INCENTIVES, EMPLOYERS, AND THE CORPORATE VEIL: Should Domestic Corporations Be More Accountable for the Actions of Their Overseas Subsidiaries?

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I. INTRODUCTION

The picnic was probably supposed to be an opportunity for the employees of the U.S. parent company to socialize with their counterparts in the Mexican subsidiary. The picnic's planners likely imagined an afternoon of good, clean fun in Mexico with employees enjoying each other's company as cold beverages flowed and office formalities slipped away. On this particular afternoon, however, events took a turn for the worse. An executive of the U.S. parent company demanded that 118 female employees of the Mexican subsidiary hold a bikini show, which the executive videotaped.[1]

The female plaintiffs, employees of the Mexican subsidiary, brought suit in the United States against the parent corporation under both Mexican law and Title VII of the 1964 Civil Rights Act.[2] Courts generally do not hold parent corporations liable for the actions of their separately incorporated subsidiaries.[3] Yet in *Aguirre v. American United Global*,[4] the Los Angeles Superior Court denied the defendant parent company's motion for summary judgment, resulting in a settlement for an undisclosed sum of money. *Aguirre* and other cases like it[5] highlight a concerning trend for U.S. parent

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1. Sandra Orihuela & Abigail Montjoy, *The Evolution of Latin America's Sexual Harassment Law: A Look at Mini-Skirts and Multinationals in Peru*, 30 CAL. W. INT'L L.J. 323, 341 (2000) (citing Aguirre v. Am. United Glob., No. BC 118159 (Cal. Super. Ct. 1994)).
2. *Id.*
3. Catherine Palo, *Liability of Parent Corporation for "Direct Participation" in Subsidiary's Actions*, 111 AM. JUR. TRIALS 205, § 1 (2009) ("It is a general principle of corporate law . . . that the parent corporation . . . is not liable for the acts of its subsidiaries.").
4. Orihuela & Montjoy, *supra* note 1.
5. *See* Rodriguez-Olvera v. Salant Corp., No. 97-07-14605-CV (Dist. Ct. Texas 1999).

companies: the possibility that they may be sued in U.S. courts to answer for the actions of their majority-owned, separately incorporated, foreign subsidiaries.[6]

Foreign plaintiffs want to bring suit in U.S. courts because U.S. forums offer a number of advantages.[7] These advantages include "a plaintiff-friendly jury system, choice of law rules available in the fifty state jurisdictions, the availability of standards of liability and damage theories, and generous damage awards."[8] Foreign plaintiffs also benefit from America's pretrial discovery process, contingent fee representation, and the relative promptness of court proceedings.[9] When the dispute involves an alleged tort or breach of contract committed by the foreign subsidiary[10] of a U.S. parent company, the foreign plaintiff has an additional incentive to bring suit in U.S. court: the chance to collect a judgment from a defendant with deeper pockets.

To collect against a parent company, a plaintiff must successfully join the company to the lawsuit. However, foreign plaintiffs face a number of significant legal obstacles when they attempt to do this.[11] These legal obstacles may create incentives for corporations to provide less oversight for their overseas operations as a way to limit the parent's exposure to liability. This troubling possibility raises the question of whether our society and our justice system have adequate mechanisms in place to discourage culpable corporate activity abroad.

This Comment compares two legal theories[12] a plaintiff could use to join a U.S. parent company to a lawsuit: the corporate veil piercing doctrine and

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6. GARRY G. MATHIASON ET AL., STRATEGIC INITIATIVES FOR THE CHANGING WORKFORCE 29 (2004), https://www.littler.com/files/press/pdf/12155.pdf.

7. Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 CALIF. L. REV. 731, 732 (2008).

8. *Id.*

9. Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1177 (2005).

10. The discussion of subsidiaries in this Comment is limited to wholly-owned subsidiaries.

11. Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 299 (2001) (discussing the "difficulties of establishing either the vicarious liability of the parent corporation for the actions of the subsidiary or the direct participation of the parent in the activity complained of"); *see also* Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOK. J. INT'L L. 241, 243–45 (1990) (examining the public and private interest factors that lead courts to dismiss cases on *forum non conveniens* grounds); Orihuela & Montjoy, *supra* note 1, at 336–37 (analyzing the obstacles non-U.S. citizens face when bringing Title VII claims for acts of employment discrimination committed abroad).

12. These are not the only theories a foreign plaintiff could use to hold a U.S. parent company liable for the actions of its foreign subsidiary. Other theories exist, such as the Alien

the single employer doctrine. Piercing the corporate veil, if it were available to foreign plaintiffs, would allow suit against parent companies for a wide range of claims in tort and contract. The single employer doctrine is far more limited, applying only to Title VII employment discrimination claims. Both doctrines have serious limitations in their availability to foreign plaintiffs. This Comment argues that the veil piercing doctrine should not be altered to impose additional liability on parent corporations because such a change would violate the fundamental principle of limited shareholder liability. By contrast, the application of the single employer doctrine should be expanded to ensure that American parent corporations[13] that control the labor relations of their foreign subsidiaries do not escape liability for discriminatory acts based on the citizenship of the victim. Plaintiffs injured by the American corporation's subsidiary are, of course, free to bring suit in their home country under that country's laws. But the U.S. forum should also be available to these plaintiffs because the United States has a strong interest in regulating the conduct of American corporations, both at home and abroad.

Part II of this Comment focuses on the current state of corporate veil piercing and single employer jurisprudence. Part III compares veil piercing and the single employer doctrine, analyzing the relative utility of the two doctrines for foreign plaintiffs and arguing that both doctrines may only be utilized in limited circumstances. Part IV focuses on the policy implications of veil piercing and single employer jurisprudence, concluding that applying the single employer doctrine extraterritorially to protect non-U.S. citizens is proper as a matter of policy and statutory interpretation.

II. CURRENT STATUS OF CORPORATE VEIL PIERCING AND SINGLE EMPLOYER JURISPRUDENCE

Corporate veil piercing is used to "disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action[s]

Tort Statute (ATS), but are beyond the scope of this Comment. *See* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 135–61 (2015); Ma Ji, *Multinational Enterprises' Liability for the Acts of Their Offshore Subsidiaries: The Aftermath of* Kiobel *and* Daimler, 23 MICH. ST. INT'L L. REV. 397, 413–16 (2015).

13. For an estimate of the number of American corporations that own foreign subsidiaries, see Sabir Shah, *Top Global Billion Dollar Companies Do Offshore Business*, THE NEWS INT'L (Apr. 8, 2016), http://www.thenews.com.pk/print/111198-Top-global-billion-dollar-companies-do-offshore-business (stating seventy-two percent of Fortune 500 companies "operat[e] subsidiaries in tax haven jurisdictions").

as if [they] were the shareholder's own."[14] This section focuses on the liability of the parent company as a controlling shareholder in the subsidiary. The single employer doctrine "seeks to determine whether two or more nominally independent enterprises are sufficiently intertwined that they should be considered a single 'employer' for NLRA purposes."[15] This Comment discusses when employees of subsidiaries are considered employees of the parent corporation under the single employer doctrine.

A. Piercing the Corporate Veil

The tests and reasoning that courts employ in veil piercing analyses are exceedingly vague and contain a number of contradictory principles.[16] Nevertheless, two variations of the "alter ego" test provide the key factors courts consider in this cloudy area of the law when faced with parent-subsidiary piercing cases.[17]

1. "Unity of Interest and Ownership" Test

One commonly accepted version of the alter ego test[18] is the two-pronged "unity of interest and ownership" test.[19] The elements of this test are "(1) that there be such unity of interest and ownership that the separate personalities

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

15. Wilson McLeod, *Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil Under Federal Labor Law*, 9 HOFSTRA LAB. & EMP. L.J. 115, 142 (1991).

16. *See, e.g.*, PHILIP L. BLUMBERG ET AL., THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 8 (2d ed. 1983) ("[W]e are faced with hundreds of decisions that are irreconcilable and not entirely comprehensible."); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 513 (2001) ("There simply are no bright-line rules for deciding when courts will pierce the corporate veil."); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) ("There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.").

17. Although the veil piercing tests that courts apply vary between jurisdictions, *see* Great Neck Plaza, L.P. v. Le Peep Rests., LLC, 37 P.3d 485, 490 (Colo. App. 2001) (applying a ten-factor veil piercing test), the two tests outlined in this paper contain the main factors involved in veil piercing analyses across the United States.

18. *See* Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854 (1982).

19. Automotriz del Golfo de Cal. S.A. de C.V. v. Resnick, 306 P.2d 1, 3 (Cal. 1957). Although this case is over fifty-years old, the test it laid out is still used in many jurisdictions today. *See, e.g.*, Bleu Prods., Inc. v. Bureau Veritas Consumer Prod. Servs., No. CV 08-2591CAS (JCx), 2009 WL 2412413, at *12 (C.D. Cal. Aug. 3, 2009).

of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[20] Courts generally find that the first element of this test is satisfied "by a showing of domination and control of the corporation, which occurs most often in the context of a parent-subsidiary relationship or of a closely held corporation."[21] The second element of the test is ill-defined but has been satisfied by corporations that are so undercapitalized that they lack the funds to carry out their business at the time of capitalization,[22] or when the structure of a corporate enterprise misleads a plaintiff.[23]

2. "Single Economic Entity" Test

The second alter ego test that courts apply to pierce the corporate veil of a parent company is the "single economic entity" test. A plaintiff must make two showings to prevail under this formulation of the test.[24] First, the plaintiff must demonstrate that the parent company and its subsidiary "operated as a single economic entity."[25] To determine whether a parent company and a subsidiary are a single economic entity, courts consider a number of factors, including:

> [W]hether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder.[26]

Second, "an overall element of injustice or unfairness" must be present,[27] but the plaintiff need not demonstrate fraudulent conduct by the defendants.[28]

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20. *Resnick*, 306 P.2d at 3.
21. Note, *supra* note 18, at 854–55.
22. *See* Multiponics, Inc., v. Herpel, 622 F.2d 709, 717–18 (5th Cir. 1980).
23. Note, *supra* note 18, at 855.
24. Fletcher v. Atex, Inc., 68 F.3d 1451, 1457 (2d Cir. 1995). *Fletcher* also illustrates the general rule that the law of the state of incorporation determines when the corporate form will be disregarded and liability imposed on the parent. *Id.* at 1456.
25. *See* Mabon, Nugent & Co. v. Tex. Am. Energy Corp., CIV. A. No. 8578, 1990 WL 44267, at *5 (Del. Ch. Apr. 12, 1990).
26. United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1104 (D. Del. 1988).
27. Harco Nat'l Ins. v. Green Farms, Inc., CIV. A. No. 1331, 1989 WL 110537, at *5 (Del. Ch. Sept. 19, 1989).
28. *Fletcher*, 68 F.3d at 1457.

Fletcher v. Atex, Inc. provides an illustration of how courts apply the "single economic entity" test. In *Fletcher*, the Second Circuit declined the plaintiff's invitation to pierce the corporate veil of Kodak, the parent corporation.[29] It found that Kodak's cash management system, its control over the leases its subsidiary entered into, and the fact that a number of Kodak employees sat on the subsidiary's board were "typical [behaviors] of a majority shareholder or parent corporation"[30] and, thus, insufficient to satisfy the alter ego test.[31] The court also found that the plaintiff's argument that Kodak dominated its subsidiary was without merit because the plaintiffs did not offer evidence of an element of injustice or unfairness.[32]

3. Trends in Corporate Veil Piercing

Courts seldom pierce the corporate veil.[33] This holds true in cases where plaintiffs attempt to hold individual shareholders liable for corporate actions[34] and in the parent-subsidiary context, where "courts generally take the view that a parent corporation possesses a separate existence and is treated separately from a subsidiary unless there are circumstances clearly involving fraud, manifest unfairness, or misconduct."[35] Perhaps the best explanation for courts' reluctance to pierce the corporate veil is that "over-utilization of [courts'] equitable power to pierce the corporate veil would make the corporate form useless"[36] by exposing shareholders to the unlimited personal liability they sought to avoid by creating a corporation.

Five major trends have emerged in the small percentage of cases where courts pierce the corporate veil. First, courts only pierce the corporate veil in close corporations and in the parent-subsidiary/sibling corporation context; they never pierce the veil of publicly held corporations.[37] Courts have pierced the corporate veil in approximately 34% of reported cases involving close corporations[38] and about 36% of cases where the plaintiff sought to "reach

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29. *Id.* at 1459.
30. *Id.* at 1460–61.
31. *Id.* at 1459–61.
32. *Id.* at 1461.
33. ROBERT W. HAMILTON ET AL., THE LAW OF BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS 222 (12th ed. 2014).
34. *See id.* at 220–22.
35. *Id.* at 222.
36. *Id.*
37. Thompson, *supra* note 14, at 1047.
38. *Id.* at 1055.

through" a subsidiary to hold the parent corporation liable.[39] Second, courts are more likely to pierce in contract cases than in tort cases.[40] Third, the greater the number of shareholders in a corporation, the less likely a court is to pierce the veil. For example, no court has ever pierced the veil of a corporation owned by more than ten shareholders.[41] Fourth, although undercapitalization is "a factor frequently cited by commentators as part of a normative standard in piercing cases," it is only present in approximately 18% of contract cases where courts pierce the veil and less than 13% of tort cases.[42] Finally, control of the enterprise is a key factor. A shareholder who is more active in the corporation's business may be subject to liability, whereas a passive investor "will be insulated from the liability of the enterprise."[43]

B. Single Employer Doctrine

The single employer doctrine is an employment law doctrine that courts use to determine whether a parent company and a subsidiary should be treated as a "single employer" for purposes of Title VII discrimination claims.[44] It provides men and women who suffer discrimination and harassment in the workplace with recourse against a parent corporation if the parent had a hand in the subsidiary's employment decisions. Although Congress extended Title

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39. *Id.* at 1057 n.111.

40. *Id.* at 1058 (courts pierce in 41.98% of reported contract cases compared with 30.97% of tort cases). For a discussion of the policy implications of this discrepancy, see HAMILTON, *supra* note 33, at 228–29 (quoting Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 983–85 (1971) ("In tort cases . . . there is usually no element of voluntary dealing, and the question is whether it is reasonable for businessmen to transfer a risk of loss or injury to members of the general public through the device of conducting business in the name of a corporation that may be marginally financed.").

41. Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 9 (1997).

42. Thompson, *supra* note 14, at 1065–66.

43. Thompson, *supra* note 41, at 10. This reflects the theory, which is embodied in limited partnership law and the law of corporations, that an investor does not forfeit limited liability protection when it lacks control of the entity. *See, e.g.*, HAMILTON ET AL., *supra* note 33, at 4.

44. Title VII of the 1964 Civil Rights Act and its amendments protect employees against: race/color discrimination, national origin discrimination, sex-based discrimination, religious discrimination, age discrimination, disability discrimination, reprisal, equal pay and compensation discrimination, pregnancy discrimination, and discrimination based on sexual orientation ("within Executive Branch civilian employment"). *Types of Prohibited Discrimination*, COURT SERVS. & OFFENDER SUPERVISION AGENCY FOR D.C., http://www.csosa.gov/about/employment/eeo/discrimination.aspx#sec10 (last visited Nov. 14, 2016).

VII's protections to Americans employed by American companies in foreign countries when it enacted the Civil Rights Act of 1991, it did not explicitly extend the same extraterritorial protections to foreign nationals.[45] The Civil Rights Act of 1991 amended Title VII to include the section "Protection of Extraterritorial Employment."[46] It changed the definition of "employee," stating that "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[47] The Act also limited the extraterritorial application of Title VII to U.S. citizens employed in foreign countries by an American employer, or an employer that is "controlled by an American employer."[48]

A corporation is deemed to be a citizen of the United States if it is incorporated in the United States, usually in a state or other jurisdiction of the United States.[49] To determine whether the plaintiff's employer is controlled by an American employer, courts must apply the single-enterprise test.[50] There are two versions of this test: (1) the traditional test and (2) the Seventh Circuit test.

1. Traditional Test

The Fifth Circuit articulated the traditional four-part single employer doctrine test, which is "aimed at determining the degree of interrelationship between the two entities,"[51] in *Garcia v. Elf Atochem North America*.[52] Under *Garcia*, a parent and subsidiary are a single enterprise if they have "(1) interrelated operations, (2) centralized control of labor relations, (3) common

45. *See* Orihuela & Montjoy, *supra* note 1, at 336–37 ("As a general proposition, Title VII discriminates based on citizenship."). As discussed below in the text accompanying notes 110–19, courts may interpret 42 U.S.C. § 2000e(f) to eliminate the purported discrimination.

46. 42 U.S.C. § 2000e(f) (2012).

47. *Id.*

48. *Id.* § 2000e-1(c)(2).

49. Orihuela & Montjoy, *supra* note 1, at 337.

50. *Id.* at 338.

51. Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995).

52. Garcia v. Elf Atochem N. Am., 28 F.3d 446, 450 (5th Cir. 1994), *abrogated by* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998). This four-part test has been adopted by other circuit courts. *See* Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993); Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983), *abrogated by* Arbaugh v. Y&H Corp., 546 U.S. 500 (2006); Trevino v. Celanese Corp., 701 F.2d 397, 403–04 (5th Cir. 1983); Baker v. Stuart Broad. Co., 560 F.2d 389, 392 (8th Cir. 1977); *see also Cook*, 69 F.3d at 1240 (stating that the test is "a flexible four-part test aimed at determining the degree of interrelationship between the two entities.").

management, and (4) common ownership or financial control."[53] Ultimately, the analysis focuses on "whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation," and each factor is examined only as it relates to the issue of whether the parent controlled the subsidiary's actions.[54]

The first factor "focuses on whether the parent corporation excessively influenced or interfered with the business operations of its subsidiary."[55] Whole ownership of a subsidiary by a parent company may satisfy this factor.[56] However, the parent's possession of a controlling interest does not automatically lead to forfeiture of limited liability.[57] Rather, the parent must have "[s]ome nexus to the subsidiary's daily employment decisions."[58]

The second factor, centralized control of labor relations, is the most important part of the test for the Second, Fifth, Sixth, and Eighth circuits[59] and has a number of sub-factors. For example, courts consider "whether the subsidiary has a separate human resource department"[60] and whether the subsidiary "establishes its own policies and makes its own decisions as to hiring, discipline, and termination of its employees."[61] Other factors courts have deemed relevant include the shifting of employees between the parent and subsidiary, and whether job applicants send their applications to the parent or the subsidiary.[62]

The third and fourth factors, common management and common financial control, are of secondary importance because they "represent ordinary aspects of the parent-subsidiary relationship."[63] When a parent corporation possesses a controlling interest in a subsidiary, it is entitled to exercise the normal rights of a controlling shareholder without forfeiting limited liability protection.[64] Such rights include selecting directors for the board and setting

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53. *Garcia*, 28 F.3d at 450.

54. Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 777 (5th Cir. 1997).

55. *Id.* at 778. In *Lusk*, the Fifth Circuit also stated that commingled bank accounts, shared employees, and direct involvement "in the subsidiary's daily decisions relating to production, distribution, marketing, and advertising" are relevant factors which suggest that the parent's and subsidiary's operations are interrelated. *Id.*

56. *Cook*, 69 F.3d at 1241.

57. *Lusk*, 129 F.3d at 778.

58. *Id.*

59. *Cook*, 69 F.3d at 1241.

60. Meng v. Ipanema Shoe Corp., 73 F. Supp. 2d 392, 403 (S.D.N.Y. 1999).

61. *Id.* (citing Duffy v. Drake Beam Morin, No. 96 Civ. 5606(MBM), 1998 WL 252063, at *4 (S.D.N.Y. May 19, 1998)).

62. *Meng*, 73 F. Supp. 2d at 403.

63. *Id.* (citing *Lusk*, 129 F.3d at 778).

64. *Lusk*, 129 F.3d at 778.

general policy for the corporation.[65] Thus, "the mere existence of common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer" in the absence of "[s]ome nexus to the subsidiary's daily employment decisions."[66]

A few general trends of the single employer doctrine have emerged from courts' applications of the traditional test. First, courts mainly focus on the parent's control over the subsidiary's labor relations. The common ownership and common management factors, by contrast, often blend together and are insignificant except as they relate to the management of labor relations.[67] Second, the bar for demonstrating that a parent company has exercised a significant degree of control is not very high. For example, in *Cook*, the Second Circuit held that a parent company that processed job applications, approved personnel status reports and affirmed significant employment decisions of its subsidiary "clearly" maintained control over the subsidiary's labor relations.[68] Finally, if a plaintiff makes a showing that the parent exercises a substantial degree of control over the subsidiary's labor operations, the plaintiff will almost certainly prevail on the single enterprise theory and be able to collect any judgment from the parent company.[69] As this Comment discusses in further detail below, this standard is more plaintiff-friendly than either of the alter ego veil piercing tests.

2. Seventh Circuit Test

Although nearly all courts in the United States continue to use the traditional test, the Seventh Circuit has adopted a new single enterprise test.[70] In *Papa v. Katy Industries, Inc.*, Judge Richard Posner criticized the traditional test[71] and introduced a major change to his circuit's single enterprise jurisprudence.[72] Under *Papa*, there are "three situations in which

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65. *Id.*
66. *Id.*
67. *See, e.g.*, Papa v. Katy Indus., 166 F.3d 937, 940 (7th Cir. 1999).
68. Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1241 (2d Cir. 1995).
69. *Id.*
70. *Papa*, 166 F.3d at 939–40.
71. *Papa*, 166 F.3d at 940 (stating that "three of the four factors" from the traditional test are vague and that the fourth, common ownership, "is useless").
72. *Id.* Although, on its face, Posner's decision to revise the traditional test was predicated upon the issue of small company exemptions to Title VII, the *Papa* holding has been extended to other cases in the Seventh Circuit where the small company exemption is not at issue. *See, e.g.*, Worth v. Tyer, 276 F.3d 249, 259 (7th Cir. 2001).

two business entities should be considered a single employer."[73] First, when "the traditional conditions . . . for 'piercing the veil'" are present, "the parent or affiliates of the plaintiff's employer would be liable for the employer's" actions.[74] Second, when an enterprise splits itself up into separate entities "for the express purpose of avoiding liability under discrimination laws," it will be deemed a single enterprise.[75] Third, when the parent corporation "directed the discriminatory act, practice, or policy of which the employee of its subsidiary [complains]," the court will hold the parent liable under Title VII.[76]

In addition to criticizing the vagueness of the traditional test, Judge Posner disapproved of the test because it lacks an act requirement. According to Posner:

> The basic principle of affiliate liability is that an affiliate forfeits its limited liability only if it acts to forfeit it—as by failing to comply with statutory conditions of corporate status, or . . . configuring the corporate group to defeat statutory jurisdiction, or commanding the affiliate to violate the right of one of the affiliate's employees.[77]

In sum, the traditional four-factor test is "not only . . . vague, but is unrelated to the act requirement."[78]

Since Judge Posner's opinion in *Papa*, single employer jurisprudence is governed by two distinct tests. The traditional four-factor test focuses on the parent company's control over the subsidiary's labor relations, while the Seventh Circuit test brings the single employer doctrine in line with corporate veil piercing. The effects of this circuit split could have major implications for foreign plaintiffs who want to hold a parent liable for the actions of its subsidiary.

III. CORPORATE VEIL PIERCING VS. THE SINGLE EMPLOYER DOCTRINE: PAST AND FUTURE APPLICATIONS FOR PLAINTIFFS IN FOREIGN COUNTRIES

Both corporate veil piercing and the single employer doctrine have serious, albeit different, limitations for foreign plaintiffs seeking to hold an

73. John P. McAdams & Michael A. Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 TRIAL ADVOC. Q. 16, 18 (2006).

74. *Papa*, 166 F.3d at 940–41.

75. *Id.* at 941.

76. *Id.*

77. *Id.*

78. *Id.* at 942.

American parent company liable for the actions of its subsidiary. However, the applicability of corporate veil piercing for foreign plaintiffs is well-defined and narrowly circumscribed, while the single employer doctrine has potentially broader applications.

With regard to corporate veil piercing, as long as the parent and subsidiary observe the necessary corporate formalities, which nearly every publicly traded corporation does,[79] a court will never pierce the corporate veil. This eliminates veil piercing liability for multinational corporations, which have the deepest pockets and the most expansive overseas operations. Furthermore, courts rarely pierce the corporate veil in any context.[80] Thus, the corporations that cause the most damage on the largest scale are immune to suit from members of the general public under the veil piercing doctrine.[81]

Toho-Tawa Co. v. Morgan Creek Productions, Inc. is one of the few cases where a foreign plaintiff has successfully pierced the corporate veil and imposed alter ego liability on a U.S. company in spite of these limitations.[82] In *Toho-Tawa*, one man owned all three Morgan Creek entities, which were incorporated in Delaware ("MCP"), the Netherlands ("B.V."), and Bermuda ("Ltd.").[83] Toho-Tawa, a Japanese company, contracted with MCP to acquire distribution rights to a movie.[84] Under the agreement, Ltd. guaranteed the B.V.'s obligations to Toho-Tawa.[85] When Toho-Tawa was awarded an arbitration judgment against Ltd. and B.V. for breach of contract, neither corporation satisfied the judgment.[86]

Consequently, Toho-Tawa sought to collect the judgment from MCP on an alter ego theory.[87] The California Court of Appeal held that "it would be

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79. *See* HAMILTON ET AL., *supra* note 33, at 242 ("Because large corporations usually have internal legal staffs, the documentation with respect to the separate subsidiaries is usually maintained with a care and fastidiousness to detail that is unusual in a corporation with human shareholders.").

80. *See* HAMILTON ET AL., *supra* note 33; *supra* notes 33–36 and accompanying text.

81. *See, e.g.*, Drusilla K. Brown et al., *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries*, *in* CHALLENGES TO GLOBALIZATION: ANALYZING THE ECONOMICS 279, 279 (2004), http://www.nber.org/chapters/c9541.pdf (discussing controversies involving sweatshops); Nazli Choucri, *The Global Environment & Multinational Corporations*, 94 MIT TECH. REV. 52, 52 (1991) ("Since multinationals conduct the bulk of the world's economic activity, they are major environmental actors . . . . By necessity, these firms engage in a wide range of hazardous and pollution intensive activities.").

82. Toho-Tawa Co. v. Morgan Creek Prods., 159 Cal. Rptr. 3d 469, 474 (Ct. App. 2013).

83. *Id.*

84. *Id.*

85. *Id.* at 475.

86. *Id.*

87. *Id.*

inequitable to uphold B.V.'s separate existence under the circumstances of this case."[88] The key facts in the court's determination were the ownership and control of all three entities by a single individual and the fact that both B.V. and Ltd. were insufficiently capitalized to fulfill their contractual obligations.[89]

Although the foreign plaintiff in *Toho-Tawa* successfully pierced the veil of the American corporation, thus providing a possible blueprint for future foreign plaintiffs seeking to sue U.S. parent corporations in U.S. courts, the case also highlights the limitations of veil piercing for foreign plaintiffs. To begin, all three defendant corporations in *Toho-Tawa* were owned and operated by a single person.[90] Given the strong inverse correlation between the number of shareholders and the likelihood that a court will pierce the corporate veil, courts are most likely to pierce the veil of a corporation with a single owner. [91] Conversely, courts do not pierce the veil between large multinational corporations and their subsidiaries,[92] so the *Toho-Tawa* court's decision to pierce the veil of a one-man corporation was not exceptional and has virtually no bearing on the liability of large U.S. parent corporations for damage they cause abroad. Furthermore, although undercapitalization played a major role in the *Toho-Tawa* court's decision to pierce the veil, undercapitalization is rarely a dispositive factor in veil piercing cases.[93] In sum, the *Toho-Tawa* case suggests that foreign plaintiffs may be able to pierce the veil of U.S. parent corporations with a small number of shareholders and undercapitalized foreign subsidiaries. However, it does not disturb the general rule that foreign plaintiffs who are damaged by the subsidiaries of large, publicly-traded parent corporations will not prevail on a veil piercing theory.

By contrast, plaintiffs who suffer Title VII discrimination at the hands of the subsidiary of a major U.S. corporation may be able to sue the U.S. parent company under the traditional four-factor test of the single employer doctrine. However, the single employer doctrine may have a major limitation

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88. *Id.* at 481.

89. *Id.*

90. *Id.*

91. *See supra* note 41 and accompanying text.

92. *See* Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 303, 307 (2001) (discussing that multinational corporations are often large public corporations and thus the elements required to pierce the veil are "most readily" applicable to "closely held small corporations").

93. *See supra* note 42 and accompanying text.

for foreign plaintiffs in that it may not apply extraterritorially to non-U.S. citizens.[94]

The Seventh Circuit's single employer jurisprudence has the least utility for foreign plaintiffs. It has all of the limitations for foreign plaintiffs outlined in Title VII,[95] so non-U.S. citizens working for an American subsidiary abroad may not bring claims under it. Additionally, in the absence of purposeful evasion of liability or direction of the alleged discriminatory actions, the Seventh Circuit applies corporate veil piercing doctrine to determine whether a parent and subsidiary should be treated as a single enterprise.[96] Consequently, the Seventh Circuit approach also encompasses the corporate veil piercing doctrine's limitations for foreign plaintiffs.

In spite of the ambiguous language in the Civil Rights Act of 1991, some courts have been willing to hold U.S. companies liable for Title VII violations committed against non-U.S. citizens outside of the United States. The most notable case is *Aguirre*,[97] where Mexican plaintiffs brought a Title VII claim for sexual harassment, and the Los Angeles Superior Court denied the defendant's motion for summary judgment.[98] However, it is important to note that because the case settled out of court for an undisclosed sum, the judge did not issue a written order nor did the case go up on appeal.[99]

Because of the settlement, it remains unclear how courts will handle cases with facts like *Aguirre*. On one hand, the executive accused of committing the Title VII violation was an employee of the U.S. parent company rather than the Mexican subsidiary.[100] As a result, there would almost certainly be a sufficient nexus between the parent company's actions and the alleged violation under the traditional four-factor test. Even a court applying Judge Posner's test would likely find that the parent and subsidiary operated as a single enterprise with respect to the plaintiff's injury because there is no question that a senior employee of the parent company committed the tortious act. On the other hand, if a court found that the plaintiffs, as Mexican citizens, were not "employees" in the context of extraterritorial Title VII protection,

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94. Some scholars have argued that this is how the applicable statute should be interpreted. *See* Orihuela & Montjoy, *supra* note 1, at 336–37. I argue otherwise. *See infra* notes 110–19 and accompanying text.

95. *See supra* notes 45–48 and accompanying text.

96. *See supra* notes 65–68 and accompanying text.

97. See *supra* notes 1–2 and accompanying text for the basic facts of *Aguirre*.

98. Orihuela & Montjoy, *supra* note 1 (citing Aguirre v. Am. United Glob., No. BC 118159 (Cal. Super. Ct. 1994)).

99. *Id.* (citing *Aguirre*, No. BC 118159).

100. *Id.* (citing *Aguirre*, No. BC 118159).

they may be left without recourse.[101] Ultimately, if a case with facts like *Aguirre* goes to trial, the Title VII claim will likely turn on the court's interpretation of the extraterritoriality clause of Title VII. [102]

In sum, until a court issues an opinion on the extraterritorial applicability of Title VII for non-U.S. citizens, the scope of the single employer doctrine for Title VII violations committed abroad is unclear. It may apply solely to U.S. citizens, but it may also apply to foreign nationals. The utility of corporate veil piercing for foreign plaintiffs is far clearer. Courts will never pierce the veil between a large, publicly traded corporation and its subsidiary, but they may pierce the veil of a small corporate parent in the United States, particularly if refusing to do so would lead to an inequitable result.[103]

IV. SHOULD CORPORATE VEIL PIERCING OR THE SINGLE EMPLOYER DOCTRINE BE EXPANDED TO ALLOW MORE SUITS BY FOREIGN PLAINTIFFS?

On the surface, the difficulty of piercing the corporate veil appears to let parent corporations off easy. Large, publicly-held corporations can profit from the tortious conduct of foreign subsidiaries without compensating the victims as they would have to in the generous American tort system. At the same time, smaller corporations, which are not capable of causing harm on the same scale as large multinational corporations,[104] are at a greater risk of being held liable for the actions of their subsidiaries. Although plaintiffs are free to bring claims in their home countries, the rule of law may be weak, thus preventing them from receiving compensation.[105] Additionally, the plaintiff's recovery may be severely limited by damage caps in foreign jurisdictions that prevent the plaintiff from being made whole.[106]

Yet, discussing veil piercing in this context overlooks a critical fact: when a parent corporation invests in a subsidiary, it is a shareholder. The subsidiary

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101. *Id.* at 336–37.

102. Civil Rights Act of 1991, Pub. L. No. 102–166, § 109, 105 Stat. 1071, 1076 (1991).

103. *See* Toho-Tawa Co. v. Morgan Creek Prods., 159 Cal. Rptr. 3d 469, 481 (Ct. App. 2013) ("In sum, it would be inequitable to permit [the defendant], the alter ego of [its Dutch affiliate], to shift liability to [the Dutch affiliate].").

104. *See* Choucri, *supra* note 81.

105. *See, e.g.*, Yemisi Akinbobola, *Slippery Justice for Victims of Oil Spills*, AFR. RENEWAL ONLINE (Aug. 2013), http://www.un.org/africarenewal/magazine/august-2013/slippery-justice-victims-oil-spills (discussing the challenges that victims of major oil pollution in Nigeria have had in courts around the world. Major American corporations including Exxon-Mobil, Texaco, and Chevron are all part of the joint venture in the Niger Delta).

106. *See* Schwartz, *supra* note 7, at 740.

has its own board of directors, and the parent company's status as a shareholder does not confer a right to manage the business.[107] Imputing liability for the subsidiary's actions to the parent on the basis of the parent's status as a shareholder would violate the fundamental principle of limited liability for shareholders.[108] It would also violate the act requirement for imposing liability, which is emphasized in many areas of American law.[109] As Judge Posner stated in *Papa*, "[t]he basic principle of affiliate liability is that an affiliate forfeits its limited liability only if it acts to forfeit it."[110] Following this principle, a corporation should not lose its limited liability protection simply because it holds shares in a foreign subsidiary with questionable business practices. Accordingly, the veil piercing doctrine is not a proper vehicle for imposing liability on parent companies for the actions of their foreign subsidiaries because using the doctrine in this way would upset the fundamental principle of limited shareholder liability.

If the parent corporation controls the subsidiary's operations, however, the corporate form should not shield it from liability. The single employer doctrine is an appropriate vehicle to impose liability under these circumstances because it holds a parent company liable when it controls or directs discriminatory acts. But the possibility that Title VII does not apply extraterritorially to non-U.S. citizens is troubling. The failure to provide Title VII's protections to non-U.S. citizens would send a message to U.S. parent companies that their overseas subsidiaries need not comply with Title VII in their dealings with non-American employees. In countries that lack strong anti-discrimination laws, many employees would be exposed to discrimination without the ability to seek a proper remedy.[111]

Moreover, employees who are not American citizens would be unprotected by Title VII, while their American colleagues would be protected.[112] The inequity produced by this interpretation of the law is illustrated by the following hypothetical. A U.S. parent company owns a subsidiary that operates a factory in Pakistan, which has some of the world's

107. HAMILTON ET AL., *supra* note 33, at 4.
108. *See supra* note 33 and accompanying text.
109. Papa v. Katy Indus., 166 F.3d 937, 941 (7th Cir. 1999).
110. *Id.* at 951.
111. The expansion of Title VII's protections to employees in countries that *do* have strong anti-discrimination laws may raise conflict of law issues and implicate comity concerns. The question of how to harmonize the extraterritorial application of Title VII with strong anti-discrimination laws in other countries is beyond the scope of this paper.
112. Orihuela & Montjoy, *supra* note 1, at 337 ("As a general proposition, Title VII discriminates based on citizenship.").

least protective labor laws.[113] The parent company controls the factory's labor relations, employing both Pakistani and American workers. If the factory manager harasses two female employees in violation of Title VII, one American and one Pakistani, the American employee would be able to seek relief under Title VII while the Pakistani would not. As a result, two workers employed in the same factory would receive different legal protections solely on the basis of their different citizenship.

This is not right. American companies should not be allowed to perpetuate discriminatory practices abroad, nor should the victims of discrimination be left uncompensated. Since Congress has decided to apply Title VII's mandates extraterritorially to protect American employees, these same protections should extend to foreign nationals. Some people may argue that the single employer doctrine should not protect foreign nationals in this context because American law does not owe the same duty to foreign nationals and because of the presumption against the extraterritorial application of U.S. law. But Title VII already applies extraterritorially to American citizens.[114] Likewise, the United States already provides equal protection of the laws to non-U.S. citizens within its borders.[115] As a nation that strives to promote equality and protect the vulnerable from exploitation, the United States should not close its courts to plaintiffs who seek to enforce these same principles.

Not only is it right as a matter of policy to extend Title VII's protections to foreign nationals employed abroad by American companies; it also comports with the principles of statutory interpretation. Two principles of statutory interpretation guide the analysis of Title VII's extraterritoriality provision.[116] The first is the negative-implication canon. This canon holds that

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113. *See* Sharan Burrow, *Top 10 Worst Countries for Workers' Rights: The Ranking No Country Should Want*, HUFFINGTON POST (June 10, 2015), http://www.huffingtonpost.com/sharan-burrow/top-ten-worst-countries-f_b_7553364.html (discussing the countries with the world's worst labor laws).

114. The presumption against the extraterritorial application of U.S. law is overcome when Congress "clearly expresses its intent" to apply a statute extraterritorially. United States v. Weingarten, 632 F.3d 60, 64 (2d Cir. 2011) (citing United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003)). Here, Congress plainly overcame the presumption by explicitly providing for the extraterritorial application of Title VII. *See id.* at 65.

115. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 210 (1982) (holding that a Texas statute barring undocumented immigrants from attending public schools violated the Equal Protection Clause of the Fourteenth Amendment); Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that an Arizona statute denying welfare benefits to resident aliens violated the Equal Protection Clause of the Fourteenth Amendment).

116. 42 U.S.C. § 2000e(f) (2012).

"specification of the one implies exclusion of the other."[117] In other words, if a statute explicitly applies to one thing, it does not apply to others. Significantly, the negative-implication canon only applies when "the thing specified [in a statute] can reasonably be thought to be an expression of all that shares in the grant or prohibition involved,"[118] and nearly all of the scholars who discuss this canon "emphasize that it must be applied with great caution, since its application depends so much on context."[119]

The second principle guiding the interpretation of the extraterritoriality provision is the presumption of nonexclusive "include." According to this presumption, "the word include does not ordinarily introduce an exhaustive list while comprise . . . ordinarily does."[120] Rather, the word "include" is used to denote a list that "is merely exemplary and not exhaustive."[121] Though phrases like "including but not limited to" or "including without limitation" can be used to defeat the negative-implication canon and indicate the exemplary, non-limiting nature of a list, "the commonness of these belts-and-suspenders phrases does not lessen the exemplariness of include."[122]

The use of the word "include" in Title VII's extraterritoriality provision allows courts to extend Title VII's protections to non-U.S. citizens. The extraterritoriality provision states that, "[w]ith respect to employment in a foreign country, [the term "employee"] includes an individual who is a citizen of the United States."[123] If Congress intended to limit Title VII's extraterritorial protections to U.S. citizens, it could have used the word "comprise" or the phrase "is limited to." Instead, Congress used the word "includes," thus triggering the presumption of nonexclusive "include." One could argue that the negative-implication canon precludes the extension of the extraterritoriality provision to non-U.S. citizens because the provision did not use a belt-and-suspenders phrase. But "include" is still an exemplary word. Moreover, the fact that the canon must be "applied with great caution"[124] provides strong support to the argument that it does not defeat the presumption of nonexclusive "include." Thus, because Title VII's extraterritoriality provision uses the word "include," courts may extend Title

117. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

118. *Id.*

119. *Id.*

120. *Id.* at 132.

121. BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 439–40 (2011).

122. SCALIA & GARNER, *supra* note 117, at 132–33.

123. 42 U.S.C. § 2000e(f) (2012).

124. SCALIA & GARNER, *supra* note 117.

VII's protections to foreign nationals employed abroad by American companies without violating the principles of statutory interpretation.

V. CONCLUSION

Both corporate veil piercing and the single employer doctrine have serious limitations for foreign plaintiffs seeking to hold U.S. parent corporations liable for the actions of their foreign subsidiaries. Plaintiffs cannot pierce the veil of corporations with more than ten shareholders, and the single employer doctrine applies only to Title VII claims. This Comment has argued that the veil piercing doctrine should not be altered to impose additional liability on parent corporations because such a change would violate the fundamental principle of limited shareholder liability. On the other hand, an American parent corporation that controls the labor relations of its foreign subsidiary should not be able to escape liability for discriminatory acts based on the citizenship of the victim.

There are some encouraging signs that American courts are increasingly willing to apply Title VII to non-U.S. citizens. For example, some courts now allow foreign nationals employed by a subsidiary of a U.S. parent to sue in U.S. court under Title VII if the parent "controls" the subsidiary.[125] The outcome of the *Aguirre* case illustrates this trend, as do other cases where courts have been increasingly willing to let foreign plaintiffs sue U.S. parent companies in U.S. courts for the acts of their foreign subsidiaries.[126] Yet, the state of the law on this issue will remain in flux until it reaches an appellate court. When it does, the court should apply the single employer doctrine extraterritorially to protect non-U.S. citizens from discrimination and harassment in the same way that it protects U.S. citizens.

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125. Orihuela & Montjoy, *supra* note 1, at 341–42.

126. *Id.* Orihuela & Montjoy discuss *Rodriguez-Olvera v. Salant Corp.*, where a court in Texas allowed Mexican plaintiffs to sue an American parent company for the actions of its foreign subsidiary. *Id.* at 340.