id.* (citing *Metts v. Clark Oil & Refining Corp.*, 618 S.W.2d 698, 702 (Mo. App. E.D. 1981) and *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975)).
[175] *Id.*
[176] *Id.* at 94-95.
[177] *See, e.g.*, FLETCHER, *supra* n. 128, at § 41.10 (articulating this justification for piercing the corporate veil).
[178] Rucker v. US Fidelis, Inc., 2009 U.S. Dist. LEXIS 67051 at *4 (E.D. Mo. 2009).
[179] Allison v. Chesapeake Energy Corp., 2013 U.S. Dist. LEXIS 28770 at *30 (W.D. Pa. 2013).
[180] Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1063 tbl. 11 (1991).
[181] Horowitz, *supra* n. 9, at 157 (citing *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159,174 (3d Cir. 2006)).
[182] 516 U.S. 349 (1996).
[183] 29 U.S.C. § 1001 et seq.
[184] *Peacock*, 516 U.S. at 351.

[185] *Id.*
[186] *Id.* at 352.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.* at 353-54 (internal citations omitted).
[192] Martin Petrin, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AM. U.L. REV. 1661, 1675 (2010) (citing *Matter of Dougherty*, 482 N.W.2d. 485, 490 (Minn. Ct. App. 1992)).
[193] *Id.* at 1674 (citing Glynn, *supra* n. 124, at 357).
[194] 21 U.S.C. § 331(k) (2012).
[195] 421 U.S. 658 (1975).
[196] *Id.* at 670-71 (internal citations omitted).
[197] *See, e.g.*, Kevin LaCroix, *New Exposure for Corporate Officials: Control Person Liability for FCPA Violations*, D&O DIARY (Aug. 24, 2009), http://www.dandodiary.com/2009/08/articles/foreign-corrupt-practices-act/new-exposure-for-corporate-officials-control-person-liability-for-fcpa-violations.
[198] 15 U.S.C. § 78t (2012).
[199] Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified across sections of the U.S. Code under Title 15).
[200] Meyer v. Holley, 537 U.S. 280 (2003); Fair Housing Act, 42 U.S.C. § 3605 et seq. (2003).
[201] Nature's Sunshine Products, Inc., Litigation Release No. 21162 (July 31, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21162.htm.
[202] Paul R. Berger et al., *Control Person Liability and the FCPA: What Are the Limits and How Should Companies Respond?*, Debevoise & Plimpton's FCPA UPDATE at 1 (Sept. 2009) http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=b576a274-9024-4ab5-880d-92867dc42922 (click on "View the update" to load the document).
[203] Nature's Sunshine Products, Inc., Litigation Release No. 21162, *supra* n. 201 ("Faggioli and Huff violated Sections 13(b)(2)(A) and 13(b)(2)(B) as control persons pursuant to Section 20(a) of the Exchange Act."); *id.* (concluding that, for this violation, "Faggioli and Huff to each pay a civil penalty of $25,000.").
[204] Berger, *supra* n. 202, at 4.
[205] Pub. L. No. 111-203, 124 Stat. 1841 (2010).
[206] *Id.* at § 929P(c).
[207] Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 438 (Fall 2012) ("The government's focus on FCPA enforcement actions against individuals may intensify with the expanded use of control person liability."); *see also generally* Martin Petrin, *Circumscribing the 'Prosecutor's Ticket to Tag the Elite'—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMPLE L. REV. 2, 283 (2012).
[208] Mark, *supra* n. 207, at 438.
[209] The recent civil case brought by the Commodity Futures Trading Commission (CFTC) against Jon Corzine for financial mismanagement at MF Global was under similar "control person liability, a legal provision that allows for the punishment of executives for the bad acts of lower-level employee." Ben Protess, *Suit Accuses Corzine of a Failure at the Helm*, N.Y. TIMES (June 27, 2013), http://dealbook.nytimes.com/2013/06/27/u-s-to-announce-civil-charges-against corzine/?nl=todaysheadlines&emc=edit_th_20130628&_r=0. There was no conspiracy element to the charge and it only affected Corzine and one other employee—an assistant treasurer for the company who performed wire transfers. *Id.*
[210] Martin, *supra* n. 68; *see also* discussion in text *infra* pp. 13-13.
[211] *See, e.g.*, Berger, *supra* n. 202, at 4 ("Section 20(a) is similar to the concept of 'respondeat superior' in other tort contexts—holding the superior official accountable for the (mis)conduct of more junior employees.").
[212] *Id.*; *see also id.* at 1, n. 2 (surveying case law).
[213] LaPererriere v. Vesta Ins. Gp., Inc., 526 F.3d 715, 724 (11th Cir. 2008).
[214] *Cf.* MODEL PENAL CODE § 5.03 (1962) ("(f) Renunciation.—It is a defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.").
[215] *Id.*
[216] *See also Tag the Elite*, *supra* n. 207, at 43-44 (discussing advocates for personal liability of corporate officers as assuming that "employees' personal liability, in order to induce greater care, be governed by a negligence standard

and employees should be permitted to insure themselves or to be indemnified by their firms."); *see also id.* at 43 (discussing studies that show that "focusing sanctions on the firm, but not its agents, can lead to optimal deterrence where the agent hold[s] fewer assets than the principal and/or where the firm is in a better position than the government to monitor and sanction the agent.").

[217] Josephine Sandler Nelson & Richard O. Parry, *Protecting Employee Rights and Prosecuting Corporate Crime: A Proposal for Criminal* Cumis *Counsel*, 10 BERKELEY BUS. L.J. 1, 117 (2013) (citations for D&O insurance estimates); *id.* at 156 ("Because the employees' right to indemnification may hinge in part or entirely on whether the employees are found guilty of the crime or not, employees have an enormous incentive to fight charges to the end instead of pleading to a lesser count.").

[218] DEL. CODE ANN. tit. 8, § 145(c); *see also* Nelson & Parry, *supra* n. 217, at 156, 161 (discussing the impact of D&O insurance incentives on the length and quality of employee careers).

[219] *Cf., e.g.*, Glynn, *supra* n. 124, at 333 (arguing instead for additional personal liability on corporate officers given the "recent emergence of a powerful, highly compensated, and highly mobile top managerial class").

[220] Elliot Blair Smith & Phil Kuntz, *CEO Pay 1,795-to-1 Multiple of Wages Skirts U.S. Law*, BLOOMBERG NEWS (Apr. 29, 2013), http://www.bloomberg.com/news/2013-04-30/ceo-pay-1-795-to-1-multiple-of-workers-skirts-law-as-sec-delays.html.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] David Weidner, *Why Your CEO Could Be In Trouble*, WALL ST. J. (Sept. 15, 2011), http://blogs.wsj.com/deals/2011/09/15/why-your-ceo-could-be-in-trouble.

[225] *Id.*

[226] Smith & Kuntz, *supra* n. 220.

[227] Hillary Stout, *Buckyball Recall Stirs a Wider Legal Campaign*, N.Y. TIMES (Oct. 31, 2013), http://www.nytimes.com/2013/11/01/business/buckyball-recall-stirs-a-wider-legal-campaign.html. The full title of the case is *In The Matter of Maxfield and Oberton Holdings, LLC and Craig Zucker, Individually and as Officer of Maxfield and Oberton Holdings, LLC and Zen Magnets, LLC Star Networks USA, LLC*, CPSC Docket No. 12-1, 12-2, 13-2 (2013). Materials are available through the agency's website: http://www.cpsc.gov.

[228] Stout, *supra* n. 227.

[229] *Id.*; *see also* Nancy Nord, Opinion, *The Irrational Federal War on Buckyballs: The Consumer Product Safety Commission is Skirting the Law and Making Consumers Less Safe*, WALL ST. J. (Nov. 12, 2013), http://online.wsj.com/news/articles/SB10001424052702303914304579191764269660456 (warning against the Buckyball case precedent).

[230] Stout, *supra* n. 227.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.* The other founder was not named in the CPSC case. *Id.*

[235] Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

[236] *Id.* at 1047.

[237] *Cf., e.g.*, Norris, *supra* n. 50 (presenting global perspective); *Cooking the Books*, *supra* n. 50 (presenting global data); Larcker & Tayan, *supra* n. 17 (noting that, in the U.S., "[a]pproximately 8 percent of publicly traded companies each year have to restate their financial results due to previous manipulation or error").

[238] Consider that the Dodd-Frank Act awards whistleblowers a ten to thirty percent bounty when the SEC wins an enforcement action worth over $ 1 million, which contemplates a very large set of damages. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Tit. VII, Subtit. A, Part II, § 748 Commodities Whistleblower Incentives and Protection (2010); *see also id.* at Tit. IX, Subtit. B, § 922 Whistleblower Protection (specifically expanding whistleblower protection provided under the Sarbanes-Oxley Act of 2002 to include employees of public companies).

[239] Harp v. King, 266 Conn. 747, 835 A.2d 953, 2 A.L.R. 6th 735 (2003) (holding that employee's conduct must be in "unrelated or extraneous" to the corporation's interest); Roberts v. Parker, 1992 WL 885025 (Va. Cir. Ct. 1992) (holding that the employee must have a "direct personal benefit… wholly separate from the more general and indirect corporate benefit" in the illegal objective); Findell v. Koos, 2002 WL 532409 (Conn. Super. Ct. 2002) (holding that, to be excepted from the intracorporate conspiracy doctrine, the agent of the corporation must have "an independent personal stake" in achieving the illegal objective); Mika v. Central Bank of Kansas City, 112 S.W. 3d

82 (Mo. Ct. App. W.D. 2003) (same); Richard Bertram, Inc. v. Sterling Bank & Trust, 820 So. 2d 963 (Fla. Dist. Ct. App. 4th Dist. 2002) (holding that agent must have a "personal stake in the activities" separate from the principal's interest in the same activities).

[240] *See, e.g.*, Maryland, LLC v. Huntleigh Financial Services, Inc., 292 S.W.3d 439 (Mo. Ct. App. E.D. 2009), *reh'g and/or transfer denied*, 91382 (Sept. 1, 2009), *transfer denied* (Oct. 6, 2009).

[241] *See* Nelson, *supra* n. 3 (discussing the limits of agency theory in application of the intracorporate conspiracy doctrine).

[242] Doctors' Co. v. Superior Court of Los Angeles County, 775 P.2d 508 (Cal. 1989); *see also* Miller, *supra* n. 1 at § 9 (citing *Doctors' Co.* "that corporate directors and officers who directly order, authorize, or participate in tortious corporate conduct are not protected by the intracorporate conspiracy doctrine" for the view that corporate officers and directors can conspire through direct participation); *see also id.* (citing *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45 (1979), and *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 93 Cal. Rptr. 2d 663 (2d Dist. 2000), *as modified on denial of reh'g* (Apr. 7, 2000) for employing the same reasoning).

[243] *Doctors' Co.*, 775 P.2d at 509-510.

[244] *Id.* at 510 (brackets in opinion).

[245] *Id.* (brackets in opinion).

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.* at 511 ("We then invoked the rule that '[agents] and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.'")(brackets in original) (internal citation omitted).

[250] *Id.* at 513.

[251] *Id.* at 514.

[252] *Id.* at 513.

[253] *Id.*

[254] Wyatt v. Union Mortgage Co., 598 P.2d 45, 52 (Cal. 1979).

[255] PMC, Inc. v. Kadisha, 78 Cal. App. 4th 1368, 1374 n. 4, 93 Cal. Rptr. 2d 663 (2d Dist. 2000), *as modified on denial of reh'g* (Apr. 7, 2000) (quoting *Wyatt*, 598 P.2d at 52, *Doctors' Co.*, 49 Cal. 3d 39, 48, 775 P.2d 508, and *Golden v. Anderson*, 256 Cal. App. 2d 714, 719-720 (1967)).

[256] VMC Satellite, Inc. v. Stevens & Assocs., Case No. (Chancery) 21421, 68 Va. Cir. 103, 107 (2005).

[257] *Id.* (citing *PJS Associates, L.P. v. Cosby*, 13 Cir. LF24201 (City of Richmond Cir. Ct. 2000); *Singer v. Dungan*, 1992 WL 884986 (Fairfax County Cir. Ct. 1992); *Mike's Madness v. Mason*, 1990 WL 751392 (Loudoun County Cir. Ct. 1990)).

[258] *Id.*

[259] 1992 WL 884986 (Va. Cir. Ct. 1992).

[260] *Id.* at *4.

[261] 181 A.2d 579 (Del. 1962).

[262] *Id.* at 853.

[263] *Id.*

[264] 485 N.W.2d 63, 67 (Wis. 1992).

[265] *Id.* at 66.

[266] *Id.* at 65, 67-68.

[267] *Id.* at 67.

[268] *Id.*

[269] MODEL RULES OF PROF'L CONDUCT R. 1.13 (2000).

[270] William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent? An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 59 (2003).

[271] *Id.* at 74.

[272] *Id.*

[273] *Id.*

[274] *See, e.g.*, *id.* at 77-78.

[275] *See, e.g.*, Darian M. Ibrahim, *Solving The Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 ALA. L. REV. 181, 181-83 (2004) (describing these fundamental problems).

[276] *Id.* at 183 (internal citations omitted); *see also id.* at n. 8 (citing cases and examples of such liability).

[277] Simon, *supra* n. 270, at 68-69.
[278] Woods v. Superior Court, 197 Cal. Rptr. 185, 188 (Cal. Ct. App. 1983).
[279] Hecht v. Superior Court, 237 Cal. Rptr. 528, 566-67 (Cal. Ct. App. 1987) (internal citation omitted). Partnerships are a form of business association with their own rules, but the functional approach that the court took toward the enterprise in general is instructive.
[280] In re Brownstein, 602 P.2d 655, 657 (Or. 1979).
[281] In re Banks, 584 P.2d 284, 292 (Or. 1978) (emphasis in original).
[282] Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987).
[283] 580 F.2d 1311 (7th Cir. 1978), *disapproved of on other grounds for appellate procedure* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 n.10 (1981).
[284] The survey for the report had promised that "Kirkland, Ellis & Rowe is acting as an independent special counsel for API, and will hold any company information in strict confidence, *not to be disclosed to any other company, or even to API*, except in aggregated or such other form as will preclude identifying the source company with its data." *Id.* at 1314 (emphasis in original).
[285] *Id.* at 1313.
[286] *Id.*
[287] *Id.* at 1321.
[288] *Id.* at 1319.
[289] *Id.* (internal citations omitted).
[290] *See, e.g.*, Kurtis A. Kemper, Annotation, *Acceptance and Application of Reverse Veil-Piercing—Third-Party Claimant*, A.L.R.6th at § 1 (updated as of Dec. 2013) (describing reverse piercing of the corporate veil).
[291] *See, e.g.*, *id.* at § 3 (updated as of Dec. 2013) ("In perhaps the earliest case involving reverse piercing of the corporate veil, *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265 (C.C.A. 2d Cir. 1929), it was recognized that a subsidiary might be held liable for the actions of its parent corporation."). The further significance of changes between parent-subsidiary and corporate-individual liability standards will be the subject of a next article.
[292] Nippert v. Jackson, 860 F. Supp. 2d 554 (M.D. Tenn. 2012).
[293] Kemper, *supra* n. 290, at § 7 ("It has been recognized that the concept of reverse piercing of the corporate veil—a means by which a third-party outsider may assert a claim against, or reach assets of, a corporation or other entity based on the action or liability of an individual with a legal or equitable ownership interest in the target entity—is inapplicable in the context of certain noncorporate entities such as sole proprietorships."); *see also id.* at § 2 ("Reverse veil-piercing has been expressly found applicable to some noncorporate entities such as partnerships and trusts, but not to sole proprietorships.") (internal references omitted).
[294] Nippert v. Jackson, 860 F. Supp. 2d 554 (M.D. Tenn. 2012).
[295] 24/7 Records, Inc. v. Sony Music Entertainment, Inc., 566 F. Supp. 2d 305 (S.D.N.Y. 2008) (applying New York law).
[296] In re Archdiocese of Milwaukee, 483 B.R. 693 (Bankr. E.D. Wis. 2012) (applying Wisconsin law). Consider whether the theory of this case might apply to any of the church's actions in New York as well, *cf., e.g.*, Laurie Goodstein, *Dolan Sought to Protect Church Assets, Files Show*, N.Y. TIMES (Jul. 1, 2013), http://www.nytimes.com/2013/07/02/us/dolan-sought-vatican-permission-to-shield-assets.html?_r=0 ("Files released by the Roman Catholic Archdiocese of Milwaukee on Monday reveal that in 2007, Cardinal Timothy F. Dolan [now of New York], then the archbishop there, requested permission from the Vatican to move nearly $57 million into a cemetery trust fund to protect the assets from victims of clergy sexual abuse who were demanding compensation.").
[297] *In re Archdiocese of Milwaukee*, 483 B.R. at 698 (internal citation omitted).
[298] *Id.* at 698-99.
[299] In re Phillips, 139 P.3d 639, 646 (Colo. 2006) (internal citations omitted).
[300] *See, e.g.*, *id.* at 644-45 ("Inside claims involve a 'controlling insider who attempts to have the corporate entity disregarded to avail the insider of corporate claims against third parties' or to protect corporate assets 'from third party claims that are available only for assets owned by the insider.'")(internal citations omitted).
[301] *See, e.g.*, *id.* at 645 ("Outside reverse piercing claims occur when a corporate outsider 'pressing an action against a corporate insider seeks to disregard the corporate entity [and] to subject corporate assets to the claim' or when an outsider 'with a claim against a corporate insider seeks to assert that claim against the corporation in an action between the claimant and the corporation.'") (internal citations omitted).

[302] *See, e.g., id.* at 646 (holding that "outside reverse piercing is appropriate"); *see also* In C.F. Trust, Inc. v. First Flight L.P., 580 S.E. 2d 806 (Va. 2003) (same).
[303] *In re Archdiocese of Milwaukee*, 483 B.R. at 698-99.
[304] *See v. Bridgeport Roman Catholic Diocesan Corp*, 20 Conn. L. Rptr. 271, 1997 WL 466498 (Conn. Super. Ct. 1997) (unpublished) (holding that the intracorporate conspiracy doctrine barred victims' claims). For more discussion of this case and subsequent events, *see* Nelson, *supra* n. 3 (discussing this case in the context of the intracorporate conspiracy doctrine).
[305] Paul Vitello, *Bridgeport Diocese Loses Bid to Keep Sex-Abuse Records Sealed*, N.Y. TIMES (Oct. 5, 2009), http://www.nytimes.com/2009/10/06/nyregion/06abuse.html; *accord* Bridgeport Roman Catholic Diocesan Corp. v. New York Times Co., No. 09A140, U.S. Supreme Court Docket, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09a140.htm (displaying entry on Oct. 5, 2009 that "Application (09A140) denied by the Court").
[306] Andy Newman, *Cardinal Egan Criticized for Retracting Apology on Sexual Abuse Crisis*, N.Y TIMES (Feb. 7, 2012), http://cityroom.blogs.nytimes.com/2012/02/07/cardinal-egan-criticized-for-retracting-apology-on-sex-abuse-crisis/?_r=0.
[307] *See, e.g.*, Allison v. Chesapeake Energy Corp., 2013 U.S. Dist. LEXIS 28770 at *30 (W.D. Pa. 2013) ("In a very broad sense, perhaps, every conspirator could be considered an 'agent' of the overarching conspiracy. Defendants' position would seem to require that any person enlisted into a conspiracy necessarily becomes an 'agent,' and therefore he cannot be a conspirator because there is only a single entity, but this cannot be right.").